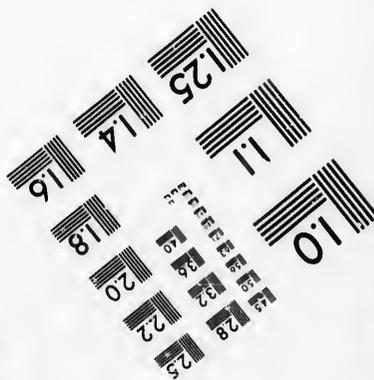
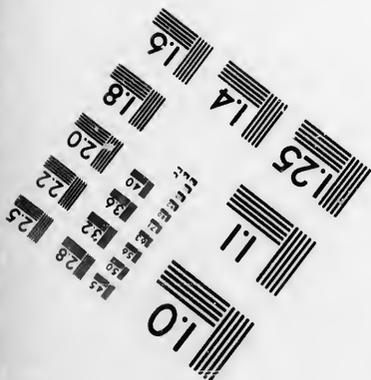
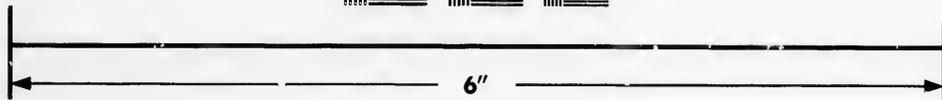
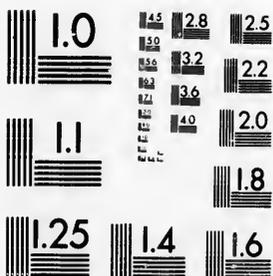


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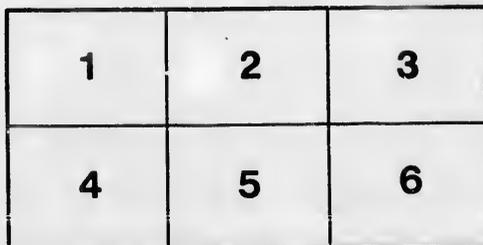
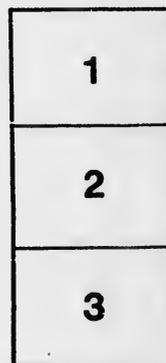
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P A P E R S

RELATING TO

THE REMOVAL

OF

THE HONOURABLE JOHN WALPOLE WILLIS

FROM THE OFFICE OF

ONE OF HIS MAJESTY'S JUDGES

OF THE

Court of King's Bench of Upper Canada.

1829.

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PART I.

No. 1.

COPY of a Dispatch from Major General Sir PEREGRINE MAITLAND to Mr. Secretary HUSKISSON ; dated York, Upper Canada, 6th June 1828. — Nine Inclosures.

Sir,

Upper Canada, York, 6th June 1828.

Mr. WILLIS, one of the Judges of the Court of King's Bench in this Province, who appears inclined to adopt the unusual Course of putting himself in direct Communication with the Secretary of State on Matters connected with his Duty in this Colony, inclosed to my Secretary a few Days since the for yourself and for Mr. Stephen which I now transmit. These Letters unsealed ; but as they were merely put under a Cover, conveying no Intimation of the Subject to which they related, nor any Request that they should be submitted to my Consideration, I directed them to be returned to Mr. Willis that he might seal them, and transmit them, if he desired it, through the Government Office. They were afterwards returned to Major Hillier, with a Letter from Mr. Willis, not submitting any Matter to my Consideration, but leaving me to gather, from perusing his Letters, that he intends to declare to the Public in the next Term, which commences on the 16th Instant, that, in his Opinion, there is no Court of King's Bench in this Province, because the Chief Justice is absent on Leave.

Considering the Manner in which the Intimation was conveyed to me, and the Nature of Mr. Willis's Intercourse with this Government, as well as his judicial Situation, I did not feel that I could properly reply in other Terms than those used in Major Hillier's Letter to him.

It is necessary I should inform you, that Mr. Campbell, the Chief Justice, who departed Two Months ago for England, on a Six Months' Leave, has been nearly Seventeen Years on the Bench in this Province, in the constant Discharge of his Duty, and without having once applied until now for Leave to be absent from the Province. The occasional Pressure of an acute Disease has made him long desirous of visiting England, in the Hope of obtaining Relief ; and when he assured me that in his present State of Health he could not discharge his Duties if he remained, I could not hesitate to grant him Leave of Absence. Throughout the Term which succeeded, the senior Puisné Judge, Mr. Sherwood, and Mr. Willis, composed the Court, as had frequently been the Case even while the Chief Justice continued in the Province ; and, indeed, the Chief Justice and one of the Puisné Judges have very frequently presided during the Indisposition of the other Puisné Judge, since Mr. Willis's Accession as well as before.

Under these Circumstances I regret exceedingly that Mr. Willis should happen only now to have taken up this decided Opinion, which he says he is resolved to act upon, though it is in Opposition not only to his former Construction of the Statute, but to the Manner in which it has been understood and acted upon ever since the Year 1794, when the Court was constituted, by a Succession of Chief Justices and Judges, some of whom were Men of high legal Attainments from the English Bar, and not less by Mr. Osgoode, the first Chief Justice of the Colony, who framed the Act on which this Question arises, having been sent from England for the express Purpose of organizing the Courts of the Province, and whom I have heard spoken of as a Gentleman of acknowledged Learning and Reputation.

Appendix to Report of Council, inclosed in No. 27 of 6 July, p. 62.

In fact, from various Casualties and Circumstances, the Court has been rarely full from the Year 1794. I believe I am safe in stating, that during the greater Part of that Period a Chief Justice and One Puisné Judge, or Two Puisné Judges without a Chief Justice, have happened to compose the Bench. Mr. Osgoode and Mr. Powell sat alone for some time after the Court was constituted; then Mr. Emsley and Mr. Russell, Mr. Scott and Mr. Thorpe, Mr. Scott and Mr. Powell, Mr. Powell and Mr. Campbell, and Mr. Campbell and Mr. Boulton. All this is perfectly well known: and it is therefore not without Reason that Mr. Willis conceives that his Announcement from the Bench of there being no Superior Court existing in the Province, and of the Invalidity, perhaps, of the greater Part of the former Proceedings of the King's Bench, will create great public Excitement.

Entertaining this Impression he might, & think, have pursued a more considerate and more natural Course than the making his first Communication of his intended Step in a Letter addressed to the other Side of the Atlantic, and to leave this Government to depend for its Information upon the Chance, not a very probable one, of my Secretary's opening his Letters to you or Mr. Stephen, merely because he might perceive them to be unsealed.

I have not yet had an Opportunity of consulting the Executive Council, which I shall do before I adopt any Measure which so unexpected a Situation of Things may call for; as it is clear that the People of the Country cannot and must not be left without the Means of having Justice administered.

I shall also, if the Occasion arises, take the Opinion of the Crown Officers here upon the legal Question, and will then communicate more fully with you upon this Subject. In the meantime, as it happens to have a bearing upon this Point, I transmit a Copy of a Report made to me by the Crown Officers in February last, upon a Reference directed by Lord Bathurst, when it was contemplated to add a Third Puisné Judge. The View of the Provincial Statute which is therein stated, before the Question had been agitated, is that which had been uniformly taken since the Statute was passed; that I can venture to state as a Fact: of course any Opinion of mine upon a Point of Law would be unimportant.

I cannot but wish I could persuade myself that Mr. Justice Willis does actually contemplate with Regret the probable Excitement which he seems to think will follow the Course of Proceeding which he has announced to you. It is with Pain I am compelled to observe, that having presided as a Judge for the first Two Terms after his Arrival, without finding more Occasion than all the respectable Judges who have preceded him to make the Administration of Justice subservient to popular Excitement, Mr. Willis has been either unable or unwilling within the last few Months to avoid making his Proceedings, either in the Civil or Criminal Court, the prominent Subject of political Discussion, and the Pretence of Attacks from the vilest Quarters and of the grossest Kind upon those who were associated with him in the Administration of Justice, and of whom I shall speak only justly when I say, that the Measure of Respect and Esteem in which their Public Conduct has ever hitherto been held, and is now held, by their Government, and by every Person except by Mr. Willis and by a Party with whom I have lamented to find him associate himself, and who are not very respectable in any Sense, is not to be attained but by a long Period of correct and honourable Service.

I feel that I ought not, in Justice to those whom it is my Duty to protect, to suffer a System to be pursued without Remark, which is injurious alike to the public Feeling and to the Character of the Government. The Attacks which, springing from Mr. Willis's Comments and Proceedings in Courts of Justice, form the principal Topics of the most contemptible Newspapers, cannot, without a Forfeiture of Self-respect, be repelled through the Medium of the Public Press by the Gentlemen against whom they are directed. I approve of their submitting to the most aggravated Misrepresentations of their Conduct and Statements, rather than involve themselves in Discussions discreditable to the Public Service; but I rely with them that the King's Government will see and feel the Justice of examining into the Foundation of such Attacks, and the Necessity of saving them in future from the painful Situation of having to sustain themselves against unfounded Imputations, suggested

and

and countenanced by those who are bound to concur with them in an independent and firm Discharge of Public Duty.

Mr. Willis has been a few Months only in this Colony. From myself, and, I am convinced, from every Member of this Government, he has received every Justice. In the first Cause ever tried by him he began an Excitement, to which our Courts of Justice had never before given Occasion, by Proceedings which have been already referred to your Consideration. He had himself been attacked by no Person; but yet, not content with making an Appeal to the Government, he concluded, to my Regret and Astonishment, a solemn Judgment of his in a Civil Suit in the Words which I have extracted, and for which I can conceive no possible Occasion, the Cause being for a Civil Action, wholly free from political Considerations, and Mr. Willis, up to that Moment, not having been made the Subject of such Remarks in the Public Papers as the Progress of Discussion upon such novel Proceedings has since led to. I confess I do not see Evidence of a Disinclination to popular Excitement in the Language of that Charge; nor can I think it either discreet or delicate in Mr. Willis, at this Moment, when he has been but a few Months in the Province, and while he is a Judge upon the Bench, to advertise in all the Papers in this Colony, and even in Newspapers of a Foreign Country, from which I extract the Notice*, of an intended Account of Canadian Jurisprudence, ushered in by so significant and unpromising a Motto as he has selected.

I have been Ten Years in this Government, and as I have never received any Representation against the Laws, or the Manner in which they have been administered, I must conclude that the People are content with both; that Contentment is of all Things most important to the Public Peace and the Security of the Government; and the Judges of the Land, I must think, are the last Persons who should employ themselves in disturbing or undermining it.

I have the Honour to be,

Sir,

Your most obedient humble Servant,
P. MATTLAND.

To the Rt. Hon. W. Huskisson, M. P.
&c. &c. &c.

Inclosure, No. 1.

My dear Sir,

York, Upper Canada, 30th May 1828.

I HAVE felt it my Duty to inform His Majesty's Secretary for the Colonies, that, in my Opinion, the Court of King's Bench, *as established here*, cannot legally sit in *Bank*, unless "the Chief Justice, together with the Two Puisné Justices of the Province," be present.

I have come to this Conclusion in consequence of a minute Investigation of the Constitution and Power of the Court; which I have been led into on account of the serious Evils which may arise from the very frequent Difference of Opinion expressed by my Colleague and myself in the Course of the last Term, the Chief Justice being absent on Leave. The general Practice hitherto has been oftentimes for Two, and sometimes for One only, of the Judges to sit during Term; and I must admit that I have so far followed this Doctrine of my Brethren, before I had sufficiently enquired into its Correctness, as frequently, when requested, to sit without a full Bench. The Provincial Statute of the 31 Geo. 3. c. 2., which establishes a Superior Court of Civil and Criminal Jurisdiction, and regulates the Court of Appeal in this Colony, declares by the First Section, "that His Majesty's Chief Justice, together with Two Puisné Justices, SHALL preside in the said Court." All the subsequent Sections, with the Exception of those relating to Appeals, which are limited to Matters exceeding £100 (Matters which but rarely occur here), are repealed by the Provincial Statute of 2 Geo. 4. c. 1.; and although Power is given to the senior Puisné Judge, in the *Absence* of the Chief Justice, to *testé* the Process, and for

* Preparing for Publication. — "A View of the present System of Jurisprudence in Upper Canada; by an English Barrister, now one of His Majesty's Judges in the Province." — *Meliora Sperans*.

ANY of the Judges to sit at *Nisi Prius*, yet there is no Authority given to the Judges to sit in *Banco*, unless the Court be full. I need not point out to you the Difference between this Statutory Court and the Superior Courts of Westminster Hall, which sit by Prescription, and are said to consist of a Chief Justice, &c. I will only call your Attention to a Court of the highest Jurisdiction in England, with the Exception of the House of Lords, I mean the Exchequer Chamber as first erected by the Statute of 31 Edw. 3. c. 12., and the Necessity which appears, from subsequent Statutes, of all the Judges named in the original Act being present, in order to transact the Business of the Court. Indeed it has been held, where certain Persons were alone appointed Judges by Act of Parliament, and were to call others to their Assistance, yet even if the Assistants were not called, as directed by the Statute, it would be Error. — See Trin. Abs. tit. Judges, (G.) I will not trouble you by alluding to the Writ of *Si non omnes*, which always, by way of Precaution, accompanies the Commission of Assize and *Nisi Prius*. The Evil of a Division of the Court here, in those Cases where there is no Appeal, is obvious. In England, in case of a Division, there are Two other Courts, the Exchequer Chamber and the House of Lords, to resort to. I think it my Duty to mention this Matter publicly when the Court re-opens on the 18th Inst., though I fear it will be productive of great Excitement; for if I be correct, all that has or may be done without the Court being full is invalid.

Believe me, &c. &c.
(Signed) JOHN WALPOLE WILLIS.

To J. Stephen, jun. Esq.
Counsel to the Colonial Department.

I hope you handed over my former Communications for Mr. Huskisson.

Inclosure, No. 2.

Sir,

York, Upper Canada, 31st May 1828.

ON account of the Absence of the Chief Justice, by Permission of the Lieutenant Governor, the Two Puisné Justices of this Province alone were present in the Court of King's Bench, established in this Colony, during the last Term. Much Difference of Opinion existed between us; which, by preventing any Decision, may *materially injure* the Parties interested. This has led me to investigate minutely the Constitution and Power of the Court; and although I find it has been the *very frequent Practice* for *Two*, or even *One*, of the Judges to sit "in Bench," as it is called, yet as the Provincial Statute by which the Court is established requires "that His Majesty's Chief Justice *TOGETHER* with Two Puisné Justices *shall preside* in the said Court," I now consider all that *hitherto* has been or may be *hereafter* done, contrary to the express Terms of the Act, *altogether void*. Entertaining this Opinion, I feel bound to express it publicly when the Court shall again open (the 18th Inst.). I have endeavoured to explain myself more fully to Mr. Stephen, as Counsel to your Department, on the Subject which I have ventured to mention to you, the Moment I came to a Conclusion upon it, in order that the Excitement, which I fear will inevitably be produced throughout the Colony, may be obviated as speedily as possible.

I have, &c. &c.
(Signed) JOHN WALPOLE WILLIS.

Rt. Hon. the Secretary of State,
Colonial Department.

P. S. — I hope you have received the former Communications with which I have troubled you through the Medium of Mr. Stephen.

Inclosure, No. 3.

Sir,

York, Upper Canada, 31st May 1828.

I HAVE to request the inclosed may be officially forwarded.

I have, &c. &c.
(Signed) JOHN WALPOLE WILLIS.

Major Hillier, &c. &c.

Inclosure, No. 4.

Sir,

Government House, 3d June 1828.

As the Letter inclosed in your Note to me of the 31st Ultimo, with a Request that it may be officially forwarded, is not accompanied by any Communication explaining for the Lieutenant Governor's Information that it relates to some Public Matter connected with the Government, or to any Subject of which it is necessary his Excellency should be apprized, I have received his Commands to return it to you, of course unopened.

I have, &c. &c.

(Signed) G. HILLIER.

The Hon. Justice Willis.

Inclosure, No. 5.

Sir,

York, Upper Canada, 3d June 1828.

I HAVE now to request you to lay the inclosed Letters (which relate to Public Business, in my Opinion of the *greatest Consequence* to the Colony,) before his Excellency the Lieutenant Governor. Not having done so in the first Instance was entirely owing to my not being sufficiently acquainted with Official Forms, and not, as I beg you will assure his Excellency, with the slightest *Intention of any personal Disrespect*. On the contrary, I conceived that by leaving the Letters *purposely unsealed* I had done all that was usual, and *what was least* obtrusive, on this Occasion; presuming that the Letters would not have been forwarded, if any Part of them met with his Excellency's Disapprobation. Should I not now have pursued the proper Course, may I beg of you to point out to me *specifically* how I should proceed.

Your obedient Servant,

(Signed) JOHN WALPOLE WILLIS.

Major Hillier.

Inclosure, No. 6.

Sir,

Government House, 4th June 1828.

I HAVE the Honour to acknowledge the Receipt of your Letter of Yesterday, which I have laid before the Lieutenant Governor; and I have been commanded by his Excellency to acquaint you, that your Letters to the Secretary of State and to Mr. Stephen will be forwarded.

If those Circumstances should occur to which you call the Attention, not of this Government, but of the Secretary of State, it will remain for his Excellency to pursue whatever Course such Circumstances may appear to him to require.

I have, &c. &c.

(Signed) G. HILLIER.

Hon. Mr. Justice Willis.

Inclosure, No. 7.

Sir,

York, 29th January 1828.

We have perused the Dispatch of the Right Honourable Earl Bathurst, late His Majesty's Secretary of State for the Colonies, respecting the Appointment of an additional or Third Puisné Judge to His Majesty's Court of King's Bench in this Province; and suggesting that Provision may be made for the convenient Exercise of an equitable Jurisdiction, by committing to the Chief Justice, or one of the Puisné Judges of the Court of King's Bench, the judicial Office of Chancellor, under the Title of Master of the Rolls, or Vice Chancellor; and, in obedience to the Commands of his Excellency the Lieutenant Governor, we have considered whether the Measure last referred to, or any Modification of it, can be conveniently adopted in Upper Canada; and also whether

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whether it may be necessary to obtain an Act of the Legislature, or to issue Letters Patent under the Great Seal, in order to render the proposed Increase to the Number of Judges legal and effectual.

And we have now the Honour to report, that in our Opinion it would not be advisable to erect an equitable Jurisdiction by Commission. It is at least doubtful whether, since the passing of the Bill of Rights, it is in the Power of the Crown to constitute any Jurisdiction with Authority to proceed otherwise than by the Rules and upon the Principles of the Common Law. And as the Erection of an equitable Jurisdiction can only be desired for the common Benefit of His Majesty's Subjects in this Colony, we see no Reason to recommend that it should not be left to rest upon the sure Basis of a Legislative Enactment, rather than upon the Exercise of a doubtful Prerogative; particularly as the former Course would properly include a suitable Provision from the Provincial Revenue for the Maintenance of the Officers constituting the Court.

In reference to that Part of his Lordship's Dispatch which relates to the Appointment of an additional Judge to the Court of King's Bench, we have the Honor to report, that by the Provincial Statute of 1794, creating the Court of King's Bench, it is provided that a "Chief Justice and Two Puisné Judges" *shall preside* in that Court."

The Legislature must be presumed to have intended something by that Provision. We conceive that the Legislature must have meant, either that the *actual Presence* of a Chief Justice and Two Puisné Judges *upon* the Bench shall be necessary to constitute a Court, or merely that the Court *shall consist* of a Chief Justice and Two Puisné Judges. The first Construction is not the most obvious; and as the Act has never been so understood, to maintain such a Construction now would be to declare invalid a great Proportion of the Proceedings of the Court of King's Bench, which have in fact taken place, and *inevitably*, before the Chief Justice and One Puisné Judge, or before Two Puisné Judges. Assuming that the Legislature rather meant that the Court *should consist of a Chief Justice and Two Puisné Judges*, the Question which presents itself is, whether it is competent to the Crown, under the existing Law, to appoint a *Third* Puisné Judge.

There is no Question in our Minds, that before the Act of 1794 was passed, it was competent to the Crown to have created, by Letters Patent, such a Jurisdiction as was created by that Act, and to have appointed any Number of Judges that might have been thought expedient; but if the Royal Assent has been given to an Act which controls and limits that Power in any respect, the Prerogative in regard to such Matter cannot be exercised in any Manner repugnant to the Act.

It is a Maxim, that affirmative Words merely do not take away or abridge the King's Prerogative; and therefore it might be maintained, with some Reason, that as it is not declared by the Act of 1794 that more than Two Puisné Judges shall *not* be appointed, and as the Existence of a Chief Justice and *Three* Puisné Judges is not inconsistent with the Enactment that a Chief Judge and *Two* Puisné Judges shall preside in the Court, there is no Objection to the Appointment of a *Third* Puisné Judge by the Crown; but it appears to us so decidedly inexpedient to suffer the Constitution of the Supreme Civil and Criminal Court in the Provinces to rest on a doubtful Basis, that we do not advise the Appointment of an additional Judge, without first proposing to the Legislature to make an Alteration in the existing Law, so far as it respects the Number of the Judges.

We have, &c.

(Signed) JOHN B. ROBINSON, Attorney General.
H. J. BOULTON, Solicitor General.

Major Hillier, &c. &c.

Copy of a Judgment delivered by Mr. Willis in a Civil Cause in the Court of King's Bench: extracted from the "Canadian Freeman" of 29th May 1828.

Judge Willis said, The Facts of this Case are simply these:—A gross Outrage was committed on the Person of the Plaintiff, for which he brought his Action against the Defendants. In order to support the Plaintiff's Case, Mr. Alexander Stevens, Mr. Allan M'Nab, an Attorney of this Court and one of the Counsel employed for the Defendants, Mr. Chewitt, also an Attorney of this Court, and a Mr. Gurnett, were called upon to give Testimony. But they refused even to be sworn in the usual Manner, stating as a Reason, that they could give no Evidence in the Matter but what might tend to criminate themselves; and Mr. M'Nab and Mr. Chewitt further endeavoured to shelter themselves from being Witnesses, on the Ground of being professionally concerned for the Parties.

The Learned Gentleman who tried the Cause was about to commit these Gentlemen for their Contumacy in refusing to be sworn; but he did not do so, as the Parties, if guilty of Contempt, might be punished on Application to this Court.

Under these Circumstances, and because the Counsel for the Plaintiff was refused the Reply which he had claimed to be entitled to, the Defendants, although he introduced no Evidence, having introduced new Matter, a Rule *Nisi* for a new Trial has been obtained; and it is now for the Court to say whether that Rule shall or shall not be made absolute.

The Solicitor General, in shewing Cause against the Rule, as I understood him, began by stating that this was an Aggression against the Public Peace, and a fit Subject for a Criminal Prosecution. In this I entirely agree with him; and I only regret that he, as the only Law Officer of the Crown on the Circuit where the Offence was committed, and who, therefore, as I am informed, according to the present Practice, was entitled to the exclusive Privilege of being employed in all Criminal Prosecutions, should, by defending those who were charged with the Outrage, have possibly prevented an earlier Appeal to those Laws which have been made for the Protection and Peace not only of Individuals but of the Community. It is a favourite Maxim in the Mother Country, that an Englishman's House is his Castle; and I trust that truly English Feeling will never be lost sight of in a British Colony. But, when the Officer whose Duty it is to enforce Obedience to the Law, appears in a Civil Action to defend those who have transgressed it, Lord Coke's Axiom, "*Oderunt peccare formidatæ Poenæ*," holds good no longer. For how, I would ask, can those whose Conduct is defended by the Public Prosecutor, although merely in a Civil Action, stand in awe of Public Punishment for that very Conduct.

It was objected, in the first place, against this Rule for a new Trial being made absolute, that what it is supposed the Witnesses who refused to be sworn and examined could have proved, and its Materiality to the Issue, should have been shewn to the Court by Affidavit. Now as to this the Law stands thus: "If the Matter be such as did not or could not appear to the Judge at *Nisi* Prius, it is declared to the Court by Affidavit; but if it arise at the Trial, it is taken from the Judge's Notes, who usually makes a special and minute Report of what occurred." (3 Bla. Com. 91.)

From the Notes in this Case it clearly appears, that the Persons refusing to be examined had some Knowledge of the Transaction, as they only excuse themselves from giving Testimony from the Fear of implicating themselves. Two of the Witnesses, indeed, also superadd the Excuse of Professional Confidence; but it is evident there might have been many material Questions asked which would not have criminated the Witnesses; and in respect to Facts unconnected with and before the Professional Relation subsisted, no Affinity in this Case is in my Opinion necessary. It was then objected, that the Plaintiff, to qualify himself to move for a new Trial, should have elected to be nonsuited. Without adverting to the Consequences of a Nonsuit, which in a Case like this would

would only have afforded the Witnesses another Opportunity of refusing to be sworn at a future Trial, I shall only say, the Refusal on the Part of the Plaintiff to be nonsuited has been determined to be no Bar to a new Trial. But where a Plaintiff refuses to be nonsuited, contrary to the Opinion of the Judge, (which was not the Case here, for there does not appear the slightest Intimation to the Plaintiff at the Trial of the Propriety of such a Course being adopted by him,) the new Trial shall be without Costs.

It was then urged that this was a Motion for a new Trial on account of the small Advantages given by the Jury, and that the Court would not in general entertain such an Application. I consider it made on an entirely different Ground—a Ground which may indeed affect the Damages, but which is totally distinct from an Application solely because the Damages were small; I consider this an Application founded on the Fact that Evidence sought to be adduced on the Behalf of the Plaintiff was improperly suppressed. It was then said, as One of the Defendants was acquitted, and the Verdict only against the other Two, no new Trial could be granted.

To obtain a Rule for a new Trial in Civil Actions, at the Instance of the Defendants, it is in general required that all must join in the Motion, though there has been a Verdict only against some of them; and if all must join when the Solicitation is on the Part of the Defendants, what Reason is there, in a Civil Action, why all should not be joined, when the Plaintiff makes the Application? In regard to a new Trial, it has been determined, that notwithstanding Evidence has been given on the Part of the Defendant, and he has obtained a Verdict, the Plaintiff may still, on reasonable Ground, have a new Trial.

If then a Plaintiff may have this Remedy even against a Verdict for the Defendant, it seems to follow that where the Plaintiff himself is in Possession of the Verdict, which he waives for the Purpose of a new Trial, there can be no Reason why it should not be granted as to all those who were Parties in a Civil Action, whether found guilty or acquitted, for the Waiver of the Verdict puts them all on the same Footing. I have been speaking hitherto of Civil Cases. In Penal Actions, and in Criminal Prosecutions for Misdemeanors, the Law, anxiously distinguishing them from purely Civil Suits, on account of the great Favour which it shews to the Liberty of the Subject, has provided that there shall not be a new Trial where there has been a Verdict for the Defendant. And in Misdemeanors, where the Indictment is against several Defendants, and some are acquitted and others convicted, the Court, contrary to the Rule in Civil Actions, may grant a new Trial as to those Defendants *only* who are convicted, if the Conviction appear improper. (Rex v. Mawley, 6 T. R. 619.) And in such Case it has been holden, that the Court is not fettered with any Rules in granting a new Trial, but will either grant or refuse it, as may best tend to the Advancement of Justice. (Ib. 638.)

Such then appears to me to be the true Doctrine in regard to granting new Trials, even after the Evidence has been fully gone into, if it appear that it should have been a different Conclusion. In this Case, however, I am satisfied that there are strong probable Grounds to suppose that the Merits have not been fully and fairly discussed, and that the Decision cannot, therefore, be conclusive as to the Justice and Truth of the Case.

The Evidence hitherto suppressed may establish a Case against the Defendant Robertson: it may give the Jury Reason to award the Plaintiff greater Satisfaction for his Wrongs. Should it not do so, the Plaintiff, who takes the new Trial at his own Hazard, must pay the Penalty of his Rashness.

But it was said the Plaintiff ought to have come prepared with his Testimony; and I admit that a Party will not be relieved on account of the Want of that Evidence, which, with proper Diligence, he might have procured at the Trial. And this brings me to that Part of the Case which seems to have been considered in the Argument as the most important.

Of those called upon to give Testimony, Two (Mr. Chewitt and Mr. M'Nab) were Attorneys of the Court; the former employed as an Attorney, the latter as a Barrister, for the Defendants in this Cause.

They were called upon by the Court to be sworn to give such Evidence as they were able, without criminating themselves, or betraying Professional Confidence. How far any Questions they might be asked would have such a Tendency

it was for the Court, and not for them, to determine. They did not object to give Evidence, because they had not been served with Process for that Purpose; nor did Mr. Stevens then object, as he now does, to the Irregularity of the Subpœna; so far from it, indeed, he wished to be sworn, but in a qualified Manner: neither did Mr. Gurnett object to give his Testimony because he had not been duly summoned. With regard to Mr. Chewitt and Mr. M^cNab, I am of Opinion that as Attornies of the Court they were guilty of Contempt in refusing to obey its Injunctions; and I think Mr. Stevens was also contumacious, even supposing the Service of the Subpœna to have been irregular. Appearing, and not objecting to the Want or alleged Irregularity of the Process, in my Opinion, cured the Defect with respect to Chewitt, M^cNab, and Stevens, whatever may have been the Case as to Gurnett. Thus, in the Case in Cooper's Reports, cited in the Argument, Lord Mansfield asserted the Authority of the Court in compelling an Attorney to give Evidence, though the Attorney alleged that the Process with which he was served for that Purpose was irregular; and even considering Mr. M^cNab as a Barrister only, and not an Attorney, it seems clear, that notwithstanding Barristers, as such, are not Officers of the Court, but merely practise as Counsellors, yet, inasmuch as they have a special Privilege to practise the Law, and their Misbehaviour tends to bring Disgrace upon the Law itself, they are amenable to the Court, as other Ministers of Justice are, (2 Hawk. 219. and References). Respecting the Waiver of the Irregularity of the Subpœna by Stevens, if in fact any Irregularity existed, I shall merely refer to the Case of Harris v. Mullet, 1 Taunt. 58., in which it was held, that where a Defendant was summoned to appear before the King's Justices at Westminster on the Morrow of Saint (without naming the Saint), to answer the Plaintiff in a Plea of Trespass, the Defendant not having appeared, Two Writs of Distringas successively issued, and Execution was levied. When the Sheriff's Officer called to execute the first Writ, the Defendant informed him he had sent his Wife to Town to settle the Action. Although it was urged that this was not an Irregularity, but a Defect of Process, and therefore could not be cured, yet the Court held the Defendant had waived it; and there are numerous other Instances where the Defect or Irregularity of Process has been waived by Appearance.

I am inclined to think that Gurnett also by his Conduct waived the Necessity of the previous Service of a Subpœna; but on this I give no Opinion. Had the Question merely depended on the Power of the Court to enforce these in its Presence (not properly subpœnaed) to give Evidence, I should have considered myself bound by the Authority of Bowles v. Johnson, 1 Sir Wm. Blackstone's Rep. 36, and decided that the Court had no such Power. It is there said, "A Person not properly subpœnaed is to be looked upon as a Stander-by, and "it is no Contempt of the Court of Nisi Prius for a Stander-by to refuse to be "examined, much less of this Court of King's Bench." Of the Power of the Judge of Assize to fine and imprison for Contempts committed in his Presence there, I have no Doubt; but, like all other Powers, it is to be exercised with Discretion; and I think it due to the Learned Gentleman who tried the Cause to say, that in my Opinion he exercised a very sound Discretion on the Occasion. The Liberty of the Subject should always, as has been the Case here, be respected, as far as it possibly can be, without obstructing the due Course of Justice. Next to doing Right, says Sir W. Blackstone, the great Object in the Administration of Justice should be to give Public Satisfaction. If a Verdict be liable to many Objections and Doubts (and I may add, if Evidence be withheld which might serve to strengthen the Verdict, and bring the Matter home to all Parties against whom the Charge is brought,) in the Minds of his Counsel, or even of the By-standers, no Party would go away satisfied, unless he had Prospect of reviving it; such Doubts, such Suppression, 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 the Possibility of Redress.

Granting a new Trial cures all those Inconveniences, and if ever there were a Case that called for one I think it is the present — in regard to the Reply from the Case of the King v. Bignold, cited in Archbold, (I have Notes of that Case as

it occurred at Nisi Prius, and afterwards in the Court above on this Point, although I have not the Case itself) — and also upon Principle, I think the Plaintiff's Counsel was clearly entitled to it; but I will not say that I consider it so important, that I would grant a new Trial on that Ground alone.

In forming my Opinion in this Case, which I have now given at very considerable Length, I viewed this Case, as I hope I shall do every Case that comes before me, solely with reference to its intrinsic Merits. Totally devoid of all Party, all political Feeling, it has been, and ever will be, my earnest Desire to render to every one impartial Justice.

My Conduct, however, has not been so construed; and of late the Slanderers and the Revilers, like the venomous Reptile of the Country, although fortunately heedless of their Rattle, by which they may be traced, have put forth their poisoned Tongues. But, —

“ Justum et tenacem propositi virum
Non ardor civium prava jumentum,
Non vultus instantis tyranni,
Mente quatit solida.”

“ The man, in conscious virtue bold,
Who dares his honest purpose hold,
Unshaken hears the crowd's tumultuous cries,
And the stern tyrant's brow in utmost rage defies.”

Inclosure, No. 9.

Sir,

York, Upper Canada, 5th June 1828.

I most unequivocally declare, or rather repeat, that by leaving the Letters I inclosed to you open, and requesting them to be laid before the Lieutenant Governor, my Object was to call the Attention of his Excellency, as well as that of the Secretary of State for the Colonies, to THE WHOLE of their Contents.

I have, &c. &c.

(Signed) JOHN WALPOLE WILLIS.

Major Hillier,
&c. &c. &c.

No. 2.

COPY of a Dispatch from Major General Sir PEREGRINE MAITLAND to Mr. Secretary HUSKISSON; dated York, Upper Canada, 26th June 1828.— Eight Inclosures.

Sir,

Upper Canada, York, 26th June 1828.

In consequence of some very singular Proceedings which took place at our last Criminal Court, at which Mr. Willis for the first Time presided, and of Two Letters which he addressed to me, I found it necessary to refer to the Attorney General for an Explanation. This, as he desired to make it full and satisfactory, has been necessarily delayed, from the Pressure of his various official Duties. I now have the Honour to transmit it, earnestly entreating your Attention to the Subject, in order that the Opinion of the King's Government may, as soon as possible, be explicitly made known.

I have ever deemed it of the first Importance to the Peace of the Colony, that the Administration of Justice should be unembarrassed by Considerations and Feelings that ought to be far removed from it; that it should enjoy Public Confidence, and that its Ministers should be respected.

I speak what I know to be the prevailing Sentiment among the most intelligent and respectable, both here and in the adjoining Country, when I declare, that in my Opinion the Course pursued by Mr. Willis was not only to be regretted, but condemned; and that his Attack upon the Attorney General was unjustifiable, and if unjust, as I think it was, was certain to be most injurious to the Character of the Government, and to the Administration of Justice.

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I feel it to be due to Mr. Robinson, after his Fifteen Years of Public Service, not only without Censure, but marked with the Approbation of His Majesty, as expressed in the inclosed Dispatch, with the full Confidence of the Local Government and of the Public, that I should most earnestly repeat my Request, that the Subject of this Communication may receive as early Attention and as close Investigation as the Importance of the Matter requires; and if it shall be found, as I confidently expect will be the Case, that in adhering strictly to the Practice of all his Predecessors in Office, the present Attorney General has not justly incurred the Censure that has been so hastily passed on him, then I trust that the Sentiments of His Majesty's Government may be so unequivocally expressed on the Subject, as to afford to him, in the upright and conscientious Discharge of his Duty, that Security and Protection to which I feel him to be entitled.

The Right Hon. W. Huskisson, M.P.
&c. &c. &c.

I have the Honour to be, &c. &c.
(Signed) P. MAITLAND.

Inclosure, No. 1.

Sir,

York, Upper Canada, 12th April 1828.

As Judge of Assize Yesterday, I stated that the Law Officers of the Crown (who have hitherto always conducted, and who alone are paid by the Public for all Criminal Proceedings in this Province,) were in my Opinion bound to prosecute for all Crimes which they know have been committed, of their own Accord.

But the Attorney General (and certainly not in so courteous a Manner as the Bench is usually addressed in England) disclaimed that Duty, admitting, however, that he and the Solicitor General were the *Public Prosecutors*. I then said, the Question must be decided by the Government; and as nothing can be more necessary for the due Administration of Justice than that the Source from which all Public Prosecutions must originate should be distinctly understood, I do not think I should honestly discharge the Duties of my Office, did I not respectfully submit this Matter to your Notice.

I have the Honour to remain,

Sir,

Yours, &c.

To the Lieut. Governor of Upper Canada,
&c. &c. &c.

(Signed) JOHN WALPOLE WILLIS.

June 1828.
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Lieutenant
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Contents.

WILLIS.

MAITLAND to
26th June

Inclosure, No. 2.

Sir,

York, Upper Canada, 14th April 1828.

I AM sorry to have Occasion again to appeal for a Decision respecting the Duties of the Attorney General of this Province, who *now* repudiates (as I understand him) what he stated on Friday last; namely, that Criminal Prosecutions in this Province are, as in England, open to the Bar; and he has this Day in open Court further asserted, that as His Majesty's Attorney General in this Province, he is answerable for his Conduet in his legal Capacity, not to any of His Majesty's Judges of this Colony, but only to the King's Government. If this be so, the Question is, whether the Attorney General (who is not only a Barrister, but also a PRACTISING ATTORNEY and Officer of the Court,) or the Judge who presides, is the *Superior*? I had Occasion to notice the greater Mildness of the Criminal Law of England, and the Administration of it, as it *now stands*, to that which is admitted into the Province, (which is what it was in England in 1792), and I now call on your Excellency to observe the Improvements since that Period, and particularly those recently made by the Right Honourable the present Secretary of State for the Home Department.

A Sense of the Duty attached to the Dignity of my Office compels me, however reluctantly, to add, that the Language of the Attorney General was such

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such that I could only tolerate from his being an Officer of Government, and from my Desire on that Account not to obstruct the Public Business.

In this Controversy I entirely disclaim all personal Feeling. I do not, nor can I ever *condescend* to entertain it in any Public Measure; but the Crisis has now arrived at which it must be determined how Criminal Prosecutions *here* are to be conducted, and how far the Law Officers of the Crown are answerable to the Judges of this Province.

I have the Honour to be,
&c. &c. &c.

To the Lieut. Governor of Upper Canada.

(Signed) JOHN WALFOLE WILLIS.

Inclsure, No. 3.

York, 20th May 1828.

Sir,

THE Reference which his Excellency the Lieutenant Governor has been pleased to make to me, upon the Two Communications recently addressed to him by Mr. Justice Willis, affords me the Opportunity of laying before the Government, in the Shape of Explanation, Occurrences so much out of the ordinary Course, and, in my View of them, of so important a Bearing upon the Public Service of this Colony, that I could not otherwise have forbore making them the Subject of a Memorial to his Excellency, which I intended to submit so soon as the Termination of the Assizes should leave me sufficiently at leisure.

Considering my relative Situation in regard to Mr. Justice Willis, I am, on every Account, better pleased that the present Course is open to me.

Having discharged the Duties of a Crown Officer in this Province for more than Fifteen Years, and, during Nine of those, under his Excellency's Observation, I cannot but believe that it was Matter of Surprise to his Excellency to receive at this Time from Mr. Justice Willis a Representation complaining of my official Conduct; the first Charge, or Insinuation of a Charge, I venture to believe, that has been addressed to the Government of this Province in respect to any Proceeding of mine by any Member of the Bench or of the Bar, or by any Person connected with me in the Discharge of Official or Public Duties. I regret least of all, on my own Account, the Occasion for the Explanations I am about to offer; but, since it has arisen, I trust I shall not be thought unreasonably anxious to vindicate a Reputation which I have hoped I had earned in the Course of a long and rather arduous Public Service, if, in order to make this Explanation clearly understood, I beg to lay before his Excellency a Statement of Circumstances, without which it is impossible that a just Opinion can be formed of the Conduct of Mr. Justice Willis or of myself on the Occasions to which his Letters refer. Such a Statement accompanies this Letter. I have forbore entering into unnecessary Details, but have, notwithstanding, been unable to compress it within a moderate Compass; for it is my Desire, that through his Excellency, His Majesty's Secretary of State for the Colonies may be put fully in possession of Circumstances upon which I earnestly intreat an Opinion may be expressed.

Upon the Representation made by Mr. Justice Willis, and upon the Proceedings detailed in the accompanying Statement, Two Questions present themselves, and upon these I am most desirous that the Government should declare their Opinion.

1st. Whether, because I forbore, under the Circumstances and for the Reasons I have mentioned, to prefer an Indictment for the Riot, when the Person injured declined to prosecute, I was fairly subject to the Censure which, to my Surprise, Mr. Justice Willis thought proper to express without the slightest Qualification or Reserve?

And 2dly. How far the View which I have hitherto taken of the Right of the Crown Officers to conduct Criminal Proceedings in this Province, is or is not correct?

Upon the first Point, I beg to refer to that Passage in the Narrative from Page _____ to Page _____ which explains the Principles upon which I acted in that Case, and on which I have uniformly acted in Cases of the same Description,

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Description. I must add, however, on this Point, that Mr. Justice Willis's Conception of the Duties and Responsibilities of the Law Officers of the Crown seems to be very much at variance with Opinions which I imagined I had derived from the most respectable Authority. Within Half an Hour after Mr. Justice Willis chose to adopt the Statement, irregularly addressed to him by a Person indicted and not upon his Trial, and to found upon that Statement an unqualified Censure of my Public Conduct, he professed himself to be but little conversant in Criminal Proceedings, and requested Information on some ordinary Points.

LE WILLIS.

It has been my Duty, for a long Period of Time, to direct much of my Attention to the Criminal Law. I have been for many Years in the constant Practice of it here, and have had Opportunities of observing the Manner in which it is administered in England. From these Means of Knowledge, I think I am correct in assuming, that no Judge of Assize in England has ever thought it to be his Duty or his Privilege to arraign the Conduct of His Majesty's Attorney General, in a Matter clearly and exclusively within that Officer's Discretion. On the contrary, Cases are not wanting in which Judges have decidedly interposed, to prevent the Motives and the Conduct of the Attorney General from being called in question by Defendants, even when they were actually on their Trial, and when, alone, such Attempts could avail them as a Defence, if, indeed, they could avail them at any Time. It is further my Impression, though I desire to speak on this Point with becoming Deference, that any Judge would be thought in England to be departing widely from the Line of his Duty, in throwing Obloquy upon so responsible an Officer of the Crown, because he had not preferred a Charge for a Misdemeanor, more usually cognizable in a Court which he does not attend, although he had never been applied to, although the Person injured had declined to prosecute, and although the Injury had been already much more than compensated in Damages; and this too while every Criminal Court in the Country was freely open to the Party injured, and was so well known to be so, that even in the Superior Courts, which the Attorney General attends, a great Part of the Business which he conducts ordinarily originates in Complaints made directly to the Grand Jury by the Parties injured, and of which he knows nothing until Presentments have been brought into Court, and placed in his Hands.

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It has always been thought, by my Predecessors here as well as by myself, that the Attorney General is vested with the Power he exercises by the King, in whose Name he acts, and that as in the Exercise of that Power he is responsible to his Sovereign, so he is allowed and is expected to use his own Discretion. That Discretion, so far as it respects the preferring Prosecutions, or the forbearing to prefer them, is, by the Law of England, so fully acknowledged to rest entirely with himself, that the Court of King's Bench has refused his Motion for Leave to file a Criminal Information, for no other Reason than that the Power and Discretion were so entirely his own, that the Court declared they would not interfere, even at his Request.

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It is not less indisputable, I imagine, that whatever Proceedings the Attorney General commences, he can equally, in his Discretion, discontinue. He can, indeed, stay any Criminal Prosecutions, however it may have originated, by entering a Nolle prosequi; and, I believe, it would not be very easy to produce an Instance in which his Right to do so has been questioned, or where his Conduct in the Exercise of that Right, even with regard to the highest Offences, has been arraigned and censured by a Judge; and still less, when there was no Proceeding before the Court which could properly and legally involve such a Question. It is, besides, too obvious to escape Attention, that the Judge of Assize may know nothing of many Facts which the Attorney General is bound to attend to; for he is supposed to know nothing of any Case which is not before him, nor until it is properly before him.

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It need, perhaps, scarcely be added, that in England, when a Defendant complains of a Criminal Prosecution as vexatious, on the Ground that he has already been severely punished in a Civil Action, or for any other Reason, it is a very usual Course for him to apply to the Attorney General to enter a Nolle prosequi. If such an Application had been made to me in this Case, even after the Prosecution was commenced, and if the Defendants had urged that

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they had already been made to pay Damages in a Civil Action to nearly Fifty Times the Amount of the Injury committed; that the Party injured had made his Option, and exercised a Discretion which belonged to him, in forbearing to prosecute criminally, while his Civil Action for the same Injury was depending; that having, in this Civil Action recovered Damages, which, by his own Confession, were beyond all Comparison greater than his Loss, he had, when afterwards applied to by the Grand Inquest of the Country, declined to prosecute, and still declined; that the Person who now urged the Prosecution was in no Degree interested, but was a Stranger to the whole Proceeding; that his urging the Prosecution now was not merely malicious, but was an irregular and illegal Attempt to evade Punishment, by setting off one Offence against another, and to obtain a Conviction of other Persons, which could have no legal Effect in privileging the Offences for which he stood indicted;—had such an Application been made to me as Attorney General, and on such Grounds, I need not now discuss whether I ought to have heeded to it or not; but it is certain that if I had done so the Proceedings must have ceased; and I think I am not wrong when I state, that in England the Decision of the Attorney General would not, in such a Case, have been made the Subject of Censure by any Judge on the Bench, but must and would have been considered an Act as clearly and exclusively within his Competency, as any Act of the Judge could be admitted to belong to him under his Commission.

The Second Point is one of great Public Interest, and I am happy it has presented itself for Discussion, if any Doubt exists upon it. Upon the Merits of the System, which places in the Hands of the Crown Officers the Conduct of all Criminal Prosecutions in the Superior Courts, I do not desire to offer my Opinion. In addition to the declared Sentiments of many of the most enlightened Lawyers and Statesmen in England, a long Experience in this Province has afforded us Means of judging, and upon the Result of that Experience it is fit the Question should be decided by those with whom the Decision rests, whenever it may, for any Purpose, be properly raised.

It did not at the Time, and does not now, appear to me, that in a Court of Justice, before a Judge commissioned to administer the Law as it is, upon the hearing of Observations irregularly, improperly, and intemperately addressed to the Bench by a Person indicted for a Number of Libels, but not upon his Trial, it was either the proper Time or Place for discussing, and still less for condemning, the Policy and Expediency of a System which had prevailed ever since this Government was formed, which has long been established in the other British Colonies, and even in a Part of the United Kingdom, which it has been thought wise to adopt in most other Countries, and which I say decidedly, because of that his Excellency has ample Means of judging, has never been viewed with Disapprobation or Distrust by the People of this Province.

Mr. Justice Willis took Occasion, during the Assizes, to state expressly that he should not be satisfied till he saw Public Prosecutions thrown open, in this Province, to the Bar, as in England. The Quarter Sessions, which no Public Prosecutor attends, afford Means of judging which Mode of administering Criminal Law is most satisfactory to the Public, and best attains the Ends of Justice. If a Preference is felt for the System in use there, I can only say I have never heard it expressed by any Persons, and that it is decidedly my Belief, with very good Means of Observation, that whatever Prejudice may in Time be excited, any Dissatisfaction with the present System of conducting Criminal Prosecutions in the Courts of Oyer and Terminer is, at present, confined to a very few Individuals in the Assizes, whose Opposition to every Arrangement and Institution of the Government is very indiscriminating.

But, whether the System of placing the Conduct of Criminal Prosecutions in the Hands of Public Officers has been established by the Legislature or by the Executive Government, it is and has been established in Canada for more than Sixty Years. If Arguments can be used which will demonstrate its Inexpediency, I dare say that neither the Legislature nor the Government will refuse to entertain them, and it is to those Quarters that I would respectfully submit they ought to be addressed.

I have

I have never before observed, that a Judge of Assize has considered it to be within the Compass of his judicial Duties to render the People impatient of the System of Jurisprudence of which he forms a Part; and, at all Events, I must take the Occasion to represent, that so long as the Crown Officers have those Duties to discharge, it is equally for the Interests of Society, and for the Honour and Security of the Government, that they should be enabled to discharge them with Effect; which they are not likely to do, if even the Jurors they are to address are to be taught by the Court to look upon their Office, and the Duties it exacts from them, with Suspicion and Dislike, and to consider their Authority in Criminal Proceedings as unwisely committed to them, if not usurped.

As connected with these Proceedings I will not remark further upon this Subject, because it is clearly not by a Court of Justice, nor in any Proceeding in a Court of Justice, that the System can be overturned, which has been so long established. Whenever it is proposed to alter it by an Act of the Government, or of the Legislature, a proper Occasion will arise for presenting Facts and Reasonings, which Mr. Willis has, perhaps, overlooked.

I must, however, add an Explanation in regard to the Expression in Mr. Willis's Second Letter to his Excellency, which has been referred to me, that "I had repudiated (as he understood me) what I had stated on the Friday preceding, namely, that Criminal Prosecutions in this Province are, as in England, open to the Bar." I must have been strangely misapprehended by Mr. Willis, for upon Reference to several Gentlemen of the Bar who were present I find they distinctly perceived my Meaning in the Observation to which he alludes, and in which I was careful to make myself understood. When Mr. Justice Willis, on the first Occasion, declared his decided Condemnation of my Conduct, in not having indicted the Persons who committed the Trespass upon the Press and Types, he remarked, that it was particularly my Duty in this Province to have prosecuted, because he understood the Crown Officers here assumed to themselves the exclusive Right of conducting all Criminal Prosecutions; and that Parties injured had no Means of appealing for Redress in a Criminal Proceeding, except through them. I replied, that in the Court of Quarter Sessions, where Riots and other Breaches of the Peace are most usually tried, there is no Public Prosecutor, but Prosecutions are in that Court, as in England, open to the Bar; and further, that I had never asserted, or considered, that all Criminal Charges in the Superior Courts must, of Necessity, originate with the Crown Officers; and I explained my View of the Matter as I have stated in the Narrative, which I thought sufficiently plain. The Judge, however, somewhat hastily, and in a Manner not usual in our Criminal Courts, seized upon my Expression, and in the Tone of Retort said, "Oh, then, I am to understand, it seems, that there is no Public Prosecutor—the Attorney General informs me that there is no Public Prosecutor; then Mr. Collins you make your Charge as soon as you please;"—or to that Effect. I replied, that I did not say there was *no Public Prosecutor*, nor had ever said so; that there were Public Prosecutors, of whom I was one, whose Duty and whose Right it was to conduct all Criminal Prosecutions for which they thought there was Ground. That I had only denied that I had ever disputed the Power of the King's Subjects to resort to the Criminal Courts with their Complaints, without going, in the first Instance, to the Crown Officers; or that the Attorney General's refusing to prefer an Indictment concluded the Party; and I repeated more distinctly my former Explanation.

On a subsequent Day, when Mr. Justice Willis recurred to this Subject, I again gave the same Explanation, which is erroneously stated to be a Repudiation of my former Statement.

That I had little Occasion to involve myself in any Contradiction can be most satisfactorily shewn, by calling to his Excellency's Notice the Opinions which I had openly and officially expressed, in Writing, more than Nine Years before, on this same Question; and to which, as it was fresh in my Recollection, I particularly adverted in the Explanation on which Mr. Justice Willis remarks. The Opinion I refer to was given by me in 1819, in a Report to His Excellency of the Criminal Prosecutions arising out of the Contest between Lord Selkirk and the North West Company, and is in the following Words: "Your Excel-
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" lency will permit me to remark generally on this Subject, that my refusing
 " to prefer these Charges was no Denial of Justice. The Crown, in this
 " Province, defrays the Charge of Prosecutions which its own Officers find it
 " proper to institute. Those Officers are sworn, and have to exercise their
 " Discretion in the Discharge of a Public Duty; but they are not the only
 " Channel to Justice. Every Subject may go directly to the Grand Inquest with
 " his Complaints; if they make a Presentment in consequence, the Crown
 " Officer, as a Thing of course, frames it into an Indictment, and conducts the
 " Case. The Act of the Grand Jury relieves him from all Hesitation. Again—
 " Any Individual, if the Crown Officer should reject his Complaint as ground-
 " less, may employ his own Counsel to frame his Indictment, and conduct his
 " Prosecution. This Right I have never doubted, nor should I ever think of
 " questioning it; though owing, I am willing to believe, to the Confidence
 " reposed in the Integrity of the Servants of the Crown, such a Course of
 " Proceeding has never, to my Knowledge, been pursued or thought of. The
 " Crown, I take it for granted, would not defray the Expence of a Prosecution
 " not committed to its own Officers; and this, I conceive, is all the Difference
 " between the System here and in England."

Whether, in giving that Opinion, I took an incorrect View of the Powers and
 Privileges of the Office of Attorney General, and a View differing from that
 which has been taken by those holding that Office in this and other Colonies,
 I cannot say; it was that which appeared to me most consistent with Reason
 and Justice. The Report in which it was stated was transmitted to the
 Secretary of State for the Colonies, by whom I had been directed, through his
 Excellency the Lieutenant Governor, to furnish it, and it can be referred to,
 as I wish it may be, in the Colonial Office. Upon that Occasion I had the
 Satisfaction of receiving from His Majesty's Government, in a Dispatch
 addressed to his Excellency, of which a Copy was sent to me, a very gratifying
 Expression of the entire Approbation of my Conduct by the Government,
 with which I cannot forbear, under present Circumstances, to accompany this
 Explanation.

I recur to my Report in 1819, as affording the most conclusive Evidence
 that my View of the Duties and Powers of the Attorney General, in regard to
 Criminal Prosecutions, was early formed, and had been long ago publicly
 explained. It has ever been consistently acted upon, and certainly evinces no
 exclusive Spirit, but clearly the reverse, at the same Time that it by no
 Means repudiates the Assumption that there are Public Prosecutors in this
 Province.

Since I have found it necessary to allude to a particular Expression in
 Mr. Justice Willis's Letter, I will remark, in reference to other Passages in it,
 that I feel I owe little to the Forbearance of Mr. Willis in the Discussion to
 which he alludes; and that it is with little Reason he represents me as obnoxious
 to a Charge of personal Rudeness towards the Bench.

I owe it to myself and to the Public, not to be unfairly borne down; and
 not to submit, in Silence, to have my Effectiveness as a Public Servant
 destroyed, or my Character as a Man unjustly attacked. I can truly declare,
 and I do so with Pleasure, that with not One of the Judges who have preceded
 Mr. Willis in the Administration of Criminal Law in this Province have I ever,
 on any Occasion, while acting as Attorney General in any Criminal Proceeding,
 had the slightest Altercation. I have never had to vindicate myself against
 an Attack from the Bench; nor has his Excellency, I believe I may add, been
 ever before appealed to on the Occasion of any disagreeable Collision between
 any Judge or any Public Officer in this Colony and myself.

When it is considered that Mr. Willis's Representation grows out of an open
 public Reprehension of my Conduct as Attorney General, unaccompanied with
 any Expression of Qualification or Deference, pronounced within the first
 Half Hour of his presiding in a Criminal Court in this or I believe in any
 other Country, within the first Six Months of his Residence in this Province,
 in which I have discharged laborious and responsible Duties for nearly Sixteen
 Years; that it was grounded upon no Affidavit or other Evidence of any
 Kind, but was expressed in an extra-judicial Discussion of a Matter which was
 not and could not be then legally before the Court; that it was in relation to

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Proceedings which had been begun and ended before Mr. Justice Willis had any Connection with this Colony, and which had not been thought, by the Judges who presided at the Time, to call in any Degree for their Censure; when these and other Circumstances are considered, I must say that I cannot, and do not, recognize in the Proceedings which took place any Forbearance on the Part of Mr. Justice Willis, to be attributed, as he expresses it, "to his Toleration of me as a Public Officer," and "to his Desire not to obstruct the Public Business." I have always felt, that Courtesy towards the presiding Judge is indispensable for the Preservation of a due Respect for Public Justice; and this Courtesy I have uniformly shewn to Mr. Justice Willis, both before and after the Censure he was pleased to pass upon me, inasmuch as I felt that Censure to be; but I need scarcely say, that the Courtesy I speak of should be mutual. The first Intimation of any Absence of such Courtesy in the Public Relation between us was exhibited in the Attack which Mr. Willis thought proper to make upon me in open Court, and of which I must ever think I have a Right to complain, as not merely uncourteous, but in no light Degree inconsiderate and unjust.

However little Connection it may seem to have with the particular Subject of this Letter, or with myself personally, I cannot but remark upon that Passage of Mr. Justice Willis's Letter to his Excellency which represents the Criminal Law of this Province as requiring Amendment from its great Severity, that it is precisely what the Criminal Law of England was at a Period when her Civil Institutions were scarcely less admired than they are at this Day. The Efforts now making in England to simplify and reduce to greater Order their Criminal Law, as well as to mitigate its apparent Severity, are highly worthy of Imitation here; but the System, as it is intended to be constructed, is yet imperfect, and I do not know that we should be thought imprudent if we forebore to touch our present Fabric till the Lapse of another Year or two enabled us to adopt one in its Room which should be complete in all its Parts, having received Amendments in its Progress, and having been in some Measure proved by Experience. At all Events, it is only since the present Assembly was chosen that Mr. Peel's Improvements here commenced. I need not say that there has been but little Encouragement in the last Three Sessions for embarking in such an Attempt as a general Revision of the Criminal Code. I have succeeded in one or two partial Measures, and was obliged to abandon others, after introducing them, from a State of Things which I think the Country now begins to understand and regret, and which I trust therefore is not likely to continue. In the meantime neither the People nor their Representatives have shewn any Impatience of the present Code. Under it Crime has been and is effectually punished, and certainly with no undue Severity in Practice, for, except in Cases of High Treason and Murder, I can call to Mind only One Instance of the Execution of Sentence of Death in this Province for more than Twenty Years, and that was in a very aggravated Case of Arson.

I am sensible that this Explanation is already protracted to an inconvenient Length, but I cannot conclude it without a Reflection upon the Manner and Occasion of the Questions involved in it being called into Discussion.

I am no Apologist for Duelling, nor have I any Inducement to be so. During the Time I have been Attorney General, no Case of Death in a Duel has occurred here; if any had, I do not feel that I could have treated it with that Degree of lenient and almost complaisant Forbearance that I have observed to be very frequently exhibited on such Occasions, both in England and the Colonies; and indeed I do not see why Mr. Justice Willis should have appeared to imagine that the Case which occurred in 1817 in this Country was not dealt with at the Time so as to satisfy the Ends of Justice. The Manner in which it was revived struck me, I confess, as extraordinary. I have frequently read, in Periodical Works and in Newspapers, the Statements published by Seconds of the Circumstances of a Duel, in which Persons were engaged, who, as well as the Seconds, were afterwards daily in Public View, and even conspicuous in Public Life. If any Party Writer, wholly a Stranger to the Duel, were indicted for scandalous Libels upon the Government, in the course of which he had stigmatized those Persons as Murderers, for the mere Purpose

of disgracing them and the Government which they served, I do not believe that in an English Court of Justice he would be suffered, even upon his Trial for those Libels, much less when he had not been arraigned upon them, to insult and abuse the Attorney General, and to claim, in Terms as I believe have been seldom used in a Court of Justice, that before he should be condemned for his Outrages against the Peace of Society, against private Feeling, and the Character of the Government, Persons who had once been publicly discharged in consequence of the Acquittal of the Principal, should, upon *his* Prosecution, be, Ten Years afterwards, arraigned and tried for Murder.

I do not think so, because I am aware that if the Objects of his own Malice had been actually tried and convicted of Murder, and pardoned, the Law of England would not suffer any one maliciously to libel them with opprobrious Epithets; much less in a Case where the Parties, never having been tried, were entitled to be presumed innocent until Conviction, and when the Person whose Guilt must have been greater and more direct than theirs had been tried and acquitted.

The Defendant upon the Libel, however, was permitted to take that Course. Perhaps the receiving his Complaint, and permitting him to become Prosecutor, was inevitable. I mean only to state my Impression; that such a Prosecution could not, properly, have any Connection with the Proceedings against himself for Libel. However that may be, Mr. Collins's Charge was entertained and acted upon; it was pushed to the utmost; he was allowed to conduct the Prosecution by his own private Counsel, the same who was engaged to defend him in the Cases of Libel. The Defendants were tried for Murder upon an Indictment such as they had been discharged from Ten Years before. A Statement of one of them was read in Evidence against him, which was *extorted* by the Necessity of defending, from the malicious Libels of the present Prosecutor, the Character of the Principal, who had been tried and acquitted, which Statement was shewn and admitted to have been communicated in the Confidence of private Friendship; and the Defendants were exposed to the Chance of Loss of Evidence from the Death or Absence of Witnesses.

Under these Circumstances the Trial proceeded, and the Defendants were acquitted.

After the Prosecutor had thus failed to verify his Libels, I am at a Loss to comprehend his Claim to the Countenance of a Court and the Compassion of a Judge.

Nevertheless the Judge did intercede, and, in a Manner which effectually disabled me from further proceeding, proposed to me to discontinue the Prosecutions for Libel, several of which had originated with the Grand Jury, from a strong Sense of the atrocious and disgusting Character of the Publications. It is not for me to determine the Propriety of such a Recommendation. I submitted to it; but I must say I am unable to reconcile the Appeal made from the Bench to my Forbearance in behalf of Mr. Collins, who stood indicted for various Libels of a most mischievous Tendency, with the very decided Censure passed upon me but a Day or Two before by the same Judge, for not volunteering to institute a Prosecution for a Misdemeanor of less moral Turpitude, when the Person injured had been recompensed fifty-fold, and had declined to prosecute, and when the Grand Jury had, for that Reason, felt themselves warranted to forbear.

If I had a Discretion to forbear, and could be asked to exercise it, *after* the Grand Jury had presented an Offence for which no Recompence had been obtained in a Civil Action, I cannot understand why I was not acting equally at least within the Limits of my Discretion in forbearing to prosecute a Case which the Grand Jury declined to present, because the Defendants had been already severely punished.

Such, however, were the Proceedings, the Particulars of which Mr. Justice Willis has not described, but which, in order to vindicate myself, I have stated in Detail, at the Risk of being thought tedious.

They have been much distorted in the only Newspapers which reported them, and for evident Purposes. These Statements I have suffered to pass

without any other Notice than I am at this Moment taking of them, having been on all Occasions satisfied with the Conscionsness of having done my Duty, and studious only to explain my Conduct where I am properly responsible. I have been much pained at the kind of Excitement which the Proceedings of a Criminal Court have, for the first Time in this Province, been made to create, and I think most unnecessarily. Had I preferred an Indictment for the Injury done to the Press and Types of Mr. McKenzie, before his Civil Action was determined, I should have been lending myself to the declared Wishes of the Offenders, as I have already explained; I should have deprived the Person injured of the Option which the Law allowed him, and should have been accused of desiring to prejudice his Civil Action, by interposing officiously with a Criminal Prosecution which he intentionally waived.

After the Civil Action was determined, and very excessive Damages awarded, it did not seem to be necessary to the Ends of Public Justice that a Criminal Prosecution should be instituted against the Wish of the Party injured. I must presume it did not appear to be so to the Grand Inquest, because, knowing the Facts, and having the Prosecutor before them, they did not present the Offence, though it was their peculiar Province. And I must presume that it did not appear so to Mr. Justice Willis, when, after a Bill had been found for the same Injury, Eighteen Months after upon the Complaint of Mr. Collins, who was in no Manner privy to it, he proposed to me from the Bench that it should be compromised, if I would forbear to urge the Indictments for Libel, thereby appealing to a Discretion which he had before virtually denied to me, or rather, perhaps, conceding to Mr. Collins a Discretion and a Power to forbear, which he did not allow to have belonged to me as Attorney General, or to the Person injured, when the Facts were recent. This Compromise was rejected by the Defendants charged with the Riot, because it came proposed to them as an Indulgence from a Person charged with scurrilous Libels, and as a kind of Purchase of his Impunity. The Trial necessarily proceeded. Mr. Justice Willis presided; and the Defendants met the Charge, without desiring to evade it. They were of course convicted, and were sentenced by Mr. Justice Willis to pay a Fine of Five Shillings each; and it was expressly declared, that they were fined no more because they had been made to pay very excessive Damages in a Civil Action. The Prosecution cost the Crown £7 5s. I knew well the Imputations to which I should be subject, if in Cases of Misdemeanor usually disposed of at the Quarter Sessions, and requiring in the Opinion of the Judge to be punished only by a Fine of Five Shillings, I should, against the Wish of the Prosecutor, urge on a Prosecution which the Grand Jury had seen no Reason to prefer, and thereby add a Charge of £7 5s. to my Account against the Government, or as many of such Charges as I could hear of Cases to pursue.

Whether, under such Circumstances, the Censure which I received was called for, is now, humbly but anxiously, submitted by me to his Excellency.

I have the Honour to be,

Sir,

Your most obedient humble Servant,

To Major Hillier, &c. &c. &c. (Signed) JOHN B. ROBINSON, Attorney General.

Inclosure, No. 4.

May it please your Excellency.

York, 10th May 1828.

I BEG to make to your Excellency the following Report upon the Matters to which Mr. Justice Willis refers in the Letter which he has thought fit to address to your Excellency.

In the Year 1817 a fatal Duel occurred in this Town between a Son of Mr. Jarvis, the Provincial Secretary, and a Son of Mr. Ridout, the Surveyor General. The latter fell. Mr. Henry Boulton, the present Solicitor General, and Mr. James Small, were the Seconds; they were neither of them at that Time in any Public Situation or Employment. Mr. Jarvis was committed upon a Charge of Murder, made by the Coroner's Inquest, and at the next Assizes,

Assizes, in October 1817. Bill was preferred to the Grand Jury, charging him with Murder, and Mr. Boulton and Mr. Small as Principals in the Second Degree. The Grand Jury found the Bill against Mr. Jarvis for Manslaughter only, and ignored the Bill as it respected the Two Seconds. Mr. Jarvis was tried at the same Assizes for the Manslaughter. Several Witnesses were produced, who proved the dying Declarations of the deceased; and after receiving all the Testimony which could be procured, independently of the direct Evidence of the Seconds, who were involved in the same Charge by the Coroner's Inquest, the Petit Jury returned a Verdict of Acquittal, which was taken both upon the Indictment and the Inquest. The Seconds, who had been charged by the Inquest with having been present, aiding and abetting, were discharged by Proclamation, under the Impression that the Acquittal of the Principal in the First Degree rendered it unnecessary, if not impossible, to urge the Prosecution further against them.

The Connections of all the Parties being numerous, and forming no inconsiderable Proportion of the small Society of this Town, the melancholy Occurrence I have related excited a very painful Degree of Interest at the Time; and as there was none of that Forbearance shewn before or at the Trial, by the Relatives of the deceased, which often on such Occasions impedes the fair Course of Public Justice, this painful Interest continued to increase until the Case was disposed of by the proper Tribunal, when the open Exhibition of private Resentment ceased, and the Peace of Society became gradually restored.

I was in England during the whole of these Occurrences, and returned to Upper Canada not long after the Trial, having been absent more than Two Years. In the Time that has since intervened I have been happy to observe that the Traces of this deep Affliction, and its Consequences, became gradually fainter; indeed the Breach in Society had been almost healed, except with regard to Mr. Jarvis, between whom and the immediate Relations of the deceased it was not to be expected, and perhaps hardly to be desired, that any thing like a social Intercourse should be renewed.

Educated at the same School with the young Men of both Families, I was on intimate Terms with all, and I did not suffer this Intimacy to be in any Degree interfered with, by entering into the Feeliags which either Party had contracted, from the distressing Events that had occurred during my Absence. On the contrary, I think it is not unknown to your Excellency, that both Mr. Jarvis and the nearest Relations of the deceased have, throughout this Period, received from me more than ordinary Proofs of Friendship, and some of them within a very recent Period.

The Recollection of the unhappy Events of 1817 has been revived, and the Hostility they then excited has most unhappily lately been renewed, by a Concurrence of Circumstances which could not in any View of them have been expected to lead to such Consequences.

Within a few Years Two Newspapers have been established in this Town, under the Conduct of Men of much less responsible Stations in Society than the Editors of Public Journals commonly are, who, being apparently without these Checks produced by a Desire to preserve a respectable Reputation, have been led, either by the Hope of Gain or by the Impulse of Dispositions naturally hostile to the Peace of Society, to indulge in a licentious Abuse, not merely of Public Men or Measures, but of private Individuals, such as, perhaps, has never been exceeded in any Community.

I always regretted the Tendency which such Publications might have in misleading the Opinions of People in other Countries as to the State of moral and political Feeling here, and perhaps a Sense of this ought to have induced me, for the sake of the Province, to attempt to put them down by Law. But I felt that, in this Country at least, the Falsehood and Malevolence of the Sentiments contained in those Papers must be generally known. I did not imagine this would or could be countenanced, and I apprehended Evil rather than Good from the Degree of Importance which Prosecutions instituted by the Crown might tend to confer upon the Authors of them. The best Antidote seemed to me to exist in the Absurdity and palpable Want of Justice in the Statements themselves. I depended upon the Neglect or marked Disapprobation

tion of the Public, for affording the most satisfactory Remedy; and I feared to call the Papers into Notoriety, and to protract their Existence, by the political Excitement which Prosecutions for Libel usually occasion. So far as the Government was concerned I felt myself at liberty, in the Absence of any Order from your Excellency, to use this Discretion; but had any Individual sought Redress by a Criminal Prosecution, and applied either to me or to a Magistrate or to a Grand Jury, he would of course have found the Remedy perfectly open to him. The Individuals, however, who were attacked by these Persons seemed equally inclined to act upon the Principles I have mentioned; and the Event justified that Course, for in May 1826 the Colonial Advocate, the Paper which had been longest established, was evidently about to be discontinued. Your Excellency knows how this Termination was most unhappily anticipated by a Number of young Men, yielding inconsiderately to the Impulse of Indignation at some most atrocious Libels, which, even after the Editor had fled the Country, were published in a Number of the Paper intended (as it was afterwards ascertained) to be the last.

The accompanying printed Statement, verified by the Affidavit of all the Persons concerned in this foolish and unwarrantable Act alluded to, explains the Causes and Circumstances of that illegal and ill-judged Proceeding, which revived a Nuisance it was intended to destroy, and which, besides bringing upon the Government the most undeserved Imputations, threw every Advantage that could be desired into the Hands of a Person whom the Violence so improperly used was but little likely to injure.

Mr. M'Kenzie, the Editor of the Colonial Advocate, knew how to improve these Advantages. The Eight or Nine Persons who, in a riotous Manner, committed a Trespass upon his House, and threw about and spoiled some of his Types, proceeded in this Breach of the Law without Concealment, and were of course made to answer for the Damage they had committed. The same Remedies, Civil and Criminal, which by the Law of England would, in a similar Case, have been open to the Party injured, were open here. Mr. M'Kenzie's Property had been illegally spoiled, and for that he had a Right to Compensation. No personal Violence had been used against him or any one; but the Riot was done by such a Number of Persons, and in such a Manner, that it constituted a Riot, and, as in a Case of Assault and Battery, rendered the Parties liable to a Criminal Prosecution, as well as to a Civil Action. In such Cases the Prosecutor can pursue either Remedy, or both. An Option rests with him; and he is only so far restrained in the Choice of his Alternatives, that the Court of King's Bench will rarely grant him a Criminal Information on his Motion, unless he agrees to relinquish his Civil Remedy. And again, when both Civil and Criminal Proceedings are depending at the same Time, the Court will sometimes stay the one till the other is determined; and it is not unusual, when a Prosecutor upon an Indictment has obtained ample Redress by Civil Action, for the Attorney General, if he deems the double Remedy vexatious, to enter a Nolle prosequi to the Indictment. The Recourse to the double Remedy is, in Practice, placed under these Restraints; and it is very reasonably recommended by legal Writers to the Parties injured, that they should first pursue their Civil Remedy to an end, in order that their Claim to a full Compensation in Damages may not be in any Degree prejudiced; because it is not to be supposed that a Jury would give full Damages in a Civil Action against a Defendant who, upon a Prosecution by the Plaintiff in a Criminal Court, has been already made to pay a Fine to the King for the same Wrong, or perhaps been imprisoned.

The Attack upon Mr. M'Kenzie's Press and Types occurred in June 1826. Taking legal Advice, he immediately commenced an Action of Trespass against all the Defendants, which was tried in the Month of October following. A Court of Quarter Sessions of the Peace intervened in July, before which it was perfectly competent to Mr. M'Kenzie to have proceeded, if he had desired to prefer also a Criminal Charge. He might have moved in Trinity Term, by his private Counsel, for a Criminal Information; or he might, as is the ordinary Course with respect to Felonies, Riots, and Offences of every Description, have gone at any Time before a Magistrate for the District, and obtained, like other Prosecutors, a Warrant against the Defendants, who

would have been bailed to the Assizes or the Sessions to answer for their Offence. At the Sessions the Prosecution would have been conducted by the Prosecutor's own Counsel, and at his own Charge; at the Assizes it would have been conducted by the Crown Officers, at the Charge of the Public. Mr. M'Kenzie chose to do neither, and was well advised in confining himself to his Civil Remedy.

Of this the Defendants were sensible; for, having through their Attorney in vain made an Offer of full pecuniary Compensation for whatever Damage they had occasioned, several of them applied to me, as Attorney General, both before and during the Assizes in October 1826, to know whether I was not going to prefer an Indictment, expressing their Hope that I would feel it my Duty to do so, as they declared their Willingness to suffer the Penalty of their Folly and Misconduct, in the Shape either of Imprisonment or Fine to the King, rather than be made to pay vindictive Damages to the Person whose Calumnies had provoked them to Violence.

I could answer, that I could be governed by no such Motive, and could not vary my Conduct as Crown Officer to meet any Wish of theirs; that the Person injured knew who had injured him, and if he complained to me as Attorney General, and wished to institute a Criminal Prosecution, or if the Grand Jury should make a Presentment, I should of course proceed; otherwise I should not, because no Informations or Papers had been put into my Hands, nor had any Application whatever been made to me upon the Subject.

The Civil Action was tried in October 1826, by a Special Jury. Some very loose Testimony was given, which led the Jury to believe that the Press and Types had been worth £500, and that by the Loss and Damage of some of the Types they had been rendered almost useless. They gave a Verdict for £625; which Sum Mr. M'Kenzie received in Compensation for an Injury that he has since repeatedly acknowledged, and has even admitted upon Oath, did not exceed £12 10s. As the Assizes continued to sit some Days after this Verdict had been rendered, I thought it not improper to suggest to the Foreman of the Grand Jury, that as the Jury had been in Court, and heard the Circumstances detailed, it might be well for them to send for Mr. M'Kenzie, and ask him whether he desired to prefer any Criminal Charge, expressing their Readiness to receive his Complaint, notwithstanding the Damages which had been obtained. They did send for Mr. M'Kenzie, who declined to prosecute, alleging that he was satisfied with the Verdict in the Civil Action.

In making this Suggestion to the Grand Jury, my Wish was to guard them against the Aspersions of Mr. M'Kenzie, and from that Motive I deviated from my ordinary Course; for I do not conceive it to be my Duty, and it has never been my Practice, to invite Complaints for Misdemeanors, or to originate any Prosecution except for such Offences as it is deemed in England to be the peculiar Province of the Attorney General to notice.

In all Cases of Felony, or other Offences against the Peace, or against the Person or Property of Individuals, I proceed upon the Informations which have been taken by the Magistrate upon a previous Complaint, and which are put into my Hands for that Purpose; or upon Presentment of the Grand Jury, upon a Complaint made to them by any Person desirous of prosecuting; or upon the Relation of the Party injured, made directly to myself. If a Murder, or other enormous Offence, were, for want of a Prosecutor, or from any Difficulty in the Investigation, likely to pass unpunished, I have always, upon Information being given to me, afforded every Assistance and Facility to Justices or Grand Juries in the Discharge of their Functions.

This View of the Duty of my Office as Attorney General is the one upon which I have uniformly acted, and I believe it to be correct. It is within my Knowledge, that the Three Gentlemen who preceded me in the Office adopted the same Course. In my own Practice, I am confident that One Instance cannot be produced in which I have acted under a different Sense of my Duty. The Crown Officers of this and of other Colonies conduct all Criminal Prosecutions, except those cognizable at the Sessions, and they charge their Fees for conducting them in Accounts against the Government.

I have ever conceived, that it was my Duty as Attorney General to act *ex officio* in such Cases only as the Attorney General in England would act in *ex officio*.

officio. There are here precisely the same Institutions of Justices of the Peace, Coroners, Sheriffs, Courts of Quarter Sessions, of Oyer and Terminer and General Gaol Delivery, as in England, and with the same Powers and Duties; every Inhabitant of the Country knows he can have recourse to them. I am not a Magistrate or a Police Officer; and, as to all those Felonies and other Offences which come, in the first Instance, properly under the ordinary Cognizance of Justices and Grand Juries, I consider it my Duty to prosecute them *when the Charge is made*, not to *make the Charge*; to do that, in short, *upon proper Application*, at the Public Charge, which any Barrister would do in England at the Charge of the Prosecutor, or, in some Cases, of the Country.

I think no Man of honourable Feeling could submit to hold the Office on other Principles, and subject to the Imputations which would be thrown upon him if he were to swell his Accounts against the Public by Prosecutions limited up by himself, which the Parties injured declined to institute, and which belonged more properly to the Jurisdiction of the Quarter Sessions, by which Court they would be disposed of without incurring any Charge upon the Provincial Revenue. The latter Consideration I have ever felt it right to keep so constantly in view, that I imagine no Instance could be found in which I have preferred a Charge at the Assizes for a Riot or Battery, unless the Defendants, for want of Bail, were in actual Custody, and entitled to be delivered under the Commission of Gaol Delivery; or unless the Grand Jury, on the Prosecution of the Party, presented the Charge themselves; or the Justice before whom the Information had been laid had deemed the Offence so serious, that he had bound the Parties and Witnesses to attend at the Assizes.

I have known many Instances in which Persons proceeding to abate a Nuisance, or in the Assertion of a Right, have so acted as to subject themselves to a Prosecution for a Riot; but a Criminal Prosecution does by no Means ordinarily follow a Violence of this Description; and I have sometimes been Counsel for the Plaintiffs in a Civil Action of Trespass founded on such Proceedings; but I have never, without the Knowledge, and still less against the Wish of the Prosecutor, instituted a Criminal Prosecution for the Misdemeanor, and without any previous Intervention of a Magistrate or Grand Jury.

On the contrary, after such a Prosecution had been instituted by the Party, I have sometimes, at his Instance, forbore to proceed in it, and this in Cases which have occurred since that which I am now referring to, as well as before. If I had, in the single Case of Mr. M'Kenzie, departed from my known and uniform Method of proceeding, I know not how I could have vindicated myself consistently from the Imputation of desiring to meet the Wishes of those who had injured him, at *his* Expence, and particularly in a Case in which it happened that a Clerk and near Relation of my own was among the Defendants, for whose Folly in being drawn, by whatever Provocation, into so absurd and improper an Act, it was most likely I should find it necessary to pay. When, after the Verdict was given, yielding a Recompence more than Forty Times over for the Injury committed, I requested the Grand Jury to send for the Prosecutor, it was because I chose, from the particular Circumstances of this Case, to do what I had not done in any other. He declined to prosecute. It was not to his Discredit that he did so. The Grand Jury seemed to conceive it unnecessary, under these Circumstances, to present an Offence, which at all Events came under the ordinary Cognizance of the Quarter Sessions: they at any Rate did not present it; and I supposed the Matter had ended with the Civil Action.

I have been thus minute in making this Statement to your Excellency, because otherwise what follows could not be understood.

Mr. M'Kenzie, having resumed his Press and continued his Paper, did not for some Time dwell much upon the Details of the Ontrage, for which he had obtained ample legal Redress. At the Time it happened several Papers, and amongst others the Canadian Freeman, published by a Mr. Francis Collins, made it the Subject of Remark, and represented it in whatever Light they thought would most serve their Cause. But a Year or more had elapsed after

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the Trial, and as the Ends of Justice had certainly been fully satisfied, it had ceased to be spoken of; when Mr. M'Kenzie, either finding his Means again failing, or for the Purpose of trying an Appeal to popular Sympathy for some other Object, began to collect and republish in his Paper and in Pamphlets all the unfounded and exaggerated Statements which he and others had put forth at the Time, and which the Defendants in the Civil Action, then depending, had not thought it proper to notice, being conscious, probably, that by their Conduct, yet unatoned for, they had subjected themselves to such Attacks.

Unfortunately, Mr. Jarvis, who had been tried for the Duel in which he had been engaged in 1817, and acquitted, was one of the Parties to the Trespass upon the Press and Types of Mr. M'Kenzie, and one of the Defendants in the Civil Action I have spoken of.

Since the fatal Event alluded to, he had married the Daughter of the Chief Justice of this Province, and had several Children; he had followed for many Years his Profession as a Barrister, and had lived since that unhappy Period, as he had done before, without Reproach, and in the most friendly Relations with an extensive Society, excepting only those from whom the Event spoken of had necessarily separated him. Among the Persons whom Mr. M'Kenzie, before the Attack upon his Press, had grossly insulted, was Mr. Jarvis, and for what Reason I cannot imagine. He had most wantonly called him a Murderer, alluding to the Transaction upon which he had been tried Eight or Nine Years before; and, excited by so atrocious a Provocation, Mr. Jarvis hastily assembled a few thoughtless young Men, and acted, I believe, the most conspicuous Part among them in the Outrage committed upon Mr. M'Kenzie's House. He bore without Resistance the Abuse which immediately followed this thoughtless Act; but after the Injury had been many Times more than compensated, and a Year and more had elapsed since the Trial, the Republication of all the Abuses which had been uttered, with the Addition of much virulent Invective, was scarcely to have been expected. Mr. Jarvis was again designated in plain Terms as a Murderer, and Conduct of a very disgraceful and atrocious Kind was ascribed to him, in allusion to the Transaction which had undergone a judicial Investigation before Mr. M'Kenzie came to this Country.

To repel the Slanders which had been circulated respecting the Destruction of the Types, Mr. Jarvis published that Statement which I have before referred to, and which contains, in Terms least of all calculated to wound the Feelings of any Person, an Allusion to the Occurrence which Mr. M'Kenzie had inhumanly made the Occasion of charging him with Murder.

Not desiring, it seems, to prefer a Criminal Prosecution for a Libel, which must have had the Effect of renewing an Excitement which a Lapse of Years had allayed, Mr. Jarvis took the Course of requesting Two Friends to wait upon the Gentlemen who had been the Seconds, with Mr. Collins's Newspaper in their Hand, and to request of them, as an Act of Justice to him, to declare how far the Statements contained in that Paper were consistent with Truth. Upon this Appeal, Mr. Boulton and Mr. Small, the Seconds, did not hesitate, it seems, to make a Statement of Facts, which Mr. Jarvis was furnished with, and which he made public, in Vindication of his Character from the Attacks that had been made upon him. This Statement gave rise to the very venomous Abuse from Mr. Collins, the Editor of the Canadian Freeman, which appeared in his Paper of April 3d.

The Solicitor General, Mr. Boulton, required me, as Attorney General, to prefer an Indictment upon the First Libel of Mr. Collins; and if he had not done so, it had become my Duty, under the Instructions of your Excellency, to prosecute that Libel, from the gross Reflections it contained upon the Government, as patronising and encouraging Felons, from its Aspersions upon the Administration of Justice, from its unfeeling Attacks upon the Public Officers of the Colony, whom it implicated, and from its manifest Tendency to provoke a Breach of the Peace, and to further Bloodshed, and to disturb in the most unwarrantable Manner the Peace of Society.

On the 7th April our Lent Assizes commenced. On the 10th I sent before the Grand Jury a Bill on the Libel; and Mr. Jarvis having gone before the

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Grand Jury to complain of the Libel contained in the Paper of the 3d April, they made a Presentment upon it, and it became my Duty, in the ordinary Course, to frame an Indictment upon that Presentment.

I also sent before the Grand Jury a Bill for a very scandalous Libel of Mr. Collins upon the Lieutenant Governor, in which he had in direct Terms charged his Excellency with *Partiality*, *Injustice*, and *Fraud*, in not paying a certain Sum upon the Address of the Assembly. This Bill they found; and as Mr. Collins, in his Paper of 10th April, (while the Court was sitting,) published a very scandalous Libel against the Grand Jury, they made a Presentment of that Libel also.

On the _____ Mr. Collins was brought up on the Process which had been issued upon the Two Indictments. Mr. Justice Sherwood presided. The Clerk of Assize was proceeding in the usual Course to arraign the Defendant upon one of the Indictments, when he applied to me, through his Counsel, to postpone his Arraignment for the present, as he had not determined whether he would traverse or not, and would prefer not being compelled to decide at that Moment. The Delay was asked as an Indulgence, and I readily conceded it. Nothing further passed on that Occasion.

On the next Day Mr. Justice Willis presided; and it was the first Occasion in which he had presided at an Assize since his Arrival in the Province. The Court met at 10 o'Clock; and while it was opening, I was called into an adjoining Room by a Gentleman of the Bar, who wished to talk with me upon some Civil Suit depending. In a few Minutes one of my Clerks came to me, and said I had better go into Court, that Mr. Collins was making a long Harangue to the Judge. On going into Court I found Mr. Collins, the Defendant upon Two Indictments for Libel, certainly of a Character as malignant and unjustifiable as were ever published, addressing Mr. Justice Willis, apparently in a premeditated Speech, and it was some time before I could catch the Purport of his Address. The Language I soon found to be highly opprobrious as it regarded myself in my Office of Attorney General. The Defendant thought fit to accuse me of "*gross and foul Partiality and Oppression*;" and, as the Court evinced no Disposition to interrupt him, I felt it necessary to rise and request to be informed by the Judge what was the Object of the Defendant's addressing the Court, whether he had made any Motion, or had intimated an Intention to make any Application. To this the Judge merely replied, "If Mr. Collins is allowed to proceed I dare say his Object will appear." Mr. Collins did accordingly proceed, and continued in Terms of Abuse to charge me with Misconduct. He stated, that I had indicted *him* for Libel, while I allowed the Solicitor General, who had confessed himself guilty of Murder, to remain unprosecuted; and that I had acted with Partiality in not prosecuting the Persons who, in 1826, had committed the Trespass on the Types of Mr. McKenzie. He demanded that I should be compelled by the Court to bring these Offenders to Justice before I brought him to Trial for Libel.

I in vain remonstrated with the Court, that the Defendant was not on his Trial, nor had he ever been arraigned; that he seemed merely to be indulging himself in an Attack upon me as Attorney General, which could not have any bearing upon his own Case even if it were now before a Jury, but which at present was nothing but a most improper Interruption of the Business of the Court, by an Harangue intended to prejudice the Public Mind before he should be put upon his Trial. I added, that in the Matters he had spoken of I was not to be called to account by him, or by any other Defendant, for the Discharge of my official Duties with respect to other Parties not then before the Court; that I was ready to account at all Times for my Proceedings as Attorney General to the Government for whom I acted, and to whom I was responsible; but that I trusted the Court would not suffer a Person whom I merely knew as Defendant upon Bills for Libels of the most disgraceful Kind, and whose Arraignment upon these Charges had even been postponed, as an Indulgence, at his Request, to address the Court in this irregular Manner, for the mere Object of calumniating me, whose Duty it was to conduct the Prosecutions against him. The Judge, addressing himself to me, said, with some Appearance of Temper and Warmth, but without any Expression of Disapprobation as to the Course the Defendant was pursuing, "that I had not discharged my

“ Duty as Public Prosecutor in not indicting the Persons to whom Mr. Collins had alluded; that the Crown Officers here were Public Prosecutors, and assumed to themselves the exclusive Management of all Criminal Prosecutions; that there were no other Means of punishing Offences but through the Crown Officers, and that it was my Duty to have prosecuted in the Cases mentioned.”

I replied, that his Lordship had not properly before him any Information of Facts upon which he pronounced this Opinion; that I had discharged all the Duties of Crown Officer for nearly Sixteen Years; that I had always observed the same Course as in the Case alluded to; and that this was the first Time a Failure in my Duty had been imputed to me; that my Predecessors, so far as I knew, had always governed themselves by the same Rules; that as Attorney General I was responsible to the King's Government for the correct Discharge of my Duty; that I had governed myself hitherto by my own Judgment of what was right or wrong, and must continue to do so.

I denied that the Crown Officers claimed the exclusive Right of conducting all Public Prosecutions; and stated my own Impression to be (though it might be erroneous), that the Crown paid the Expences of those Prosecutions only which were conducted by its Officers, and not of such as its own Officers declined to prefer; and that the Exclusion went no further; that I had never made a Claim of the Kind which his Lordship seemed to suppose existed. I then further explained, that I had always conceived my Duty to be to notice Offences which are commonly called Offences against the State; and, as to others, to proceed upon Informations and Complaints placed in my Hands by Justices of the Peace, and upon all Presentments of Grand Juries; and further, to afford every Facility to Persons who stated to me their Desire to go before Grand Juries to make their Complaints. I added, that in Cases of Injuries to Individuals or their Properties, such as Assaults and Riots, when the Party had his double Remedy by Action and by Indictment, I always conceived the Option lay with him to proceed criminally or not, as he pleased; and in such Cases I did not act unless Informations were placed in my Hands, or the Prosecutor desired to be heard by the Grand Jury; that if he desired the latter, I saw that he was sworn in Court, and sent to the Grand Jury, and of course, if they presented any Offence, I proceeded upon it as Crown Officer. I stated that this had always been my Course, that I considered it the right one, and should certainly continue to pursue it.

The Judge said, “ Then I take leave to remark, as a Judge, sitting here under His Majesty's Commission, that you have never properly discharged your Duty, and that in the Case mentioned you ought to have prosecuted;” to which I replied, “ My Lord, I think differently; I think I have properly discharged my Duty; and I must be allowed to say, that I think I understand that Duty as well as any Judge presiding on the Bench.” The Judge rejoined, that the Case should be laid before His Majesty's Government.

I further stated, in allusion to the Case which had been referred to, “ that I had merely observed my unvarying Practice, and therefore that no undue or improper Feeling could be imputed to me; that if I had, on the contrary, deviated in that Instance from my usual Practice, and preferred a Charge when the Person injured had declined, it might have been imputed to an unfair Desire on my Part to interfere with his Civil Remedy, by diminishing his Damages; I therefore proceeded in that Case as in all others, and as I should continue to do, notwithstanding the Opinion which had been expressed from the Bench.”

The Judge concluded by saying to Mr. Collins, “ Go you before the Grand Jury, and if you meet with any Obstruction or Difficulty I will see that the Attorney General affords you every Facility.”

To which I could not avoid replying that, “ That Remark was unnecessary, as neither Mr. Collins, nor any one else, had ever in any Manner applied to me to prosecute for the Offences alluded to; and that every Facility within my Power to afford always had been and always would be given in the Administration of Justice, without any such Injunction as his Lordship had been pleased to express.”

Thus

This encouraged, Mr. Collins went before the Grand Jury, and preferred Complaints against Mr. Boulton and Mr. Small for Murder, and against the late Defendants in the Action of Mr. M'Kenzie, for Riot, calling Mr. M'Kenzie, who had constantly declined prosecuting, as a Witness to support *his* Prosecution.

The Grand Jury presented the Two Seconds for Murder, in aiding and assisting Mr. Jarvis to shoot Mr. Ridout, but found "*no Bill*" against Mr. Jarvis. I explained to them repeatedly, in open Court, that they ought to make the Charge sensible and consistent, by presenting Mr. Jarvis for Murder by shooting, and the others as Principals in the Second Degree, according to the Facts; and I framed the Bill accordingly, because the Grand Jury could not regularly take Cognizance of the former Acquittal of Mr. Jarvis; that was Matter to be pleaded by him afterwards, and to be proved by the Record. They refused, however, to put Mr. Jarvis again upon his Trial, and found "*no Bill*" as to him; returning a true Bill against Mr. Boulton and Mr. Small, as Principals in the Second Degree. This they did with apparent Reluctance; and after I had, in answer to a Reference made to me, informed them that, as a mere legal Question, the Discharge from the Indictment in 1817, in consequence of no Bill being returned, did not preclude the preferring a Second Charge; and that the Acquittal of Mr. Jarvis, however it might ultimately affect the Charge made against the Seconds when it was proved upon the Trials, could not now be noticed by the Grand Jury.

On the next Day a Gentleman of the Bar moved that Mr. Collins, as the Prosecutor on this Charge, might be allowed to conduct the Prosecution from that Stage by his private Counsel, and independently of the Crown Officer. To this Application Mr. Justice Willis answered, by intimating that it could be done with my Assent. Thus appealed to, I replied, that I had been made aware of the Intention to make this Application, and had only not consented to it privately because I preferred that any Steps taken in the Matter should be public; and I had resolved, when the Motion should be made, to express my Sentiments explicitly upon it, being desirous of the Opportunity of obviating any Misapprehension of the Remarks made by me on the preceding Day, respecting the Right of the Crown Officers to conduct Criminal Prosecutions in this Country.

These I explained at length; and I concluded by expressing my Desire to be relieved from the further Prosecution of the Charge for Murder, as Mr. Boulton had been so long and so nearly united with me in the Discharge of official Duties.

I therefore resigned the future Management of the Case to Mr. Baldwin, Counsel for Mr. Collins; which, however, I should not have done, if the State of the Bar had put it in my Power to place the Duty in the Hands of some Gentleman of sufficient Standing, not employed in the Prosecution or Defence.

When I had finished my Remarks on this Occasion, which were purely general, and confined to the general Question of Criminal Prosecutions, Mr. Justice Willis chose to recur to the Case of Riot, to which I had not in the slightest Manner alluded, and reiterated his Assertion, "that I had not discharged my Duty in not prosecuting upon it;" although the Person injured had been amply recompensed in a Civil Action, and had declined to proceed criminally.

I could not forbear replying to this uncalled-for and renewed Attack, by repeating, "that, according to my own Judgment, I had correctly discharged my Duty; that I was not the Attorney General of his Lordship, but of the Crown; that I had, in that Office, high Duties to perform, and under a high Responsibility to my Sovereign; that I had a Discretion to exercise, which must be governed by my own Judgment, unless controlled by the Order of my Government; that whenever, in any Point of Duty as Attorney General, my Opinion of what was proper happened to differ from that of his Lordship, it was my own Opinion, by which I must and ever would be governed."

The Prisoners, Mr. Boulton and Mr. Small, were arraigned and tried for Murder before Mr. Justice Willis. The same Evidence was given as was given to the Petty Jury in 1817, when Mr. Jarvis, the Principal in the Duel, was acquitted

acquitted of the Charge of Manslaughter, and the additional Evidence of the written and other Statements, which the Prisoners, for the Purpose of vindicating Mr. Jarvis from the Libels which had been published, had made in the Presence of certain of their Friends. After a Trial, which lasted nearly Two Days, the Petty Jury retired, and in Ten Minutes brought in a Verdict of Acquittal.

In the meantime, the Grand Jury had, upon the Complaint of Mr. Collins, brought in a Presentment for the Riot committed in 1826 on the Premises of Mr. McKenzie, and which the latter had declined to prosecute. I, as in all other Cases, framed an Indictment upon it, and had the Defendants brought into Court on the usual Process.

The Counsel of Mr. Collins moved for Leave to conduct this Case also by his private Counsel, but I determined to withstand further Interference of the Kind; for though one of the Defendants was a Nephew and a Clerk of mine, and two others of the Clerks of my Office had most inconsiderately associated themselves with the others in the Outrage complained of, and had thereby subjected me to Imputations which I could not prevent, but which, from the utter Want of Foundation for them, I could easily despise, I saw no Reason in that Circumstance for declining to conduct a Prosecution against them, which I would at any Moment have done, without the slightest Hesitation, if I had been applied to for that Purpose.

After the Trial of the Murder was finished, I was proceeding to call on this Case of Misdemeanor, when a Compromise was proposed on the Part of Mr. Collins, through his Counsel, who addressed the Court, and expressed a Wish, that now the painful Investigation of the Case of Murder was finished, the Prosecution for Libel should be discontinued, as the best Means of allaying any Excitement that had existed. This Suggestion was warmly seconded by the Judge, who urged it upon me as Public Prosecutor; suggesting also, that, as Part of such Compromise, the Prosecution for the Riot might be dropped. To this latter Proposition the Persons indicted for the Riot entirely objected, declaring that they never had wished to avoid Prosecution, but had rather courted it; that they were now here expecting to be tried, and willing to submit to whatever Punishment the Court, under all the Circumstances, should choose to impose; and that they would accept of no Compromise of a Prosecution which, they said, had been maliciously and vexatiously instituted, not by the Person injured, but by a Person who, being brought into Court charged with an Offence, had been received as a Sort of Public Prosecutor, and allowed to harass them by raking into old Transactions which had been long ago investigated and atoned for. They insisted upon the Matter now coming before the Country, that it might be finally disposed of, and that it might no longer remain in the Power of any malicious Person, wholly unconnected with the Case, to prosecute them at his Pleasure. The Trial was consequently proceeded in.

Upon the Judge's Appeal to me, recommending the settling of the Prosecutions for Libel, I felt it proper to say, that in the very novel Situation in which I was placed by the Judge recommending a Discontinuance of Prosecutions for the Libels in question, which, perhaps, were as atrocious as were ever published, it was my Duty to consider that there were Two Objects involved in the Prosecutions which had been commenced against Mr. Collins. So far as the Peace of Society was to be protected, and the Laws enforced for the general Welfare of the Community, I could not but feel that the Appeal made to me by the Judge from the Bench was irresistible; for I could not desire to be thought more solicitous to punish Offences, or more anxious to attain the Ends of Public Justice, than the Judge who presided for the Purpose of administering it: but that it was incumbent on me to consider that the Solicitor General and Mr. Jarvis, whose Feelings had been cruelly assailed, and their Reputations injured, by being published to the World as Murderers in the most unfeeling and slanderous Attacks, had a Right to insist on the Defendants being punished for so unwarrantable a Breach of the Law; that for that Purpose they had complained to me as Attorney General, and Mr. Jarvis had gone before the Grand Jury as Prosecutor upon the Charge. Under these Circumstances I declared, that however necessary I might feel it in other respects to acquiesce

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in the Judge's Suggestion, I certainly ought not and could not with any Propriety forbear to proceed on the Indictments for those Libels, unless the Solicitor General and Mr. Jarvis should expressly desire it.

Those Gentlemen did not withhold their Assent, but gave it in a qualified Manner; and I did, in consequence of the Judge's Suggestion, declare that I would proceed no further upon these Indictments. I stated, however, that there were other Cases of Libel, one against Mr. Collins, and another against Mr. McKenzie, which had originated with the Grand Jury; the former being for a very unwarrantable Libel on the Jury themselves, then acting in the Discharge of their Duty; and the latter for what is commonly termed a Political Libel, very scurrilous in its Language.

As these had emanated from the Grand Jury, and had come before me as their Presentments, I did not feel that, with proper Deference to them, I could at once relinquish them; but that I had no Objections to state, that I would forbear proceeding on them during the present Assizes, and that in trying them or not at the next Assizes I should be governed in a great Measure by the Sense which the Defendants should shew in the meantime of their Duty and Obligations as Conductors of Public Presses. With this his Lordship declared himself perfectly satisfied, and stated that the Course I had mentioned was indulgent to the Defendants.

On the next Morning, being the last Day of the Assize, the Defendants, by their Counsel, expressed a strong Wish to be tried on those Two Presentments; but as I had framed no Indictments upon them, in consequence of what had passed the preceding Evening, when the Presentment against Mr. McKenzie had been found, and as the Defendant Mr. Collins had throughout the whole Assize declared himself uncertain whether he would try or traverse, I did not, after what I had acceded to the last Evening, at the earnest Wish of the Court, think proper to suit my Proceedings to the shifting Desires and Convenience of Defendants, and, at a Moment's Notice, proceed in Cases which required some previous Preparation, and in which it was a Matter to be considered, whether Special Juries ought not to be had. I had the Defendants bound to appear at the next Assizes, and the Session was that Day terminated.

On the preceding Day I had conducted the Case against the Persons charged with Riot; they were, of course, found guilty; and Mr. Justice Willis sentenced them to pay a Fine of Five Shillings each, expressly stating, as a Reason for the slight Punishment, that more than ample Recompence had been already obtained in a Civil Action.

This is a Narrative, as accurate as my Memory can furnish, of the whole Course of the Proceedings which have given Occasion to Mr. Justice Willis's Letters to your Excellency. They were, in several Respects, extraordinary; and the Comments which I am constrained to make upon them are contained in my Letter to your Excellency, which accompanies this Paper.

I transmit, with this Detail, the printed Statements and the Libels referred to; and to the latter particularly I solicit Attention.

All which is respectfully submitted.

(Signed) Jno. B. ROBINSON,
Attorney General.

To his Excellency Sir P. Maitland, K.C.B.
Lieutenant Governor, &c. &c. &c.

Inclosure, No. 5.

Extract from the "Canadian Freeman" of 3d April 1828.

Sam Jarvis, the official Desperado; Henry J. Boulton, his Accomplice in Crime; and James Fitzgibbon, the Tool of Tools.—Having shamed, or rather frightened, *Echo* in the Gazette from any further Connection with these "Men of Character," this *pious Trio*, they have had recourse to the *Cuckoo*, the extra-printing Tool of the Ministerialists, and last Prop of official Corruption.

From that hireling Press *Sam* has brought out a Pamphlet, intended as a Justification of the killing of John Ridout, in contradiction of the Statement of "A Relative;" but which, in our Opinion, makes bad worse, and gives the clearest Acknowledgments of the blackest Guilt.

Sam says, that the Statement of "A Relative," if true, *should drive him "out of the Pale of all respectable, indeed of all civilized Society!"* This is just what we think ourselves; and, unfortunately for himself and his Accomplice, he has admitted almost *all* the leading Features of the Statement to be correct and *true*. The very first Statement of "A Relative," the Point upon which the whole Question hinges, the Fact which first led to the Death of young Mr. Ridout, namely, the villainous, tyrannical, and unprovoked Assault upon him by his Slayer, in his own Office, surrounded by his Clerks, is overlooked by Jarvis in his Defence; he dare not attempt to contradict it. He admits, then, by not contradicting this Part of the Statement, that he was the first Aggressor. That he was afterwards the first to challenge is admitted by all. That he shot down the Boy, standing at the Distance of *eight Paces, with an empty Pistol in his Hand*, he admits; and what does he contradict? Why, that Henry J. Boulton, instead of being Twenty-eight Years of Age, was only Three Weeks past Twenty-seven! A fine Apology, indeed, for the Blood of John Ridout!—the Difference of better than Eleven Months in the Age of a Man between Twenty-seven and Twenty-eight!!

He denies also that he used the ruffianly Language attributed to him in the Field; and we now believe, from a Conversation with a Gentleman who has a good Right to know the Truth, that he did not; this, however, is of little Consequence. But in the same Conversation we learnt a Fact, that makes powerfully against him and Boulton, of which "A Relative" seems not to have been aware when he made his Statement; namely, *that Mr. Ridout's Pistol, being very free in the Touch, actually went off by Accident while he was fixing his Finger upon the Trigger, and before he ever lifted his Arm, the Ball entering the Ground near his Feet!* This is a Fact of the first Importance, which throws a darker Shade on the whole Transaction than any thing stated by "A Relative."

What does Jarvis's last Confession again acknowledge? *That not a Man on the Ground, at the Time poor Ridout was butchered, knew any thing of the Laws of Honour, or Practice of fair and manly Duelling!* For he admits, that "the Ground was accordingly measured, and a Space chosen between *Two Stumps!*" before which each Party would have stood! *the larger of the Two behind "Mr. Ridout!"*

Now every Gentleman must know, that the Men who chose such a Position were grossly ignorant of every Rule and Practice of Duelling. Here, too, at the very Outset, it appears that the poor Lad Ridout got foul Play. Why "the larger of the Two Stumps behind Mr. Ridout?" Mr. Small, being nothing but a Boy himself, might not have known; but Henry Boulton, having gone Three Weeks past Twenty-seven, must have been well aware that the larger the Stump the better the Direction of the Eye; and therefore he placed his innocent Victim before the larger Stump, that he might be butchered with the more Precision! Jarvis says, himself was the Person who caused them to change from this murderous Position; and if so, we give him Credit for it; but in so doing, eternal Disgrace must attach to Henry Boulton for choosing, or submitting to the Choice of, such Ground. In the next place, Jarvis says the Distance was shortened from Twelve to Eight Paces, at the Request of the unhappy Boy Ridout, who, he continues, acknowledged on the Ground that he was not a Match for him (Jarvis) at the Pistol. It was hard for a green Boy of Eighteen Years, that, perhaps, never fired a Pistol in his Life, to be a fair Match for a Man of Twenty-five, who, Rumour says, having a Thirst for Blood, made the Practice of the Pistol his favourite Amusement from his Infancy. But when the Boy's Pistol went off by Accident, did Jarvis act as a manly Fellow, contending with a Person confessing himself his inferior? Did he discharge his Pistol in the Air, as any honourable Man would have done?—No. Did he allow the Boy to reload?—No. Did he say, "Now, kidout, "I see your Hand is not formed to the Pistol; I will give you your Choice of "another Weapon; or if I am to take a cool deliberate Shot at you, go back "Four Paces, to the Distance originally intended?"—No. Did he, in taking a cool deliberate Shot at an unarmed Antagonist within *Eight Paces*, show a Disposition to avoid the vital Parts, and close the Affair (which himself had commenced) with a slight Wound?—No. Did he, in short, shew a Disposition to be satisfied with any thing but the Heart's Blood of his God-brother?—No.

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He, we hear, that was in a State of Trepidation, and pale as Death itself, before the Boy's Pistol went off, immediately became firm and collected on seeing an empty Pistol before him. He knew the Use of his Weapon, as a Butcher does of his Knife; he knew that, with long Practice and a steady Hand, he could not miss a Mark within *Eight Paces*. The Heart's Blood was his Object — at that he aimed — for that he thirsted — and that he shed! But finding that the Cup was bitter, he dashed it from his Lips, and instantly exclaimed, "My God! what have I done?" Oh! consummate Hypocrisy! Oh! blasphemous Appeal! To which that God has well replied, "*Whoso sheddeth the Blood of Man, by Man shall his Blood be shed!*"

The leading Facts in the Statement of "A Relative" being thus freely admitted, Henry Boulton and James Fitzgibbon are called in to contradict minor Statements, of little or no Consequence, in order to make the Thing out, what they are pleased to call it, "*a Libel*." But who are they? Why, the one an Accomplice in Jarvis's Crime; the other a Busy-body, who knows nothing of the Matter, and merely pledges his Word for the Statements of others — a standing Volunteer in the Cause of official Corruption, wherever the Services of such a Sycophant may be required. Supposing, then, that these Two Witnesses contradicted a leading Fact in the Statement of "A Relative," (which they do not, while they have exposed their own Weakness,) is there a Man in Upper Canada, save their own tyrannical Faction, who would believe a Word that should fall from their Lips? We think not. Henry Boulton, as we guess, (or Jarvis himself,) is also exposing their own Side, in Carey's Observer, under the ill-chosen Signature "Justice." But we can assure him that he has got into muddy Water, and the more he stirs it, the worse for himself and his Friend. "Justice" is such a silly Writer, however, that we see nothing in his Productions worth Notice. Colonel M'Sycophant says, "Indeed I think it due to the Community, that every Man should now exert himself to protect individual Character from the Attacks of unprincipled and wicked Men." We suppose it was this charitable Disposition of the Colonel that led him to beg Money to protect the Desperado in question from the Operation of the Law, after "the Community" had been disgraced and insulted by the Grossness of his Outrage! As Charity begins at Home, we would advise the Colonel to look to his own Character, and can assure him, if he only knew how it stands in the Eyes of the Public as well as we do, he would not so often introduce it unnecessarily to Public Notice.

The Attorney General sent one of his Nephews to purchase Two Papers at our Office, containing the Statement of "A Relative," with a View to prosecute for a *Libel*. What! a *Libel* to call that Murder which the Law of the Land declares to be such! — A *Libel* to say that it was *murderous* to compel a Stripling of Eighteen Years to stand unarmed within *Eight Paces* of an experienced Marksman to be shot down coolly and deliberately! — A *Libel* to say that the Desperado, who, having first dipt his Hands in human Gore, and afterwards put himself at the Head of a lawless Band of Rioters to break Houses and destroy Property, even at the Risk of shedding more Blood, ought to be scouted from Society! — A *Libel* to say that the Authorities who protect and patronize such Characters, ought to be protested against by every loyal Man! — A *Libel*, in fact, for a free Press to lash Immorality and Vice of the most flagitious Character! If this be Mr. Attorney General Robinson's Ideas of *Libel*, we will let him know, when he brings the "*Freeman*" into Court, that he is mistaken, and convince him of the Necessity, as Kitt Hagerman says, of coming into Court *with clean Hands*. If this be *Libel*; if Desperadoes such as Jarvis can trample upon the Lives and Property of the People with the Patronage and Protection of Men in Power under the Administration of Sir Peregrine Maitland; and that it is a *Libel* in the Press to arraign them before the Bar of Public Opinion; we may bid good-bye to the Liberty of the Press — good-bye to the Rights of the People — good-bye to all Security either of Person or Property.

Inclosure, No. 6.

Statement of Facts relating to the Trespass on the Printing Press in the Possession of Mr. William Lyon M'Kenzie, in June 1826. Addressed to the Public generally, and particularly to the Subscribers and Supporters of the Colonial Advocate.

PREFACE.

In presenting to the Public a Statement of Facts relating to the Trespass committed in 1826 on the Printing Press at that Time in the Possession of Mr. William Lyon M'Kenzie, and candidly declaring and avowing the Motives which influenced the Persons concerned in that Act, I feel it necessary, as I am connected with the Government by an Office, however unimportant, to offer, respectfully, to his Excellency the Lieutenant Governor an Apology for the Liberty I have taken in presuming to make use of his Name, or the Names of Persons forming Members of his Government, without first obtaining his Permission, or even making him aware of my Intention.

But the Editor of the *Colonial Advocate*, having lately thought proper, by representing, in his usual Style, Statements relating to the Injury committed upon his Property by myself and a few others, in Language which could not have proceeded from any Mind not callous to Truth and devoid of every honourable and virtuous Feeling, with the sole View of exciting Public Indignation against myself and Companions, and involving the Government in a Suspicion, created by his own malignant Imagination, that they were the Contrivers and Instigators of the Act he complains of, I cannot, in Justice to myself, or to those implicated through my Indiscretion, remain longer silent, and quietly witness this Second Attempt at Imposition, without an Effort to counteract its wicked and mischievous Tendency, by what I declare on my Honour, and what is known to Eight or Nine other Persons concerned with me, to be a true, faithful, and ungarlished Statement of every thing that occurred relating to that hasty and inconsiderate Act.

I had once before made up my Mind to give to the Public my Sentiments on this Subject; but I am almost ashamed to confess, that I was deterred, or rather restrained, by the Conviction that the Editor of the Advocate, and his Fellow-labourer the Freeman, would represent me, as they had done before, to be acting under the Direction or with the Knowledge or Sanction of the Executive Government, and consequently, according to their Doctrine, unworthy of Belief; and although I then felt, and now do feel, the perfect Absurdity of such a Charge, and strongly condemn an Apprehension which may be by others pronounced very unworthy and unjust towards the Public, the Curreney which the foulest and most unfounded Attacks upon the Character and Reputation of some of our oldest and most respectable Inhabitants seemed to obtain throughout the Province, and the Avidity with which they were sought after and read by those whose Abilities and Station in Society might have taught them better, made me imagine that the Time had not yet arrived when I could hope for a cool, dispassionate, and unbiassed Opinion of my Conduct, and the Motives which governed it.

I had sufficient Experience of the uncompromising Looseness of Mr. M'Kenzie's Disposition, and could not doubt that he would descend to the meanest and most contemptible Artifices, and use the most strenuous Exertions, to paralyze the Effect which a candid and ingenuous Relation of Facts was calculated to produce on the Minds of a generous and impartial Public; but as he appeared to think that he had already succeeded in establishing a Belief that the Government had incited a Party of young Men to commit a Trespass on his Property, it was not altogether improbable or unreasonable to suppose that a similar Artifice would be practised by him on the Credulity of the same Persons, and with equal Success.

Indeed it is more than probable that he will now resort to this Stratagem to blunt the Effect which the following Pages may have upon his Subscribers; for I think they will find themselves not a little at fault when they reflect upon and compare the Statements herein set forth, verified and strengthened as they are by a solemn Affidavit of their Truth, with the innumerable and extra-

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vagant Falsehoods, fabricated and ushered into the World by their Friend Mr. M'Kenzie, unsupported in any Way but by his Character and Reputation for Honour and Integrity, which his Style of conducting his Paper was calculated to impress upon the Public Mind; for I know not what other Test they have by which to judge of his Character.

If his Word, supported only by a Character so acquired, is to be considered satisfactory, and is to stand uncontradicted even by the Oaths of Eight or Nine Persons of undisputed Veracity, then I most sincerely hope and trust that his Friends will at least pause before they again condemn the Conduct or Motives of any one against whom the Columns of such a Journal as the Colonial Advocate may be filled with base, scurrilous, and unfounded Abuse.

York, 1828.

(Signed) SAMUEL P. JARVIS.

STATEMENT, &c.

Within the last few Weeks the Columns of certain Newspapers printed in this Town have been filled with Statements contrived with much Meanness and Malignity to inflame and abuse the Public Mind with respect to a Transaction in which I am stated, and not untruly, to have acted a prominent Part. I have thought several Times before that an Explanation to my Fellow-subjects of all that can be truly stated upon the Subject of Mr. M'Kenzie and his infamous Press was due in Justice to myself and to others; and now, upon the Occasion of the mean and deliberate Revival of Statements formerly made, with a full Knowledge of their Falsehood, I will discharge candidly, at all Events, a Duty which I think I owe to Society; and I shall do it in as few Words and as plainly as I can.

I will appeal to such of you as have, like myself, been born and brought up in Canada, to remember, that, until within these few Years, our Society was happily undisturbed and undisgraced by those unfeeling and unprincipled Attacks upon the Characters and Reputations of Individuals and Families, and by those gross and vulgar Personalities, which have, for some time past, been a Blot upon the Province; I say a Blot upon the Province, because it must appear very evident to our Fellow-subjects in other Countries, that unless such Calumniators found some Support from others, they could not continue their scandalous Trade; and no one can expect but that in the Eyes of all reflecting Men, those who abet such a Nuisance to Society must appear as culpable as those who derive their Bread from it. I do not say that we had not formerly some Newspapers in which, for political Purposes, and, perhaps, also in the Hope of making a Profit by the Slanders, Public Men were spoke of in their Public Capacity, and the various Authorities of the Province attacked with Rancour and Injustice; indeed we all know this was the Case; and that with respect to the Printer of one Paper, he went to such unwarrantable Lengths in Conduct of this Kind, that he was convicted and sentenced for a seditious Libel to a very ignominious Punishment, from which he was saved by the Lenity of those against whom it had been his whole Employment to endeavour to raise the Hatred and Indignation of the Country. But then let it be remembered, that although the Editors of these former Journals transgressed the Laws, and became justly liable to Punishment, it was against Public Measures and Public Men that their Efforts, however base and unprincipled, were directed.

A few Years ago Mr. M'Kenzie came to this Country a perfect Stranger, and in the Employment of a respectable Man, who has since become a worthy and useful Member of our Society; and how long before or after I do not know, but probably somewhere about the same Time, Mr. Francis Collins, the present Editor of the Freeman, came here from another Part of the United Kingdom, equally a Stranger to us all, and was of course, like other Strangers, at liberty to gain among us, without Hindrance, an honest Livelihood by any lawful Course. We saw both these Persons for several Years in this Town; the former apparently earning his Support by attending the Shop of his Employer, the latter following his Occupation of Journeyman Printer in the Gazette Office. Why they did not continue in these Employments no one has any

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Business to enquire ; it is enough to know, that no one of all those whom they now spend their Time in slandering could have had any Inducement to injure them in their several Callings, and that no one did. They saw us living, as People do in other Societies, happy and harmoniously. We had done so for a long Series of Years before they came among us. During that Time some of our most respected Inhabitants had gone to their Graves in Peace, and the Feelings of their Relations had never been harrowed by brutal and inhuman Attacks, which the Dead cannot repel. Many of our Townswomen, aged and respectable Mothers of Families, had arrived at the Verge of Life, without having been distressed and insulted by having their Names bandied about, with the coarsest Abuse, in the Columns of the Newspapers. Many of our Townsmen had here, as in all other Countries, risen to Independenee, and to Respectability in Character and Circumstances, by their own Exertions, without having drawn upon them, by their Prosperity, the Envy of malignant Spirits, without having their Wives and Mothers, their Daughters and Sisters, and even their Grandmothers, insulted and spoken of with coarse and unfeeling Insolence in Newspapers industriously circulated throughout the Province, for no Offence of theirs, for no Provocation they had given ; in short, for no other Reason, and upon no other Pretext, than that their Relatives happened to fill those respectable Stations which some Persons must fill in all civilized Societies, but which are always Objects of Envy to the mean and the vicious.

It was, I think, some Time in the Year 1824, that Mr. McKenzie set up a Paper called the "*Colonial Advocate*," in the District of Niagara. The principal Object it professed was to advance the Commercial and Agricultural Interests of the Province; but it very soon became evident, that the Conductor of the Paper was determined to try whether there was not in this Colony an Appetite for Calumny, which he might turn to good Account, and which he might gratify with less Trouble to himself and less Exertion of Intellect than would be required for more honest Purposes ; for, indeed, it had been proved very clearly to the People of Upper Canada, that when a Writer has once brought himself to lay aside all Regard to Decency and Truth, nothing is easier than for him to fill the Columns of a Newspaper, once a Week, with false and slanderous Stories.

Mr. McKenzie, accordingly, even while he kept his Press at Niagara, commenced an Attack upon a few Persons, most prominent, or supposed by him to be so, in Public Affairs, and commenced it in a Style which had been almost without Precedent in this Country before, and which I am sure very many People will remember excited their Surprise at first, though some of them may now have become rather callous.

After a considerable Time, the Editor of the *Colonial Advocate* removed his Press to York ; and I am not sure that he did not for a while attempt to establish it at the Head of the Lake ; ultimately, however, he fixed himself at York, and published here a Paper under the original Title, "*Colonial Advocate*," at very irregular Intervals.

I never subscribed to his Paper, but frequently saw it in the Hands of those who did, and probably as often in the Hands of those to whom he sent it without its being subscribed for, as indeed he did for some short Period to myself ; for it is very well known, that in order to force himself, if possible, into Notice, he was in the habit of sending his Paper to a Multitude of Persons who did not subscribe ; and thus, those whom he chose to select as Objects of his Slander had to complain of it as an additional Injury, that that Slander was gratuitously circulated, and sent unbidden to Taverns and other Places to meet the Eyes of the People of the Country in every Quarter, whether they desired it or not.

For the Months, or rather the Years, during which the *Colonial Advocate* was published in this irregular Manner, it was distinguished, beyond all other Papers that ever had preceded it, for the rancorous and insolent Language in which it attacked the Government, the Members of the Legislature, and some of the highest Officers of the Colony.

Why an Abuse of the Press, licentious beyond all former Example, was suffered by the Government to continue with Impunity, it is not my Business to enquire. I can easily conceive that a great Unwillingness should be felt

to notice a Paper so utterly contemptible, and conducted so entirely without regard to the maintaining a Character either for Decency or Truth. I can readily suppose, that it must have anticipated with Confidence that the Public at large would receive from the Perusal of such a Paper no other Impression than Abhorrence of its Falsehoods and Contempt for its Author; and that any official Notice of either would only be giving a Degree of Importance to such a Journal, which it never could obtain if left to itself. How far it is right to forbear on such Principles, or to forbear at all, I will not presume to say. My individual Opinion is, that the Laws should not have been allowed to be insulted so long and so grossly with Impunity; and I believe that the Forbearance shewn has only encouraged and increased an Evil that other Measures would have cured. But no Part of the Responsibility rests with me; what I desire to give to the Public is merely a Statement of Facts.

Finding, it would seem, that his Paper, conducted as it was, was not very profitable, he began, in the Spring of 1826, to shew Symptoms of discontinuing it; and if I remember right, for I have no File of his Papers before me, he threw out several Hints of his Intention to do so, complaining of the Want of Zeal and Interest in the People, which prevented "their supporting an independent Press;" but perceiving, as I hope I may more truly represent it, that the Morality and honest Principles of the People prevented their contributing to support any Man in obtaining a Living by inventing and disseminating Slander.

Nevertheless, before Mr. McKenzie could make up his Mind to abandon his Employment, and endeavour to earn his Living by honest Industry, he was determined to make one or two desperate Efforts to draw the universal Attention of the Public upon him. Perhaps his Hope was, that he should compel the Government to prosecute him, by the unexampled Scurrility of his Language; or perhaps he expected to gain a rather less Degree of Notoriety, by enraging Individuals, and provoking them to a Prosecution, which he of course would represent as Persecution; or he may have meant principally to make an Experiment, whether by making his Columns the Vehicle of the grossest and coarsest Slanders, and of the most malicious Lies, against the living and the dead, against Men and Women, the powerful and the helpless, he should not at least secure the Patronage of all those whose Minds and Hearts were so utterly depraved as to rejoice in this Degradation of Human Nature, and thus draw a Subsistence from some Source, no Matter how polluted.

Under the Influence of some or all of these Motives, he began, in the Month of May 1826, to send into the World a Series of Libels, unequalled for their disgusting Ribaldry, for their hardened Insolence, and for their brutal and unfeeling Cruelty; and these Libels were directed not merely against Persons in Public Situations, who had borne his Slander for Years with silent Contempt, but against Persons unknown in Public Life, and unconnected with Politics, against married Women, against aged Widows, and even against our Friends who had been long dead, and who, while they lived, were universally beloved and respected. Many of the foul Aspersions thus published to the World had no Connection with any Public Measure; the Misfortune, the Poverty, the former Occupations, the personal Appearance of Individuals, were all made alike the Objects of unfeeling and impious Abuse, regardless of the Pain which the wanton Calumny might bring to the Bosoms of Relations and Friends. To make the Insolence the more intolerable, no Pains were taken to avoid Mention of Names; on the contrary, they were given at full Length; no Blanks, no Asterisks; all set down plainly, to amuse the Malice of the World, and to insure the whole Mass of unmanly Scandal being as fully understood and applied Abroad, as it might otherwise only have been among ourselves.

I cannot reconcile it to myself to be the Means of giving a Second Publication of these horrid Papers, which, I am sure, it has been the Endeavour of all good Men to forget; and, therefore I will not, for the Sake of justifying my own Conduct more plainly, pollute the Public Eye with placing before them any Part of these Productions, which no Language can describe. But I call upon any Man who may have preserved a File of the Colonial Advocate to turn to the Number published on the 18th May 1826, as well as to those immediately preceding and following it, and then inform me, if he can, in what Country, and at what Time, the Feelings of a whole Society were so barbarously and

and cruelly outraged as they were by this Man, whom no one had injured, whom, indeed, many of those whom he has thus insulted did not know by Sight, and of whose Existence even, it is very probable, some of the Persons he abused were unconscious.

Need I say what must have been the Feelings of those thus injured, and what ought to have been the Feelings of all Mankind, against the Individual who, for the Chance of making a few Pounds by such a Trade, rather than by the honest Exertions of his Mind and Hands, could thus scatter his base Calumnies, to excite the Hatred of the malignant and the Ridicule of the unfeeling, to inflict Pain and Injury for which he could never atone ?

If I speak warmly on this Subject, it is because I am myself the Instance of the most cruel Persecution of this heartless Man. I never had with him either Transaction or Dispute of any Kind. I held no Situation that made me responsible for any Aet of the Government, or that gave me any Share in their Measures. I am not, and never was, a Politician ; not having either the Station or the Disposition, and not pretending to the Talent that leads a Person into that Path. If any Merit belongs to me for it, I had, like almost every other Person, allowed his slanderous Attacks upon others and myself to pass unnoticed. I never condescended to be the Author of a Line in Print, in which he or his Colonial Advoeate was spoken of.

But this signified nothing ; I was connected with Persons who served the Government ; in an humble Office I had the Honour to serve it myself ; I was, as every Man of Character is, the Friend of those Gentlemen whom he thought it his Interest to abuse most ; and I had a Mother and a Wife whose Feelings he might wound, and Children whose Love and Respect for their Father might make them one Day feel their Share of the Pain to which they could not yet be sensible.

These were, in Mr. M'Kenzie's Eyes, sufficient Reasons, for I can fancy no other, for stigmatizing me in his Paper as a Murderer ; in his Paper which he boasted of sending to all Corners of the World, and which you all know he sent to all who would receive it, and to Hundreds who would not.

In making this Charge, he knew he should be understood, by all who read his Paper here, to be alluding to an Occurrence, the most distressing of my Life, which he has within these few Days unreservedly recurred to in his Paper, endeavouring to attach to it every Feeling of Horror for which Falschood could invent a Motive.

I will not, I cannot, for Feeling forbids me, dwell upon the Circumstances of a Misfortune which the Heart of no Man should have suffered him wantonly to recall to the Recollection of those whose Affliction may have been at least alleviated by Time; it is not necessary I should. Conscious that I acted under a fatal Necessity, which the Condition of Human Society imposes, I surrendered myself unhesitatingly to the Officers of Justice ; I endured Imprisonment, unmitigated by Favour ; I underwent a Public Trial, under Circumstances of peculiar Disadvantage ; and was readily acquitted by a Jury of my Countrymen. The whole melancholy Story has been long given to the World. I will not do such Injustice to myself, or such Violence to the best Feelings of Mankind, as affect to be without that lasting Sensation of Regret which the greatest of Misfortunes has unavoidably occasioned, and which it is my Lot, as it has been the Lot of many with whom I cannot presume to compare myself, to bear and to lament.

After Mr. M'Kenzie had, in defiance of all Shame and of every Feeling of Restraint, sent into the World the very disgraceful Paper I have alluded to, and in particular that of the 18th of May 1826, which I have already mentioned, he seemed to consider it a very necessary Measure of Prudence to keep himself as much as possible from the View and Contact of the Society which he had insulted.

He could not indeed have walked into the Street without meeting the Husband, Son, or Brother of some Female whose Feelings he had outraged ; and scarcely, indeed, without meeting some one of the numerous Individuals whose Characters he had wantonly attacked, with an equal Disregard of Decency and Truth.

I only

I only desire any Person to turn to his Paper of the 18th May 1825, and, having read it as deliberately as his Patience will allow him, to ask himself, whether it is not expecting too much from the Members of any Community on Earth, to suppose that the Person who had dared to propagate these odious Slanders could, while the Recollection of them was fresh in the Minds of those he had insulted, walk the public Streets with Impunity, enjoying with a malignant Smile the Pain he had inflicted. My Belief is, that he thought and felt it to be unsafe to make the Experiment, for he could hardly have done otherwise than expect the same Chastisement here, which, for much less Provocation, he had more than once received in other Parts of the Province.

The Public Feeling indeed was immediately expressed, and very unequivocally. Letters from those who had formerly befriended him were inserted in other Newspapers, declaring their Abhorrence of his Conduct; Subscribers withdrew their Names; his Papers were returned; and those who had been his Agents were anxious to rid themselves of the Discredit of having any Connection with such a Paper, or such a Person, by publicly renouncing their Agency.

It was currently reported that his Creditors, seeing that his Situation had become hopeless, had, by his Consent, taken Possession of the Press, and that he had given up his Establishment, and intended to take leave of the Province. I believe now that it was so; that the Experiment he had made was indeed about to end in the Way most creditable to the Country; that the Want of Public Patronage, and the decided Expression of Public Detestation, had really put an End to Mr. M'Kenzie's slanderous Career.

In common with others, I expected such a Result, and did not believe that another Paper would have issued from the Press of the Colonial Advocate. No one has greater Reason than myself to wish that not another had, for in that Case my first Notice of Mr. M'Kenzie's Press would have been spared, as well as this — the last, I trust, which I shall ever feel it necessary to take of him, or of his Trade of Calumny, which he has since driven, and which he, no doubt, will continue to drive, so long as it suits his Purpose, and he is permitted to go unpunished.

But the Reward of Mr. M'Kenzie's Mind was not yet satisfied. He had, up to the Moment of his hasty Departure, shot his poisoned Arrows where he pleased; he had been called to no Account; he had had every thing his own Way; and even when he left his Trade and this Country together, he yielded only to a Necessity of his own creating. But what was his last Resource? He went to Lewistown, to be sure, and took up his Residence in the United States; but he left as managing Journeyman at York, a Person who had some Years ago been convicted of a seditious Libel, and pardoned upon his earnest Assurance, no doubt, of Repentance; and in the Hands of this Man, and Two or Three Apprentices, the Press was still left, to usher into the World, under the Conduct of no Person apparently responsible, such Falsehoods as Mr. M'Kenzie, now out of the Reach of Justice, might choose to send them from a Foreign Country.

When the first Number that was printed under these extraordinary Circumstances made its Appearance, it is not to be wondered that all had not Patience under such an Abuse.

Mr. M'Kenzie has affected to record the Eighth Day of June as a Sort of Era in this Province, because it was signalized by a Trespass on a Press, which, in his Hands, had been used only to destroy whatever was most valuable in public or private Life; and which he had so abused, that he had actually accomplished with it, at last, his own Destruction.

The Facts have all been detailed on Oath in a Court of Justice; they have since been trumpeted forth with more or less Exaggeration in the Newspapers of the Province. There never was less Room for Misrepresentation or Doubt. Whatever was done was done openly; there was neither an Attempt or Wish to conceal a single Particular of the Transaction. It can all be told in a few Words.

In Company with Eight or Nine Persons, most of them, perhaps all of them, younger than myself, I went to the Office of the Advocate at about Half-past Six o'Clock in the Afternoon, with the Determination to abate an intoler-

able Nuisance; with a perfect Readiness to abide the Consequences, but, I will freely grant, without having reflected sufficiently upon them. The Press was overturned; the Types were scattered about, and some Portion of them, unquestionably, lost, thrown away, and destroyed. No personal Violence was offered to any Body, nor was any intended; though I do not deny, that if Resistance had been made, under the Influence of the Feelings which actuated myself and my Companions, our Intentions would probably have been nevertheless persevered in.

As it was, the Extent of the Injury was what I have described, and nothing more. I do not pretend to be able to estimate the Loss correctly, (not the Loss of Mr. M'Kenzie, for it turns out that the Press was really no longer his,) but I have heard others state, and I fully believe it, that Fifty Pounds, and perhaps less, would have paid the whole Loss he had sustained. The Press was soon afterwards in Operation again, and, I imagine, without any very great Expence in Materials or Repairs.

An Expression of Indignation, rather than deliberate Destruction, was the Purpose of our Attack. In either Point of View, I admit its Impropriety, so far as Society is concerned, and still more its Folly. Of all that followed, the Public are aware. Of course, Mr. M'Kenzie, as a Moment's Reflection might have led us to expect, came back to the Province, delighted with his Success. He had at length succeeded in producing such an Effect as I am satisfied he had been long contemplating. He had, on the one Hand, a few inconsiderate Individuals on whom he could wreak his Vengeance, for an Injury little more than imaginary, while on the other he could make it answer the Purpose of his Politics, by affecting to believe, that the Government, or any Person whom he chose to traduce, had been the Contrivers of this hasty and thoughtless Act. The Loss, in point of fact, did not fall upon him; but for all that, he now might assume the Language of Complaint, represent himself as persecuted, and, by my Imprudence, and the Imprudence of others associated with me, he had a straight Road before him for repairing his broken Fortunes. We were all known, and were some of us responsible; and it was not long before an Action brought against us by Mr. M'Kenzie in £2,000 Damages, shewed pretty plainly his Conviction that he had at last brought his Press and Types to good Market. His Creditors, it is well known, rejoiced with him, and they had Reason.

In the meantime, and up to the Moment of the Trial, Mr. M'Kenzie was to be seen traversing every Corner of the District, spreading the Story of "his wrongs."—His wrongs indeed!! the wrongs of him who, in almost every Paper that he published with that Press, inflicted, without Provocation, without other possible Motive than Malice, Envy, or Hopes of Gain, Injuries to Characters and Feelings which no Money could repair.

He took his Stand at the Corners of the principal Streets leading into the Town, in order to catch the People of the Country as they passed, and to qualify them by his Harangues, of a Piece, no doubt, with the Statements in his Papers, to discharge *coolly and impartially* the Duty of Jurors in his own Case at the approaching Assizes, and in hope that if they should not be chosen they might at least perform the friendly Task of instructing their Neighbours.

His Counsel at the Trial thought it neither proper nor prudent to give, by his Assertions, any Countenance to the base Falsehoods which Mr. M'Kenzie had uttered for the Purpose of implicating the Government, and various official Characters, in a Transaction of which the Defendants alone were the Authors; but the Wrongs, the Losses, the Sufferings of the Plaintiff, were made the Ground of an Appeal to the Compassion of the Jury; and they were called on to prove their Indignation against an Outrage, of which the Circumstances were of course painted with the strongest Colouring by the Counsel, while the Provocation, which no Language could exaggerate, was kept out of View.

It was proved on the Trial, by Mr. M'Kenzie's own Witnesses, that the general Tenor of his Paper was scandalous and scurrilous; and the Counsel for the Defence, in Language which must have carried Conviction to every candid Mind, shewed it to be clear and certain that, in the first place, Mr. M'Kenzie had sustained no actual Damage, and that if he had, it was to be charged solely to his own Misconduct, and to Provocations more aggravated than had ever before been endured; and that the Peace of Society having been

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been infringed, and the Possessions and Property of an Individual trespassed upon, *some* Damages must of course be given; yet, if they were limited either to the Amount of the Loss which Mr. M'Kenzie had suffered, or of the Recompence which his Conduct deserved, they must be small indeed.

The plain Fact is, that the Press, in Mr. M'Kenzie's Hands, had become worthless, and was no Loss to him. When he abandoned it, it was left to his Creditors; the Loss of it, therefore, as to Press and Types (had it amounted to £50), was in effect their Loss, and not his. The Loss of the Opportunity of using such an Engine of Malice and Falsehood was in reality no Loss to him or them; for while he had used it, unmolested and unrestrained either by Force or Law, or Religion or Morality, it had only incumbered him with Debt, and covered him with Contempt.

The Jury found a Verdict of £625; and it has been paid not only by the Defendants themselves, but by a Tax, if I may call it so, which our inconsiderate Act imposed upon Society in various Parts of the Province. We were enabled to pay it, and to disappoint the Malice of Mr. M'Kenzie, by the voluntary Contributions of Persons who, sharing the Feelings of Indignation under which we had acted, regretted, while they condemned, the rash, imprudent, and improper Act into which those Feelings had hurried us.

Mr. M'Kenzie, having received a more than Tenfold Recompence for an Injury provoked by himself, is evidently disappointed that Individuals, whom his own unprincipled Scurrilities had led into the only Act of Violence, perhaps, which can be laid to their Charge, have not been for ever ruined by it; he would be content with nothing less than that they should be marked out, for the Remainder of their Lives, as proscribed Members of Society, for ever unworthy of the Countenance of the Public, or the Confidence of their Government. He would wish that an Injury offered to a venomous Press, which had once been his, should be the only Offence never to be pardoned, and never to be atoned for; and he would see, with Pleasure, Nine or Ten Individuals, for one Trespass, heedlessly committed, without Concealment or Disguise, and under the most provoking Circumstances, ruined and disgraced for the rest of their Lives, whilst he is permitted to continue, as he had done for Years before, to stab the Reputation of these Persons and their Families, without Provocation, without Remorse, and without Punishment.

He has accordingly been ever since complaining that myself and One or Two others, whom he ridiculously and falsely represents as holding high Situations under Government, have not been ruined beyond Redemption by this one Act; and he has uncharitably and basely pretended to construe the Forgiveness or Forbearance of Government (after we had suffered for our Indiscretion) into an Approbation of the Act. The Object of such Insinuations is as evident as its Injustice. He must think meanly of the Hearts and Minds of his Readers, on whom he endeavours to impress such groundless Suspicions. While he has been laboring to produce this Impression, which he knows to be false, I and the others whom he was prosecuting at Law have always felt that our Case was most unfortunately prejudiced, and our Trial prevented from being equal and dispassionate, by the Step which his Excellency the Lieutenant Governor thought it proper to take, in dismissing Mr. Lyons from being a Clerk in his Office, and thereby pronouncing, in the strongest Terms, his Condemnation of an Act which was the Subject of a Lawsuit depending against us.

Besides this Artifice of attempting to throw Suspicion on the Government, Mr. M'Kenzie next attempts to console himself for his Disappointment in not seeing our Ruin complete, as well as his own Fortune established, by stating that the extravagant Verdict of the Jury, which he hoped was calculated to ruin ourselves and Families, was paid wholly by Officers of the Government, and by certain Individuals whose Characters and Feelings he had cruelly outraged, and by pretending, that having done this, they had thereby proved not merely that they approved of the Act, but that they had instigated and contrived it. I have on my Part to assure the Public, that so far from being indemnified by the Contributions which from various Motives were made for our Relief, the Burthen fell heavily upon such of us as had the Means of paying any thing; and I affirm, that the Share of the Verdict which I myself had

had to defray, from no very abundant Means, was such, that if Mr. M'Kenzie had made as much clear Profit by his Press, during the whole Time he has employed it in the Work of Detraction, he would not have found it necessary to leave the Concern, and abandon it to his Creditors. With this simple Fact before the Public, I will ask, upon what Calculation did the Jury find their Verdict? I have also to assure Mr. M'Kenzie, rather than the Public (for many of the latter already know the Fact), that among the Contributors to the Payment of the Verdict were many, both Men and Women, whose Names had never been made the Topics of his Slander, and who, living in different Parts of the Province, and having no Reason for personal Resentment against him, yet felt that the Cause was that of Society in general, and voluntarily offered to bear their Share in the Consequences of a pardonable Imprudence, committed under the Influence of a most unpardonable Provocation,—so general was the Scandal excited by Mr. M'Kenzie's Paper! As to the Idea that those who contributed to our Relief approved of the Act, it is hardly deserving of a serious Refutation.

In point of fact, both I and my Companions had the Mortification to find that no or approved of an Act, the Impolicy of which, on every Account, (to say nothing of its bad Tendency as an Example,) was too evident not to be seen by every body, and by ourselves as well as others, as soon as we reflected upon it.

No Persons certainly had more Reason to regret or condemn it, and none, I am persuaded, did more justly or more heartily condemn it, than the very Persons whom Mr. M'Kenzie would insinuate (though he well knows better) to have given it their Countenance.

It is true that some Persons seemed to think it reprehensible, chiefly as a Breach of the Laws, and others as affording an evident Triumph and Advantage to a worthless Person. All concurred in censuring and regretting the Transaction from the Moment it was known; and if we had been unassisted, except by those who thought we had done wisely, Mr. M'Kenzie's malignant Wishes might have been gratified to the utmost.

Another Act to which Mr. M'Kenzie has resorted, for the Purpose of raising a Prejudice against us, and at the same Time injuring the Government, is his insinuating that we had Favour shewn us in not being prosecuted criminally for the Act, as well as being made to pay more than Ten Times the Value of the Property which we overturned and threw about.

We went, without Disguise or Concealment of any Kind, and in open Day, to the Premises of Mr. M'Kenzie, and did what I have stated, and nothing more. We were all known, and immediately prosecuted by him for Damages. There was nothing to investigate; every thing was known; and it was for Mr. M'Kenzie to determine whether, besides trying to fill his Pocket with Damages, he should also have us brought up before the Sessions or Assizes, and punished in another Way.

If it is the Duty of the Government, or of Crown Officers, to prosecute criminally for every Trespass done to Individuals, whether those Individuals complain of it or not, I think I have a Right to ask, why the Crown Officers have allowed Mr. M'Kenzie to call me a Murderer, another Person a Shoe-black, and another a Beggar, in his Newspaper, as often as he pleases, and to abuse, in the most offensive Manner, not only the whole Magistracy of the District in a Body, but every Individual, both Male and Female, whom he chooses to make the Object of his Malice? I think their Character is as dear to them, and mine to me, as the old Press and Types which Mr. M'Kenzie knows he had never paid for, could possibly be to him. I know if I complain, or if any other Person should complain of Mr. M'Kenzie's Libels, the Grand Juries must notice them, and the Attorney General must conduct the Prosecution; but inasmuch as we have not thought it worth our while to do so, Mr. M'Kenzie has gone unpunished by the Public, although he has not, as we were forced to do, made any Recompence to the Individuals for the Injuries he and his Press had inflicted.

But People will know better what to think of these Insinuations and Complaints of Mr. M'Kenzie, when I state to them, as I now do, that the Defendants were, above all Things, anxious that they should have been prosecuted

scouted criminally by the Grand Jury, or the Crown Officers, while the Civil Cause was depending; they would cheerfully have suffered any Imprisonment, or paid any Fine to the Public, upon an Indictment, in the Hope that such Punishment would have prevented the Jury from giving as large Damages to Mr. M^cKenzie; and they were disappointed (and the Crown Officers know it) that they did not think proper in this Case, any more than in other Cases of Trespass committed against the Person or Property of an Individual, to interfere on behalf of that Individual, who knew the Aggressors, and had chosen his Remedy against them. Our Counsel stated very truly, at the Trial, the Hurdle that Mr. M^cKenzie would have made, and the Motives which he would have imputed to such a Departure, in his Case, from the ordinary Forms of Proceeding. But what is best of all, Mr. M^cKenzie has, within these few Days, confessed in his Paper that the Grand Jury, hearing the Evidence given in Court, did notice the Transaction so far, that they sent for him to their Room, and only forbore to proceed upon his Complaint, because he expressly declined to prosecute, alleging that he thought the Civil Action was Punishment enough.

But no sooner has Mr. M^cKenzie pocketed his £625, and applied a small Part of it in repairing the Injury done to his Press, and the rest to his other Purposes, than he resumes his Trade of Slander, and abuses the Grand Jury and the Court altogether, because we were not indicted, although he tells us himself, that he was expressly applied to, and declined to prosecute.

I shall only say of this, that it is like Mr. M^cKenzie.

As to the Amount of Damages awarded, I have no Inclination to say much on the Subject, nor do I think I need. It is but Justice to Mr. M^cKenzie's Counsel, however, to say, that they resorted to no unfair or unworthy Means to inflame or prejudice the Public. The Jury have by Law the Discretion of measuring the Damages, and it would be wasting Time to say much of the Manner in which they have exercised it. I have no Wish to do more than to observe, that for Insults far less aggravating than abound in Mr. M^cKenzie's Paper of the 18th May 1826, he is stated to have been twice horse-whipped in different Parts of the Province, and, for that particular Paper, to have been hung in Effigy at Kingston and at Ancaster.

Of these Outrages, he has thought it prudent to take no notice. Had I, or any other Person, whom Mr. M^cKenzie had grossly libelled in that Paper, met him in the Street, and chastised on the Spot as he deserved, I know not what Damages he might have succeeded in obtaining here; but we have all read enough of such Proceedings in other Countries, to know that his Chance of Sixpence Damages with an English Jury, who should have heard his Libels read, would have been at least doubtful. By what Law, or upon what Principle it is, that the Property of a Ruffian is more sacred than his Person, I am at a Loss to understand.

But I have done with Mr. M^cKenzie and his Verdict. Before I conclude I have a few Words to offer, which I think are required by a Sense of Justice to others.

The Public know the Individuals who were associated with me in the Attack upon the Advocate Press. Most of them were young Men. That they are not lawless Characters is best proved by appealing to the whole Tenor of their Lives, and by putting the single Question, Upon whose Property did they ever trespass before?

Not satisfied with abusing us first, then suing us, and then, after obtaining Satisfaction, returning to the Subject and abusing us again, Mr. M^cKenzie has thought it would be a good Stroke of Policy to insinuate, at least, that the Government, the Magistrates, the Crown Officers, and others, were all concerned in the *Outrage*; and if he can make any one believe it, the Truth or Falseness of the Statement is not likely, as every one knows, to give him much Concern. He has accordingly thrown out certain Hints for Public Suspicion to work upon; and then affects to regret that his Counsel would not allow him upon the Trial to attempt to prove the Truth of his Assertions, telling him very gravely that it would hurt his Cause. They knew it would, and so did he, for not a Question could have been asked with that View, that would not have proved at once, upon Oath, the Injustice and Malice of his own

Insinuations. He thought it better, therefore, to confine his Calumny to his Paper, and say nothing about the Proof.

On this Head I feel it right to state, truly and plainly, with respect to Mr. Allan, who is a Magistrate, and Mr. Heward, who is not, and, I believe, never has been, that I neither saw them nor knew they were in View. The Transaction took place at that Time, in a Summer Afternoon, that People are usually to be seen standing or walking near their Doors. The House of Mr. Allan is immediately opposite to the Advocate Office; the House of Mr. Heward near, and in Sight, though more distant; and the Attorney General's Office stands between them.

Had Mr. Allan or Mr. Heward been in the Street before we entered the House, I am convinced I should have seen them. But as they were not, and as the whole Transaction occupied but a Moment of Time, being scarcely sooner begun than ended, had they known what was going on, they could not possibly have prevented it; and as to their being Parties to it, and approving it, because they happened to be in Sight, it might be said as truly that the Crowd that stood on the Bank last Spring, and saw the Squaw quarrelling with Higgins, and strike him with the Axe, were Accomplices in his Death.

Another Statement, wholly false, is, that the Party rendezvoused at the Attorney General's Office. If they had done so, it would only have shewn more clearly their Heedlessness and Indiscretion; but there is not a Word of Truth in the Assertion. It is well known that the Attorney General's Residence is a Mile from his Office, which he therefore does not see, except in Office Hours, and which might be used by any Clerk who keeps the Key of it, without the Knowledge of the Attorney General, for any Purpose. But the Truth is, it was neither used nor intended to be used on this Occasion as a Place of Rendezvous, any more than the Office of the Canadian Freeman. Not one of the Party had been in it, or came from it; and the whole Foundation for the Story is, that some of the young Men were seen to come past it, and from that Direction, as others did, past other Houses in the other Street. The Office, however, was all the while locked up and fastened; and the Attorney General, I dare say, at his Dinner at the other End of the Town, knowing as much of what was doing as Mr. McKenzie, who was at Lewistown.

As to my own Conduct and Motives, I confess the Want of Prudence — the Impropriety of the former; I cannot and do not admit the Impropriety of the latter. I feel now, and I felt it as strongly after an Hour's Reflection, that what we did was wrong, and I regret it. It was infringing the Peace of Society, and taking the Law into our own Hands; and it was setting an Example which might lead to worse Excesses. I feel that by our imprudent and rash Proceeding we have been the Means of supporting rather than suppressing a Nuisance; and that we were doing, for a very despicable Person, the very Thing he wanted — we were giving him Notoriety, which he wanted to obtain by any Means and at any Price.

But I feel that, more than the Government, and those Individuals of the Government whom Mr. McKenzie had been employed in traducing, had Reason to complain of our Want of Consideration, in subjecting them to Insinuations which they could not condescend to repel.

I have allowed Persons, thoughtlessly, to join me, whose Connection with the Friends and Officers of the Government would afford a plausible Ground for a malicious Calumny, not considering that their having been provoked, beyond others, by the brutal Slander on their Relations and Employers, though it prompted them most strongly to the Act, made them the last Persons that should have been suffered to join in it.

As the best Amendment I can make for the lateness of my Reflection, I have taken upon myself the Task, without the Knowledge, and consequently without the Approbation, of the Government, whose Servant I am, to give to the Public this true Account of a Matter, upon the Fame of which Mr. McKenzie evidently hopes to live after the Injury has been recompensed.

As to the Morality or Immorality of the Act, I am easy on that Head; for I feel that I deserve more the Respect of Society, and have more Reason to respect myself, as an Actor in the Attack upon the Press of the Colonial Advocate, than those Persons who, regardless of the Peace and Happiness of

Families, have contributed Funds for the Propagation of Scandal and Falsehood by subscribing to the Paper which has proceeded from it.

The Original of the Affidavit which follows may be seen by any Person in my Possession.

(Signed) SAMUEL P. JARVIS.

York, January 1828.

Samuel P. Jarvis, Charles Richardson, John Lyons, and James King, Esquires; Peter M'Dougall, Merchant; Henry Sherwood, Charles Heward, and Charles Baby, Gentlemen; severally make Oath and say, That they were the Defendants in the Action of Trespass brought by William Lyon M'Kenzie, for an Injury done to his Press and Types, in which a Verdict of £625 was rendered for the Plaintiff; that the Act complained of was committed without much Time for Reflection, and without any deliberate Concert; that it proceeded from the Impulse of their own Minds, under a strong Feeling of Indignation for the very cruel, false, and scandalous Attacks then lately made in the Colonial Advocate upon some of the Defendants, or their Relations or Friends; and, lastly, they depone, that the Charges and Insinuations made in some of the Public Newspapers, that the Defendants were incited and persuaded to do the Act complained of either by the Government or by any Members of the Government, or by any Magistrate, or that they had communicated their Intentions to or consulted with any other Person or Persons who were not then actually assembled and met together, or that the same was made with their Approbation, are wholly and utterly untrue.

Sworn before me,
this 2d January 1828.
(Signed) Alex. M'Donnell, J. P. }

(Signed)

SAMUEL P. JARVIS.
HENRY SHERWOOD.
JAMES KING.
C. R. HEWARD.
CHARLES BABY.
PETER M'DOUGALL.

JOHN LYONS.
CHARLES RICHARDSON.

John Lyons sworn to the aforesaid Affidavit before me, the 10th Day of January 1828.

(Signed) Charles Cummings, J. P.

January sworn before me, at Niagara, Charles Richardson, to the said Affidavit, this 10th Day of January 1828.

(Signed) J. Muirhead, J. P.

Since writing this Statement I have read in the Montreal Gazette, of a late Date, (13th December 1827,) the following Paragraph:

"The Colonial Advocate of the 6th Instant has embellished his Paper with a curious Diagram, purporting to illustrate the Destruction of the Printing Materials employed in the Publication of this Journal, and giving the relative Positions of the Individuals whom he asserts to have been engaged in the Affair. We would advise Mr. M'Kenzie to let this Matter drop, as we have it in our Power to throw some Light on the Subject. Does he recollect declaring to an Individual in Montreal, that his real Loss amounted to Forty-five Dollars only, and that he had cleared Two thousand four hundred and fifty Dollars by this Business? If Mr. M'Kenzie denies this, we beg to remind him of the Time and Place where, and the Person to whom such Declaration was made, when the Editor and Proprietor of the Colonial Advocate was last in Montreal, at a Public House not a Hundred Miles from our Establishment, and to a Person then in our Employ."

It is not a bad Comment upon the Opinion I have expressed; and I dare say if Mr. M'Kenzie or any of his Witnesses or Friends desire to know more, they can be satisfied by a Reference to the Conductor of that Paper, of whose Name I am ignorant.

I remember an Editorial Remark of Mr. Gurnett, the Editor of the Gore Gazette, which leads me to think, that he could, if he would, throw further Light upon this Point.

In the meantime, I think the Montreal Gazette has made it pretty clear, that instead of calling the Verdict a Tenfold Recompence for all Mr. M'Kenzie's Loss, I should have been nearer the Truth if I had used the Word Fiftyfold.

S. P. J.

(18)
Inclosure, No. 7.

To the Public.

A Contradiction of the Libel, under the Signature of "A Relative," published in the Canadian Freeman of the 23th February 1828; together with a few Remarks, tracing the Origin of the unfriendly Feeling which ultimately led to the unhappy Affair to which that Libel refers. By Samuel P. Jarvis. 8th April 1828.

To the Public.—When I perused the Article under the Signature of "A Relative," which appeared in the Canadian Freeman of the 23th February last, my first Impulse was to publish a faithful Detail of every Particular relating to the unhappy Affair to which that most atrocious and unmanly Libel refers; and also to endeavour to make appear to the World how and in what Manner the unfriendly and vindictive Feeling originated, which has so long existed, and which, on every possible Occasion, has been manifested towards me by Mr. Ridout's Family.

But having disclosed my Intention to One or Two Persons, for whom I have ever entertained the highest Respect, and on whose Judgment and Talents I have always placed the greatest Reliance, and they unanimously deciding that the unmanly and unwarrantable Attack upon me by "A Relative" was in itself so gross, so fiend-like, and so improbable, that it needed no Contradiction, or, at all Events, nothing more than that which must and would be afforded by the only Two Gentlemen who could with Fairness and just Propriety contradict it, I hesitated not, in deference to their Opinion, to abandon my first and original Intention, and to adopt another Course.

Accordingly I requested Two Gentlemen of Respectability to call upon Mr. Small and Mr. Boulton, to confirm or to deny the Statement of "A Relative." The Result of this Interview has already been laid before the Community; and I indulged in the Hope that I should have been spared the Pain of again recurring to a Transaction which I have declared, on a former Occasion, to be the most distressing of my Life. But it was destined to be otherwise.

In the Freeman of the 3d instant, under the Editorial Head, I am again attacked in the most brutal and unfeeling Manner, and I have Reason to believe, with the Sanction and Approbation of some Members of Mr. Ridout's Family. Motives and Feelings are therein ascribed to me, which I never did and never can possess; and Conduct so disgraceful is attributed to me, as almost to exceed the Bounds of Possibility. Upon these malignant Assertions, however, the Public is called upon to pass Judgment — to condemn or to acquit me; and the Appeal is made, because I have not condescended publicly to contradict every false, improbable, and absurd Statement set forth in the first Paper signed "A Relative."

When I yielded to the Opinion of my Friends, I must candidly acknowledge that I was not convinced that I was then mistaken in the Course I was about to adopt; but it was because I felt that they, having no immediate personal Feeling or Bias, either on the one Side or on the other, were far better qualified to decide on a Question of so much Delicacy and Propriety than myself, who had been, and still was, the Object against whom was waged the most deadly and uncompromising Hostility.

I am quite certain that the Advice which I received from my Friends would have been, in any ordinary Case, or had the Persons against whom I was opposed possessed such Tempers and Dispositions, or any of those open and manly Feelings, as are commonly to be met with in Society, the most fair and proper that could be devised. But the Sequel has proved it to be otherwise; for, through the Medium of a shameless Press, I am visited with Persecution, such as I do not suppose has disgraced any civilized Society before. This unexampled Conduct has driven me to follow my own Judgment in giving to the Public, in the following Pages, a true and impartial Relation of Facts, which have been so wickedly and so cruelly distorted and perverted.

I cannot be certain, at this Distance of Time, that there may not be some trifling Errors, in Dates or otherwise, which might be made the Ground of Cavil; but I pledge myself that all the material Circumstances are as I state them.

Having

Having submitted to the painful Task of giving this Detail, I trust I have done enough to enable my Friends and others to form a correct Opinion; and I can scarcely imagine that any thing which can be said will induce me to change my Determination of forbearing any further Notice of this Subject, unless by those Proceedings which I may think necessary for punishing the Publisher of the malicious Calumny.

York, 8th April 1828.

(Signed) SAMUEL P. JARVIS.

We, the Subscribers, having noticed the Article under the Signature of "A Relative," published in the *Canada Freeman* of the 28th February 1828, in which it is stated that the Trial of Samuel P. Jarvis, Esq. for Manslaughter, in the Year 1817, was "a sham Trial," by which may be inferred, that undue Influence was used with the Jury to favour the Acquittal of the said Samuel P. Jarvis, feel ourselves called upon publicly to repel a Charge so malicious, so injurious to our Characters, and so subversive of Justice; and we do declare, that Samuel P. Jarvis, nor any Person in his Behalf, ever directly or indirectly endeavoured to bias us in his Favour; but, on the contrary, our Verdict was rendered, as we then thought, and do still think, in the Manner the Circumstances of the Case warranted and required.

(Signed)

PETER LAWRENCE.

GEORGE BOND.

THOMAS B. CAREY.

WILLIAM HILL.

JOSEPH HARRISON.

ALEXANDER MONTGOMERY junior.

To trace the Origin of the unfriendly Feeling which has long existed between the younger Branches of Mr. Ridout's Family and myself would perhaps be impossible, as even when we were Children together we had frequent Misunderstandings, which very often produced a Suspension of all Intercourse between the Two Families.

But as the late Conduct of the Family towards me has been so extremely vindictive and unfair, I can no longer avoid entering into those painful Details which are necessary to shew the World how inevitably I was forced into the last Contest I had with them, which terminated so unhappily.

In the latter Part of the Year 1815 I visited Quebec, for the Purpose of placing my youngest Sister at a Boarding School there. About a Week before the necessary Preparations for this Change were completed, Mrs. Ridout called or sent (I do not recollect which) to know whether I had any Objection to take charge of her Daughter Sarah, who she was anxious should be placed at the same School. For Reasons of Prudence, which unfortunately I did not suffer to prevail with me, I at first hesitated, being desirous to avoid, if possible, a closer Intimacy, as I was convinced I could not, by any Conduct which I could pursue, guard against Misunderstanding in my Intercourse with the Family, though with all other Persons I was living, and have ever since lived, in Harmony and Friendship.

By the Persuasion of my Family, and contrary to my own Judgment, I complied with the Request; and from that Moment had no other Thought but to fulfil the friendly Office which I had undertaken, with all the Attention and Kindness in my Power.

I took the young Ladies down; and on my Arrival at Quebec I called upon Mr. Thomas G. Ridout, who was at that Time an Officer on Duty in the Commissariat Department. He was expecting me, and expressed himself with much Warmth of Feeling for my having brought his Sister. He insisted on the Two young Girls being under his Protection, and that he should be allowed to act as my Agent. I left Quebec a Day or two afterwards, and returned Home.

It was arranged between us that he should draw upon me for all the Expences of my Sister's Schooling, Boarding, &c.; and he did accordingly draw upon

upon me from Time to Time for what Money he required, most frequently, I think, in favour of his Father, the present Surveyor General; and some of his Orders were mere Requests, expressed in Letters to his Father or Brother, to pay Sums required into their Hands. All these Orders and Requests were immediately complied with.

In the Year 1816, Mrs. Ridout visited her Daughter at Quebec. It was told me that during her Stay in that City, and on her Way up the Saint Lawrence, she made Assertions of a very unpleasant kind, and extremely prejudicial to my Character as a Man of Integrity, charging me (as I was informed by various Persons) with having left my Sister at Quebec a Burthen to her Son, who had been compelled to pay £100 for her Maintenance, which he was unable to obtain from me again.

Naturally indignant at an Imputation for which I was conscious there was not the slightest Foundation, I wrote, in the Instant, a Letter to the Surveyor General, which, under the Influence of Feelings much excited, was certainly strongly expressed, and which, at the Recommendation of a mutual Friend, I did not object to withdraw, sensible, on further Reflection, that the Disparity of Years existing between us might have well excused me from the Use of Terms which I could scarcely have avoided using under such Circumstances to a younger Person.

I have no Desire, however, to keep back any thing that may prevent the Public from judging fully of all the Offence which I could have given, and therefore I shall lay before them the Letter, although it had been withdrawn. It ought not to have been suffered to excite a Desire of Revenge. It was as follows:—

“ Sir,

York, 5th Nov. 1816.

“ A Report, which I understand has been in Circulation for some Time in this Place, and which, from very good Authority, I find has emanated from Mrs. Ridout, was communicated to me but a Day or Two ago.

“ I should have treated it now with the Contempt it deserves, did not the Comments of several Persons, under the Supposition of its Authenticity, prompt me to this Investigation.

“ I allude to the Declaration made to Mr. Charles Shaw (shortly after his last Return from the West Indies to this Place) by Mrs. Ridout, who had the Effrontery to assert, *that her Son Thomas had been under the Necessity of defraying the Expences of Miss Eliza Jarvis's Schooling, &c. since her Arrival at Quebec, to the Amount of One hundred Pounds Currency; and that, under no Circumstances whatever, could he prevail on me to remunerate him for this Act of Generosity.*

“ I am perfectly at a Loss to conjecture Mrs. Ridout's Motive for circulating so palpable a Falsehood. It cannot be palliated under the Pretext of Ignorance, since the Letters you have received from Mr. Thomas are incontrovertible Proofs of the contrary being the Case.

“ I therefore request from under your Hand a Contradiction of this Report.

“ I am Sir, &c. &c. &c.

(Signed) “ SAMUEL P. JARVIS.”

“ To Thomas Ridout, Esq.

“ &c. &c. &c.”

Before the mutual Friend to whom I have alluded had induced me to withdraw this Letter, it had been placed by Mr. Surveyor General in the Hands of Mr. George Ridout, who, as perhaps he could not avoid doing, made it the Occasion of seeking an Explanation from me. The Terms in which this was asked left me but one Course to pursue, which might have led to a fatal Issue, if the Vigilance and Anxiety of Friends had not interposed. The following will explain it.

“ Sir,

6th November 1816.

“ For any imagined Injury from any Part of my Family I am ready to answer. I must further add, that the Language contained in your Letter does not bespeak the Gentleman.

“ Your humble Servant,

“ Samuel P. Jarvis, Esq.”

(Signed) “ GEORGE RIDOUT.”

" Sir,
 " Since you are ready to answer for the malignant Aspersions uttered by
 " any Branch of your Family, I beg to observe, that I have taken much Pains
 " to trace the Subject of my Letter to your Father to the Author; and upon
 " a more minute Inquiry I find that the same unaccountable Assertion of
 " Mrs. Ridout was promulgated by her on her Way up the Saint Lawrence.
 " I therefore require from you an Apology for her Behaviour, or that you
 " meet me with your Friend, at Seven o'Clock on Saturday Morning next, at
 " the Five Mile Meadow, opposite Brown's Point.

George Ridout, Esq.
 " &c. &c. &c."

" I am, Sir,
 " Your obedient Servant,
 (Signed) " SAMUEL P. JARVIS."

" Sir, " 6th November 1816.
 " I shall accept of the Terms contained in the latter Part of your Letter,
 " if it be possible to reach the appointed Place within the Period limited."
 " Your humble Servant,
 " S. P. Jarvis, Esq." (Signed) " GEORGE RIDOUT."

This Meeting did not take place: it was prevented by Circumstances not under the Controll of Mr. George Ridout.

On the Evening of my Return to York I received the following Note:—

" Sir, " 12th November 1816.
 " The Accidents which have already occurred to prevent the Meeting
 " agreed upon, may, I trust, be avoided in any new Appointment you may
 " think proper to make.
 " It is unnecessary for me to state, that I consider myself bound by the
 " former Engagement to give you the Satisfaction required, at any Time or
 " Place you may appoint.
 " Samuel P. Jarvis, Esq." (Signed) " GEORGE RIDOUT."
 " &c. &c. &c."

A Second Appointment was agreed upon by verbal Communication.

When Dr. Strachan, who, being equally the Friend of both Parties, had interfered, and succeeded in preventing the Meeting which had been intended, he proposed to me to signify a Wish to withdraw my Letter to the Surveyor General of the 5th November 1816, which I accordingly did, and addressed to Mr. Ridout the following Letter.

" Sir, " 15th November 1816.
 " Having traced a Report to Mrs. Ridout, that her Son Thomas had been
 " under the Necessity of defraying the Expences of Miss Eliza Jarvis's School-
 " ing, &c. since her Arrival at Quebec, to the Amount of £100 Currency,
 " and that he could devise no Means to induce me to remunerate him for that
 " Act of Generosity, I am induced to call upon you, Sir, in this Manner, for
 " an explicit Contradiction of that Report.
 " I am well convinced that your Son Thomas could never have stated any
 " thing to yourself, or Mrs. Ridout, from which such a Conclusion could be
 " drawn; and as you must be well aware of the Injury done to my Character
 " and Feelings from the Circulation of such a Report, you cannot hesitate
 " complying with the above Request.

" I am, Sir,
 " Your obedient Servant,
 (Signed) " SAMUEL P. JARVIS."
 " Thomas Ridout, Esq." " &c. &c. &c."

" Sir, " York, 15th November 1816.
 " In reply to your Letter of this Date, I beg to assure you that no Assertion
 " of the Import therein mentioned was ever made by Mrs. Ridout (as she
 " declares to me) to any Person whomsoever.

" The

“ The Accounts which my Son Thomas has rendered to you will undoubtedly show his Expenditure and your Remittances, and prove an honourable Testimony of your Regularity in acquitting your Engagements.

“ I very much regret that your Feelings should have been hurt at any Report, for I am well convinced that your Conduct has been honourable, and not deserving of the smallest Reproach.

“ I am, Sir,

“ Your very humble Servant,

“ Samuel P. Jarvis, Esq.”

(Signed) “ THOMAS RIDOUT.”

The next Day I received the following :—

“ Dear Sir,

16th November 1816.

“ Being well convinced that the Expressions said to have been uttered by my Mother are without Foundation, I must request you will have the goodness to inform me whether your Information on the Subject, and to the Extent communicated to my Father, has been exclusively from Mr. C. Shaw, or whether such Report has been confirmed by any other Person.

“ From the Assurances of my Mother, I am bound to believe, that although she may have made hasty and unguarded Remarks on the Business between yourself and my Brother, yet that those Remarks never amounted to the Import contained in your Letter; and therefore request you will give me such Information as may tend to a complete Explanation of this Matter.

“ I remain, dear Sir,

“ Your very obedient Servant,

“ To Samuel P. Jarvis, Esq. &c.”

(Signed) “ GEORGE RIDOUT.”

REPLY.

“ 16th November 1816.

“ Dear Sir,

“ In Answer to yours of the 16th, I have to reply, that in addition to Mr. Charles Shaw, whom I have already noticed as propagating the Report made to my Prejudice by Mrs. Ridout, which he said she repeated to him, I beg leave further to notice Mr. Charles Short, who travelled with Mrs. Ridout from Montreal to Kingston.

“ This Gentleman says, as I have been credibly informed, that Mrs. Ridout observed to him, as well as to others, ‘ *There is Sam Jarvis; he took down his Sister, and left her in Quebec last Year, and she has been supported by my Son Thomas ever since;*’ with other Expressions much to my Prejudice.

“ At Kingston, I am informed, the Report was generally repeated; and it was in Circulation here for some Time before it came to my Knowledge.

“ I remain, dear Sir,

“ Your obedient Servant,

“ George Ridout, Esq. &c. &c. &c.”

(Signed) “ SAMUEL P. JARVIS.”

Thus terminated for the Moment this unfortunate and unpleasant Dispute, in which, certainly, I was alone the Person injured, and confessedly without the slightest Cause; but it had nevertheless engendered Feelings towards me which it seems could not be overcome.

Some Time in the Month of June 1817, Mr. George Ridout brought an Action against my Father, Mr. Secretary Jarvis, to recover the Amount of an unliquidated Account, placed in his Hands for Collection by a Man of the Name of Robison, by Trade a Gardener.

I had heard nothing of this Debt until some Time after the Action had been commenced, and a Writ of Summons had been served on my Father; and then I was informed of it by Mr. George Ridout, who stated to me that he was about to visit New York, and was desirous of closing as much of his Business as possible before he took his Departure.

I promised to speak to my Father immediately, and inform Mr. Ridout of the Result. A few Hours afterwards an Opportunity presented itself, and I did so. He told me that this Man, Robison, had been in his Employment for a long Period; that he had from Time to Time made him Advances, as he thought, if not quite, the full Amount of Wages due to him; and that he had dismissed him for gross Misconduct.

Several

Several Years had elapsed (if my Recollection serves me right), after Robison had been dismissed from my Father's Service, before he brought his Action. His Claim was not large; and I recommended my Father, who had not kept an accurate Account of the Advances made to him, to submit to the Claim, however unjust, rather than hazard a Suit, which, in my Opinion, would inevitably be decided against him, in consequence of his own Neglect. This Advice he acted upon; and I waited on Mr. George Ridout, to say that I would be responsible for the Debt, and see that it was paid by a certain Day, which I named (it being the probable Time that the Warrants for the Payment of the Office Accounts would issue), and that all further Proceedings should be stayed. To this Mr. Ridout assented; but added, that as he was about to leave the Province for a considerable Time, he thought it would be more regular, and certainly it would be more satisfactory to him, if the usual Course was pursued, which was for Mr. Jarvis (the Defendant) to sign a Confession of Judgment for the Amount. I made no Objection to this; but on the contrary procured the Execution of the Paper, and witnessed it myself.

When I placed it in Mr. Ridout's Hands, it was with a full and clear Understanding that it was not to be acted upon, but that all Proceedings in the Suit should, in consequence of the Undertaking I had made, from that Moment cease.

Mr. G. Ridout soon after left this Place for New York.

Before his Return, his Brother John, then a Student at Law, and in charge of his Brother's Business, called upon me to say, that he had been going on with the Suit instituted against Mr. Secretary Jarvis by his Brother before he left Home, had prepared all the Papers for entering up Judgment, and now waited for an Affidavit to prove the Execution of the Cognovit, in order that a Writ against the Chattels of Mr. Jarvis might be placed in the Sheriff's Hands.

Astonished at this Communication, and still more so at finding that the Proceedings were conducted in the same Manner as if no Confession had been given, I inquired of him whether his Brother had not made him acquainted with the Arrangement he had entered into respecting this Suit. He replied in the Affirmative. I then demanded upon what Principle his Conduct (in proceeding in the Suit, and incurring to the adverse Party so much additional Expence,) could be justified. He answered me by saying, "that he considered it his Duty, during his Brother's Absence, to increase the Costs in every Suit left to his Charge as much as possible." This Expression surprised me; and I protested against such Conduct as improper and dishonourable, and declared my firm Determination neither to pay myself nor suffer my Father to pay any thing more than the Amount of Debt recognized on the Face of the Instrument which had been executed, and such Costs as had accrued up to the Period of its being given.

He, on the other Hand, declared that every Farthing of the additional Expence incurred should be paid by myself or Father; and he grew so warm and violent on the Subject, that to put an End to the Conversation I desired him to leave the Office. There was no Person present but a young Man by the Name of Marshall, who neither spoke nor moved from the Desk at which he was writing.

I did not lay my Hands upon him, neither did any one else, nor was Violence of any kind used towards him, unless the Circumstance of my requesting him in a firm and peremptory Manner to leave the Office can be called Violence. When he obeyed my Request, he apparently was under the Influence of excessive Rage, and made use of much threatening Language, and in fact he then declared his Intention to be revenged upon me.

The next Day or the Day after (I am not clear which) Mr. George Ridout returned Home.

I suppose his Brother communicated to him what he had done in the Suit, and the Conversation that had passed between us, as he called upon me almost immediately after his Return, and apparently for the Purpose of conversing on the Subject. He expressed Regret at the Steps his Brother had taken during his Absence, and said he could not for a Moment suppose that the additional Expence which had thus been incurred in the Suit would be defrayed

by my Father; but he added, that he thought my Behaviour to his Brother, in ordering him out of the Office, was quite uncalled for and unnecessary, and that he felt very much hurt at it. I explained, by assuring him that his Brother's Language, Manner, and indeed his whole Deportment on the Occasion, were so strange and unaccountable and unexpected, that I could not avoid terminating the Interview, and that I saw no other or better Way than by requesting him to withdraw.

Mr. George Ridout soon after left me, but evidently labouring under the same Feelings of Resentment or Displeasure with which he called upon me.

A Statement of the Debt, &c. was sent to me a short Time after, and I settled it, no more being required of me than the Debt and Costs up to the Time of the Cognovit being given.

A Day or two after this, while walking up King Street, I saw John Ridout coming towards me from an opposite Direction. As he approached he walked hastily. I thought he had something to communicate. Indeed he came so near to me that I was almost in the Act of speaking to him, when he suddenly turned away, and walked in another Direction. It was, I think, on the same Day that I met him again in the same Street; he was on the Right Hand Side and I was on the Left. When nearly abreast of each other, he suddenly turned about, and came rapidly towards me. His Conduet on the former Occasion had excited in my Mind a Suspicion of what afterwards proved to be the Case; and not feeling disposed to manifest a Disinclination to come to an Explanation with him, I advanced a few Steps towards him. When within a few Yards of each other, he again wheeled about, and walked in an opposite Direction.

On the Day following I was walking with Mr. George Markland. It was Council Day, and there might have been, perhaps, Fifty or Sixty Persons lounging in the Street about Mr. Snull's House, in which the Council was then held. Mr. Markland and myself had walked up to the Crowd, and were returning, when I observed Mr. John Ridout and a Mr. Stewart (another Student in Mr. George Ridout's Office) turn the Corner of the Street near us.

Mr. John Ridout had in his Hand a large Stick or Bludgeon. As soon as he perceived me he left Mr. Stewart and walked towards Mr. Markland and myself. When he had approached within a few Paces of us, he stopped, and addressed himself to me as follows:—"I have come for the Purpose of paying *you for the Insult I received in your Office last Week, by giving you a good sound Drubbing.*" I immediately separated from Mr. Markland, and said, "You are armed, and I am not; but as you have signified your Purpose, the sooner you begin your Work the better."

On this he rushed upon me, and struck me several Blows. The first I received from him was on the Head, which nearly stunned me. The second shattered the Bones of my Right Hand, and rendered it perfectly useless; nor did I recover from the Effects of this latter Blow for Six Months after. He was considerably taller and stouter than myself. I attempted to close with him; but as I advanced, he retreated, striking at me with increased Violence. At last I approached within Reach, and I struck him with my Left Hand somewhere upon the Face; and before he had Time to recover, repeating the Blow, he fell to the Ground; and laying hold of the Stick he held in his Hand, with some Difficulty I succeeded in taking it from him, and afterwards threw it over a Fence into an adjoining Field. Then advancing upon him, many Blows were interchanged, which resulted in his being brought to the Ground several Times.

No Person had as yet interfered; but just at this Time Captain Fitzgibbon, and, I think, Dr. Horne, appeared in View, and immediately approached the Spot where we were engaged. On discovering the Parties, Captain Fitzgibbon interposed, and said to me, "Do not strike him again; he has enough of it;" and, taking Mr. John Ridout's Arm, he conducted him to his Brother's Office; on entering which (as he informed me) he said to Mr. George Ridout, that he had found his Brother engaged in an Affray with Mr. Jarvis—had interposed—brought him away, and recommended his using his Influence to prevent a Repetition of the Occurrence.

Mr.

Mr. George Ridout (as I was told) replied, that he was sorry that he (Captain Fitzgibbon,) had interfered at all; that it would have been better to have allowed his Brother John to punish Jarvis severely for the Insult he had received from him.

The very Day this Occurrence took place I was under an Engagement to accompany the Reverend Dr. Peters to Lake Simcoe.

I had but just returned Home from the Affray, when Mr. George Ridout called upon me, and said, that he had heard of what had taken place between his Brother and myself, and that if I took any farther Notice of it I should certainly afterwards account to him.

I answered him by saying, that I should pursue that **Conduct** I thought most proper.

The same Day I proceeded with the Reverend Doctor Peters, in a hired Conveyance, and arrived in the Evening at the Residence of Mr. Peter Robinson at Newmarket. On the following Day I accompanied Dr. Peters to a Place called the Landing, on the Holland River, where he embarked for Drummond's Island.

That Day I returned to York, and arrived about Sun-set. When within about Two Miles of the Place I met Dr. Powell on his Way from Town to his Residence at Springfield, and he invited me to return with and spend the Evening at his House. I declined the Invitation, and spent the Evening at Home.

On the following Morning I called on Mr. Henry Boulton, for the Purpose of consulting him on what had taken place Two Days before, and obtaining his Advice as to my future Conduct. I felt that there was but one Course I could pursue to save myself from perpetual Insults, and I was prepared to take it.

Not finding Mr. Boulton at Home, I left a verbal Request that he should call upon me as early as it might suit his Convenience.

Between Three and Four o'Clock, (or perhaps a little later,) whilst at Dinner, I heard a Knock at the Door, and anticipating the Arrival of Mr. Boulton, I rose from the Dinner Table, and upon opening the Door found Mr. James Small, who said he had called upon me at the Request of Mr. John Ridout, who felt aware that the Affray which had taken place between us could not terminate in its present Stage; that he had heard that Enquiry had been made for him, and had in consequence requested that he (Mr. Small) should wait upon me and say, that he was ready to give me any Satisfaction I required.

I replied to Mr. Small, that Mr. Ridout had anticipated me; that I had already been in search of a Friend to make a similar Communication, and that I should immediately send him Word of Time and Place.

Accordingly, meeting Mr. Boulton soon after, I requested him to make the necessary Arrangements.

It was agreed that Elmsby Farm should be the Place of Meeting, and Day-light of the Morning following the Time.

About Two Hours before Day-light I left my Residence, and called for Mr. Boulton, and we proceeded on our Way to the Ground. When we were nearly opposite Dr. M'Caulay's Farm, we heard the Sound of Voices and Foot-steps, as we thought, for it was extremely dark, close to us. Mr. Boulton spoke, and I think was answered by Mr. Small, who accounted for his being off the Road, by saying, that also hearing Voices and Steps approach, he and Mr. Ridout felt apprehensive that there might be Persons employed to prevent the Meeting. Both Parties then proceeded together, conversing in a friendly Manner.

The Day had not dawned when we arrived on the Ground. The Sky suddenly became overcast; and there being every Appearance of an immediate Shower of Rain, we unanimously decided on taking Possession of the Barn, which was close at Hand; and in that Place we remained, conversing, until the Shower was over. A little before Day-light the Weather cleared; and I walked out, and laid myself down upon a large Rock, intending to remain there until the Day-light appeared.

I had

Mr.

I had been there but a short Time, when Mr. Boulton came to me, and said, " I think there is now sufficient Light." I replied, " Very well," and rose up.

He then went to Mr. Small, and (as I understand from him) proposed that the Distance should be Twelve Paces. Mr. Small and Mr. Ridout were at this Time standing together. Mr. Boulton again came to me, and said, " I have proposed Twelve Paces for the Distance, but Mr. Ridout prefers Eight; and assigns as a Reason, that he considers you the better Shot of the Two; and therefore the nearer you are together, the more will you be on an Equality."

I replied, that it was a Matter of Indifference to me what the Distance was; and that if he preferred being even nearer, I would consent to Five Paces.

The Two Seconds proceeded to measure the Ground, which they did between Two Stumps, and desired us to take our respective Positions.

I objected to the Ground; and remarked to Mr. Boulton, that having so large and conspicuous an Object as the Stump immediately behind my Antagonist, to direct and assist the Eye, it became almost a Certainty that my Fire would take Effect. The Stump before which Mr. Ridout was to stand was much larger than indeed Treble the Size of that before which I was placed. New Ground was consequently paced off, in a Situation free from any Object of the Kind.

On taking our respective Positions, the Two Seconds declared to us that the Signal should be One, Two, Three, Fire; but on no Account was either Party to raise his Pistol until the Word *Fire*.

Mr. Small repeated One, and was in the Act of pronouncing Two, when Mr. John Ridout presented his Pistol, and fired at me, and then left his Ground in an opposite Direction to the Place where I stood.

He received a Rebuke from his Second for firing before the Word, and was required by him to resume his Place. He answered, " Yes, I will; but give me another Pistol."

What passed between the Seconds on this Subject I cannot (of my own Knowledge) say, as I was some Distance from them; had not moved from my Station, nor uttered a Word. Mr. Ridout, after firing, did not approach towards me; neither did I address a Word to him.

I was afterwards directed by Mr. Small to fire, which I did, strictly observing the Rule laid down by the Seconds, of not raising my Arm until the Word *Fire*. No Proposal for an Accommodation was suggested by any of the Parties; nor have I Reason to believe such a Thing was ever thought of.

On observing that my Fire had taken Effect, I ran up to Mr. Ridout, and asked him if he was badly wounded. He replied, " I do not know; but I forgive you, let what may be the Consequence of the Wound." He then reached out his Hand, and said, " I have brought this on myself, and I am sorry for it;" and again repeated, " I forgive you."

There were many Showers of Rain during the Morning, and by the Time I had reached Home my Clothes were thoroughly drenched. Whilst in the Act of changing my Dress, my Father came into my Room to inform me that the Deputy Sheriff, Mr. Playter, was below Stairs, and had come to take me into Custody.

I sent to Mr. Playter, to request him to remain in the Parlour until I was dressed. I think he came to my Door and spoke, and again returned to the Parlour.

Having finished dressing myself, I was proceeding, before I surrendered myself, to the back Part of the Premises, in doing which I crossed from the Kitchen Yard to the Front of the House through a back Passage or Way.

When in the Act of passing through this Passage, I met Mr. Playter, who had been walking in front of the House; he was anxious that I should immediately go with him, as the Inquest was then sitting. On my requesting a few Minutes Delay, he objected, saying, " You had better stay with me, for I know some of the Family are lurking about the Premises, and I am sure, if they get an Opportunity, they will do you some Harm."

From

From D. Forrest's Hotel I was conducted to Prison, where I remained until the October Sittings, with the Exception of an Hour or two, when I was permitted to visit my Father, who was lying on his Death-bed.

Before the Assizes I applied for a Copy of the Panel of Jurors, which was refused me. I did not, until I went into Court, know from what Quarter of the District the Jury were summoned. Upon being arraigned, I again requested, as an Indulgence from the Bench, that I should be favoured with a Sight of the Panel for a few Minutes previous to the Jury which were to try me being brought to the Book to be sworn; and it was not until after much Contention that even this Request was at length complied with.

The Indictment being read, the Attorney General rose, and asked Leave of the Court to withdraw from the Conduct of the Suit, assigning as a Reason, that his own Son was implicated in the Charges contained in the Indictment. The Request was granted.

The Solicitor General (Mr. Robinson) was at this Time in England.

The Chief Justice, Mr. Powell, who tried the Case, directed the Indictment, on the Back of which were indorsed the Names of the Witnesses, to be handed to him. The Clerk of Assize impannelled the Jury, and the Witnesses were examined by the Chief Justice.

Mr. George Ridout and other Members of the Family were in Court. The former took Minutes of the Trial, and, I think, would not pronounce it a sham Trial.

After all the Evidence had been gone through, and the Jury charged, (which I solemnly affirm was any thing but indulgent to the Prisoner, and was so considered by most of the Persons present in Court,) the Jury retired, and were out but a few Minutes, when they returned, and gave in a Verdict "Not Guilty."

Mr. Small and Mr. Boulton, who were indicted as Accessories, (the Grand Jury having found a Bill of Manslaughter,) were, as a Matter of course, discharged, on the Verdict against myself being pronounced.

After the cruel and unmanly Attack, under the Signature of "A Relative," which within these few Days, after a Lapse of nearly Eleven Years, has been admitted into the Columns of a Newspaper, I have felt myself compelled to give this Statement to the World, and to accompany it with the Testimony which follows.

Within the Eleven Years I have become the Father of a Family, and have been living as a Member of this Community, in intimate Acquaintance with a numerous and respectable Society.

With no Person before or since have I been involved in any similar Conflict, nor have I given Occasion to any one to revive the Recollection of a Misfortune which I deeply deplore.

I ask only that (after reading what I have been constrained to publish) the unfeeling and malignant Paper I have alluded to may also be read, and its Statements examined.

I am content that, without a Remark from me, these Statements should be judged of as they may seem to deserve.

The Canadian Freeman of the 28th February I perused on the Afternoon of that Day, and on the 1st of March I addressed the following Letter to James Fitzgibbon, Esq.

My dear Sir,

York, 1st March 1823.

In the Freeman of the 28th of last Month I have noticed an Article under the Signature of "A Relative," which purports to give to the World a circumstantial Account of a Duel in which I was unhappily engaged some Ten or Eleven Years ago.

The principal, indeed the only, Object the Writer seems to have, is the Gratification of a deep and implacable Feeling of Hatred and Revenge towards me.

As the Article alluded to is as replete with base, unmanly, and extravagant Falsehoods, as perhaps could have been invented and uttered by the most hardened, unprincipled, and abandoned Wretch in existence, and as the

Statements (if true) should drive me out of the Pale of all respectable, indeed of all civilized Society, I feel it necessary, however painful it is, and however humiliating it may appear in the Eyes of the Public, to come openly forward, and in direct and specific Terms contradict what is alleged against me by this malignant and anonymous Scoundrel.

It suggests itself to my Mind, that to do this most properly, and at the same Time most effectually, it would be advisable to call upon the Two Seconds to confirm or deny the Account given by the "Relative;" and it will afford me peculiar Satisfaction to have you (in Company with some other Gentleman) wait on Mr. Boulton and Mr. Small for that Purpose.

I am,

My dear Sir,

Yours very faithfully,

SAMUEL P. JARVIS.

Colonel Fitzgibbon, &c. &c. &c.

My dear Sir,

5th March 1828.

Messrs. Henry John Boulton and James G. Small have met in Presence of Mr. William B. Jarvis and me, and the Result of our Conference has been the accompanying Papers, numbered One and Two.

No. 1. is a Contradiction of the false Statements made in the Paper published in the Canadian Freeman, signed "A Relative;" and No. 2. is a detailed Statement of the Circumstances which attended the Duel.

Considering the Nature of the Attack which has been made upon you, I did not hesitate to comply with your Request. Indeed, I think it due to the Community, that every Man should now exert himself to protect individual Character from the Attacks of unprincipled and wicked Men.

I remain, dear Sir,

Very truly yours,

JAMES FITZGIBBON.

Samuel P. Jarvis, Esq. &c.

No. 1.—On the 5th of March instant (1828), Messrs. H. J. Boulton and James G. Small met, by Request, in the Presence of Messrs. James Fitzgibbon and William B. Jarvis, when the following Statement, intended to contradict an Article which appeared on the 28th ultimo in the Canadian Freeman, under the Signature of "A Relative," was produced and read to Mr. Small, and an Appeal was made to him to confirm its Correctness, when he declared that there was no material Part of it which he could contradict, and that the minor Parts, which he could not confirm, he admitted may be quite correct, but that he could not then recall them to his Memory, viz.

* That Mr. Samuel P. Jarvis was not in York from the Afternoon of the Day on which he was assaulted by Mr. John Ridout in the Street, until the Tenth of the Month of July.

* That Mr. Boulton was not at the Time of the Duel Twenty-eight Years of Age, he having attained, not Three Weeks before, the Age of Twenty-seven Years.

That Mr. Boulton was not at the Time of the Duel Acting Solicitor General, nor was he appointed to that Office until the 11th March 1818, the Year following; nor was he in any Manner connected with the Government.

That Mr. Ridout, having understood that Mr. Jarvis intended calling upon him, desired Mr. Small to wait upon Mr. Jarvis, and inform him that he was ready to meet Mr. Jarvis at any Time and Place he would name; and that Mr. Boulton afterwards waited upon Mr. Ridout at Mr. Small's for the same Purpose, and the Meeting, &c. were arranged.

That that Part of the said Article that declares that Mr. John Ridout fired by mistaking the Second Word for the Third (owing to a stronger Emphasis being placed on the Second Word by Mr. Henry John Boulton) is wholly false and untrue, inasmuch as the Signal was given by Mr. Small, and not by Henry John Boulton.

That the Words stated and declared to have been used by Mr. Jarvis to Mr. John Ridout, when Mr. Ridout fired, viz. "Go back to your Ground, " damn you," are utterly false and untrue.

* This Mr. Small cannot say of his own Knowledge.

That

That Mr. James Small never interfered with a View to an amicable Settlement between the Parties after or before they arrived on the Ground.

Neither did Mr. John Ridout, on retaking his Ground, declare (as it is stated) "if it must be so, it must;" but, on the contrary, Mr. Ridout fully acquiesced in the Decision of Mr. Small and Mr. Boulton, on the Justness of Mr. Jarvis being allowed his Fire.

Neither did Mr. Jarvis (as it is stated) make use of the Expression, "There, damn you," when he fired.

That the Statement, that Mr. Ridout fell crying, "Oh! you have killed me; it was foul Play," is wholly untrue and false, inasmuch as Mr. Ridout did not fall, but was supported for some Time after he received his Wound, shook Hands with all Parties present, fully forgave Mr. Jarvis, and declared "If Jarvis had not shot him, he might have shot Jarvis;" and never intimated that there was any thing unfair, but expressed himself satisfied with the Conduct of all Parties.

That there was not at this Moment Thunder and Lightning, or Rain, as stated in the Article signed "A Relative."

That it is utterly false and untrue that Mr. Boulton touched or stirred Mr. Ridout with his Foot, after he was supposed to be dead, as is stated to be the Case.

That there is no Foundation for the Assertion that Mr. John Ridout declared to Mr. Playter, "Ah, Playter, it was foul Play," inasmuch as Mr. Ridout expressed himself quite to the contrary while the Parties remained with him.

(Certified)

JAMES FITZGIBBON,
WM. B. JARVIS.

No. 2.—The following, purporting to be a Statement of the leading or most important Circumstances attending the Duel between Mr. Samuel P. Jarvis and Mr. John Ridout, was submitted and read to Mr. Henry John Boulton and Mr. James G. Small, and agreed to in our Presence, viz.

On the Afternoon of the 11th July 1817, Mr. Small called, at the Request of Mr. John Ridout, upon Mr. Samuel P. Jarvis, to say that Mr. John Ridout had understood that Mr. H. J. Boulton had been in Search of him, and that, imagining Mr. B. was the Bearer of a Message from Mr. Jarvis, he had called to say that Mr. John Ridout was ready to afford Mr. Jarvis a Meeting whenever Mr. Jarvis thought proper.

That Mr. Boulton afterwards called upon Mr. Small at old Mr. Small's House, and arranged the Time and Place of Meeting; and that the following Morning, at Day-light, at Elmsley's Farm, was appointed.*

H. J. B.

Some Time before Day-light the whole Four Persons met nearly opposite Dr. Macanlay's Gate, as they were proceeding to the Ground. They all Four proceeded together, and arrived there about an Hour before Day-light. They remained a great Part of the Time in the Barn, in consequence of the Thunder and Lightning and occasional Rain. Mr. Jarvis left the Barn before Day-light, and was absent for some Time. Mr. Boulton, Mr. Small, and Mr. Ridout, remained in the Barn, conversing in a friendly Manner. When Day-light appeared, Preparation was made for the Contest.

Twelve Paces were first proposed; but it was afterwards decided that the Distance should be Eight, on the Suggestion of Mr. Ridout, who assigned as a Reason, that he considered Mr. Jarvis a better Shot than himself, and that at a short Distance they would be more upon an Equality.

The Ground was accordingly measured, and a Space chosen between Two Stumps, before which each Party would have stood—the larger of the Two being behind Mr. Ridout; but upon Mr. Jarvis observing that the Stumps

* Mr. Small is under the Impression that Mr. Boulton called at his Father's for the Purpose of delivering a Challenge to Mr. John Ridout, and not merely to fix the Time and Place.

would

would attract the Eye, and aid the Parties in taking Aim, and consequently would be more likely to cause the Fire to take Effect, the Ground was changed to an entire open Space. It was agreed that the Signal should be given by Mr. Small, which was to be One, Two, Three, *Fire*. At the Word Two, Mr. Ridout fired, and moved from his Ground. Mr. Small called to him to resume his Ground, and put a loaded Pistol into his Hand. On a Consultation between Mr. Boulton, Mr. Small, and Mr. Ridout, it was considered by all Three that Mr. Jarvis should have his Fire. The loaded Pistol was accordingly handed back by Mr. Ridout to Mr. Small, and the discharged one replaced in his Hands. Mr. Small then gave the Word as originally agreed upon, One, Two, Three, *Fire*; and Mr. Jarvis, at the Word *Fire*, did fire, without Deliberation, and without raising his Arm until the Word *Fire*.

Mr. Ridout partly wheeled round, but did not fall. All Parties ran up to him. Mr. Jarvis threw his Pistol on the Ground, and said, " My God, what have I done!" Mr. Ridout shook Hands with all Parties, and freely forgave Mr. Jarvis, and said, " If Jarvis had not hit him, he might have shot Jarvis." There was a full Expression of Forgiveness on the one Side, and Sorrow and Regret on the other. After this Conversation Mr. Ridout fainted, and the Parties, supposing he was dead, left the Ground.

No Rain fell after the Ground was measured, during the Stay of the Parties in the Field; and none of the Expressions attributed to Mr. Jarvis, viz. " Go back to your Ground, damn you," and when firing, " There, damn you," were ever uttered by him, or any thing like them. Mr. Jarvis, when he perceived the Nature of the Wound, and what was likely to result from it, appeared much overcome, and used many Expressions of Sorrow.

Neither did Mr. Ridout ever say that there was foul Play; on the contrary, Mr. Small asked Mr. Ridout if he was satisfied with his Conduct, and he said perfectly, that it was all fair. Neither did Mr. Boulton ever stir the Body of Mr. Ridout with his Foot, all Parties being too deeply affected by the melancholy Sight, to indulge in such Brutality. Every thing that took place on the Ground was with the full Concurrence of Mr. Small and Mr. Boulton, neither of them insisting on one Line of Conduct instead of another.

What is above stated is correct from my Initials. What is previously stated I was not present at.

H. J. B.
JAMES FITZGIBBON.
WM. B. JARVIS.

My dear Sir,
If my Recollection serves me right, you were present at an Affray I had with the late Mr. John Ridout, in 1817, in the main Street, near to where Dr. Widmer's House now stands.

Will you have the Goodness to inform me, in Writing, what you know and saw of that Affair?

The Article under the Signature of " A Relative," published in the " Freeman " of the 29th Ultimo, will, I am sure, be a sufficient Apology for putting you to this Trouble.

I am yours very truly,
SAM. P. JARVIS.

Colonel Fitzgibbon.

REPLY.

My dear Sir,
In answer to your Note of this Morning, relative to the Affair you mentioned, I beg leave to acquaint you, that on the Day on which that Affray took place I was passing down the Street which leads from the Surveyor General's House towards Dr. Widmer's, where I saw a Crowd assembled round some Individuals who appeared to be in close Conflict with each other. Unwilling to witness Scenes of this Description, I was passing on, but on observing the Crowd opening towards me, I raised my Eyes, and saw the late Mr. John Ridout and you grappled together in close Conflict. Mortified that Two young Gentlemen, for whom I had a high Respect, should so expose themselves in a Crowd, I instantly ran to separate you, and seeing Mr. Robert Kerr present, I called upon him

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him to assist me, when we with Difficulty parted you, and I, with much Exertion, compelled Mr. Ridout to accompany me to his Brother's Office, to whom I gave him in charge.

I remain, dear Sir,
Very truly yours,

SAM. P. JARVIS, Esq.

JAMES FITZGIMMON.

N. B. The Circumstance or rather Words which took place in Mr. George Ridout's Office, and which I did not state this Morning in the foregoing Note, I now subjoin, since you express a Wish for me to do so.

When I consider the Nature of the Attack which has been made upon you, I cannot withhold from you any Fact within my Knowledge, which you may think necessary to employ in your Defence. They were as follows: On arriving at the Office, I found Mr. George Ridout in it, when I spoke to him to the following Effect; viz. "That I had just found his Brother in an Affray with " Mr. Sam. Jarvis in the public Streets, and that I had by Force separated them, " and brought his Brother to him." To which Mr. Ridout answered, saying, " Upon my Word, Sir, I am very sorry you did." This surprised me a good deal, and I replied by formally bidding him a good Morning.

J. F. G.

My dear Sir,

York, 11th March 1828.

In an Article published in the "Canadian Freeman" of the 28th Ult., under the Signature of "A Relative," it is made to appear rather doubtful whether I was or was not the first Aggressor in an Affray which I had early in the Month of July 1817 with the late Mr. John Ridout, at which you were present.

I shall feel much obliged by your stating, in Writing, what you recollect of that Transaction.

Believe me,
Yours very faithfully,
SAM. P. JARVIS.

The Hon. George Markland, &c. &c. &c.

My dear Sir,

York, 13 March 1828.

In reply to yours I beg leave to state, that at this Distance of Time I cannot recall to mind the express Words which were used at the Meeting between yourself and the late John Ridout.

The following Circumstances are, however, fresh in my Memory.

We were walking arm-and-arm in King Street, near Dr. Widmer's, where we saw John Ridout coming towards us; when sufficiently near, he stepped up to you, using some threatening Language, and struck at you with a large Stick, which Blow, I think, was warded off; you then immediately closed with him, and a Scuffle ensued, which ended in a Separation by the Persons around.

The Attack was wholly unprovoked at the Time, though apparently pre-meditated by the unfortunate Deceased, whose Assault took us both by Surprise, at an unguarded Moment, when we were engaged in Conversation, and unprepared for such Violence.

I am your obedient Servant,
GEO. H. MARKLAND.

Samuel P. Jarvis, Esq.

My dear Sir,

York, 13 March 1828.

Among the numerous Falshoods and Mis-statements contained in an Article signed "A Relative," published in the Canadian Freeman of the 28th Ultimo, I notice the following: "On Thursday, the 10th of July, Samuel P. Jarvis " went up Yonge Street, on Pretence of accompanying his Grandfather, " Dr. Peters, to Lake Simcoe; but he only went as far as Dye's Tavern, " 12 Miles from Town, and remained there until Friday Afternoon, when he " came in to a Party at Chief Justice Powell's."

You may, perhaps, recollect that I arrived at your House in Newmarket, in Company with the Rev. Dr. Peters, on the Evening of the 9th July 1817; that I remained at your House that Night, and on the following Morning accompanied Dr. Peters to the Holland Landing, where he embarked in a

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Canoe

Canoe for Drummond's Island; and also that you accompanied me a Part of the Way on my Return to York.

If you can bring these Circumstances to your Mind, you will oblige me by doing so, and communicating them in Writing at your earliest Convenience.

I am, my dear Sir,

Yours very faithfully,

SAM. P. JARVIS.

The Hon. Peter Robinson, &c. &c. &c.

REPLY.

York, 14th March 1828.

My dear Sir,

In reply to your Letter of Yesterday, requesting to know whether I recollected your having arrived at my House at Newmarket, in Company with the Rev. Dr. Peters, on the Evening of the 9th of July 1817, and of my having accompanied you on the following Day a Part of the Way on your Return to Town, I beg to say, that I remember perfectly the Circumstance of your coming to my House about the Period you mention, in Company with the Rev. Dr. Peters; and also my riding with you, on your Return to York, the following Day, as far as Davis's in Younge Street (Four Miles).

I remain, my dear Sir,

Yours very truly,

P. ROBINSON.

Sam. P. Jarvis, Esq.

Inclusur, No. 8.

Downing Street, 11th May 1819.

Sir,

I HAVE had the Honour of receiving your Dispatch of 6th January, transmitting Copies of Letters addressed to you by the Earl of Selkirk and the Attorney General of the Province, relative to the Trials which have recently taken place in the Colony between the Earl of Selkirk and the North West Company. I have not failed to lay these Papers before His Royal Highness the Prince Regent; and I should not do Justice to the Attorney General if I were to forbear expressing the Satisfaction which I have derived from his detailed Explanation, desiring you to assure him that the Temper and Judgment with which he has conducted himself during the whole of these long and difficult Proceedings has received His Royal Highness's entire Approbation.

I have the Honour to be, Sir,

Your most obedient humble Servant,

(Signed) BATHURST.

Major General Sir Peregrine Maitland.

No. III.

COPY of a Dispatch from Major General Sir PEREGRINE MAITLAND to Mr. Secretary HUSKISSON; dated York, Upper Canada, 6th July 1828. — Nineteen Inclosures.

No. 27.

JUDICIAL AFFAIRS.

Sir,

Upper Canada, York, 6th July 1828.

REFERRING to my Dispatch of the 6th Ultimo, a Duplicate of which is herewith transmitted, I have now to solicit your particular Attention to the Report of the Executive Council of this Province, and to the Documents appended thereto, and amongst those most especially:

P. 66.

1st, The Address delivered by Mr. Justice Willis to the Public, while occupying a Seat on the Bench in this Province, announcing that there was no Court of King's Bench existing in the Colony; and that the Chief Justice and various other Civil Officers had forfeited their Offices.

P. 84--101.

2d, The Opinion of the Law Officers of the Crown, and of the other Puisné Judge, upon the legal Questions involved in these Proceedings.

3d, The Statement of the Senior Puisné Judge of the Court, of the Occurrences referred to, and his Opinion on the several Points.

I have further to acquaint you, that for the Reasons stated in the Report of the Council I have found it necessary to remove Mr. Willis from his Seat on the Bench, and have appointed Mr. Hagerman, a Gentleman of long standing at the Provincial Bar, to supply the Vacancy.

The Want of good Feeling and of sound Discretion evinced by Mr. Willis on this and on other Occasions, his Disregard of the Practice sanctioned and established by all the Judges who have preceded him, among whom were some of much Experience and Learning, and even of the declared Intentions of the Legislature, must be sufficiently evident from a Perusal of the Documents referred to.

Above all, I regret to be compelled to add, that Mr. Willis, since his Arrival in this Colony, has manifested a Disposition, and adopted a Course of Conduct, utterly incompatible with his Situation as a Judge; and it is my Duty to state to you, in the most decided Terms, that his Restitution to Office, while it would be received by the most Portion of the Population as a Triumph over the Government which Mr. Willis has ungratefully and wantonly insulted, would be most pernicious to the Peace of this Colony, and an Act of the most aggravating Injustice to those faithful Servants of the Crown against whom he has, for unworthy Purposes, dishonourably laboured to excite the Prejudice and Hatred of the ignorant and malicious.

My Observation of the Practice to which Mr. Willis does not scruple to resort, leads me further to request, that if, for the Purpose of injuring this Government, or any of its Officers, or of promoting his other Views, Mr. Willis has made or shall make any Representations affecting the Conduct of this Government, or of any Officer serving under it, such Representations, however supported, may be communicated to this Government, that they may be openly met.

I also beg that it may be distinctly understood, that this Government will be always prepared to meet the fullest Investigation of every Matter connected with Mr. Willis's Proceedings in this Colony, as well as any Statement he may advance.

The Rt Hon. W. H. Huskisson, M. P.
&c. &c. &c.

I have, &c.
(Signed) P. MAITLAND.

Inclosure, No. 1.

Order of Reference laid before the Council 18th June 1828, with Documents Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10.

THE Lieutenant Governor submits to the Executive Council a Letter which has been addressed to him by Mr. Sherwood, the Senior Puisné Judge of the Court of King's Bench, reporting a Circumstance which has occurred in that Court, and which appears to the Lieutenant Governor to call for the immediate Attention of the Government.

A few Days ago Mr. Justice Willis inclosed to Major Hillier Two Letters, one addressed to Mr. Huskisson, His Majesty's Secretary of State for the Colonies, and the other to Mr. Stephen, the Counsel for the Colonial Department. Major Hillier observed them to be unsealed, but as they were accompanied by no Communication from Mr. Willis, either addressed to the Lieutenant Governor or to Major Hillier, but were merely inclosed in a Cover, addressed to the latter, on the inner Side of which was written a Request that they might be officially transmitted, they were returned to Mr. Willis, of course unread, with the Letter, No. 3.

Mr. Willis then inclosed them again to Major Hillier, with the Letter, No. 4, which it will be seen conveys no Explanation whatever of the Contents of these Letters; but merely states, that they relate to a Matter of much Consequence, and that he wishes they should be perused by the Lieutenant Governor.

They

No. 1.

No. 2.

No. 3.

They were read accordingly, and were found to convey to Mr. Huskisson Information of a Resolution on the Part of Mr. Willis, to inform the Public, on the first Day of the approaching Term, that, in consequence of the Absence of the Chief Justice, there was, in his Opinion, no Court of King's Bench in this Province. The Letters further contained some Explanation of the Grounds on which that Opinion was formed, and of the Occasion which had led him to consider the Question; and they also expressed his Fears that the Step he intended to take would create great Public Excitement through the Province. Mr. Willis's Letters were forwarded by the Lieutenant Governor, with such an Explanation to the Secretary of State as the Occasion called for, and with the Assurance, that if such a Step should be taken as Mr. Willis announced, the Matter should be submitted to the Executive Council, and the Opinion of the Law Officers be taken; and that the Lieutenant Governor would then communicate more fully with His Majesty's Government on the Subject. To Mr. Willis a short Note was also written, of which a Copy is annexed, No. 5.

No. 5.
No. 6.
Nos. 7, 8, 9,
10.

The Document, No. 6, was received Yesterday from Mr. Willis. Nos. 7 and 8, 9 and 10, are Communications received from Mr. Willis this Day. The Lieutenant Governor has called on the Senior Puisné Judge and on the Law Officers of the Crown for their Opinions on this Subject, which will be laid before the Council as soon as received. In the meantime, the Lieutenant Governor is desirous of receiving from the Executive Council any Suggestion they may have to offer, with a View to remedy the Inconvenience that may accrue to the Public from what has occurred, as well with reference to the present Term as to the approaching Circuits.—

A true Copy.
(Signed) John Small.

18th June 1828.

(1.)

Mr. Justice Sherwood to his Excellency the Lieutenant Governor, respecting Proceedings in the Court of King's Bench.

York, 16th June 1828.

Sir,

I BEG leave to state, for the Information of your Excellency, that I repaired to the Judges' Room in the Court House at the usual Hour this Morning, for the Purpose of holding the present Term of Trinity in the Court of King's Bench; Mr. Willis was in the Room, robed in the Costume of a Judge. We then went into the Court Room, attended by the Sheriff in the usual Manner, and the Court was opened; after which Mr. Willis stood up and addressed the Audience in a Public Manner, standing all the while like a Counsel at the Bar. He stated at great Length his decided Opinion that the Court of King's Bench could not be legally held without the Presence of the Chief Justice and Two Puisné Judges; that every thing heretofore done in the Court by Two Judges was null and void; that he had examined the Office of the Executive Council, and found the Chief Justice was absent from the Province without Leave of the Governor and Council, in consequence of which he had forfeited his Office, under a Statute of the British Parliament passed in 1814; that the Governor had no Authority to give Leave of Absence to any Judge, without the express Approbation of the Executive Council. After he had ended his elaborate Address, he declared his Intention to retire from the Bench; and I informed the Bar, that I would continue in Court, and transact such Business as the established Practice of the Court allowed of being done by One Judge. Mr. Willis, still standing up, publicly protested against my doing any Business in Court, or adjourning the Court to any other Day; and, after loudly repeating this Protest twice, retired from the Bench. I then adjourned the Court 'till To-morrow, and intend to proceed with the Public Business during the Remainder of the Term, unless your Excellency may think proper to give some Directions to change my Intention.

I thought it my Duty to inform your Excellency of this extraordinary Occurrence, which took place in the Court where I have the Honour at this Time to preside; and I have done so in the most concise Manner, in order to avoid all unnecessary Remarks on the unparalleled Conduct of Mr. Willis.

I have, &c.
(Signed) LEVIUS P. SHERWOOD.

(65)

(2.)

Mr. Justice Willis to Major Hillier.

Sir, York, Upper Canada, 31st May 1828.
I HAVE to request the inclosed may be officially forwarded.
I have, &c.
To Major Hillier, Private Secretary, (Signed) JOHN WALPOLE WILLIS.
 &c. &c. &c.

(3.)

Major Hillier to Mr. Justice Willis.

Sir, Government House, 3d June 1828.
As the Letter inclosed in your Note to me of the 31st Ultimo, with a Request that it may be officially forwarded, is not accompanied by any Communication explaining, for the Lieutenant Governor's Information, that it relates to some Public Matter connected with the Government, or to any Subject of which it is necessary his Excellency should be apprized, I have received his Commands to return it to you, of course, unopened.
I have, &c.
The Hon. Mr. Justice Willis, (Signed) G. HILLIER.
 &c. &c. &c.

(4.)

Mr. Justice Willis to Major Hillier.

Sir, York, Upper Canada, 3d June 1828.
I HAVE now to request you to lay the inclosed Letters (which relate to Public Business, in my Opinion, of the *greatest Consequence* to the Colony,) before his Excellency the Lieutenant Governor. Not having done so in the first Instance was entirely owing to my not being sufficiently acquainted with official Forms; and *not*, as I beg you will assure his Excellency, with the *slightest Intention of any personal Disrespect*. On the contrary, I conceived that by leaving the Letters *purposely unsealed*, I had done all that was usual, and what was least obtrusive on this Occasion, presuming that the Letters would not have been forwarded if any Part of them met with his Excellency's Disapprobation. Should I not now have pursued the proper Course, may I beg of you to point out to me, specifically, how I should proceed.
I have, &c.
(Signed) JOHN WALPOLE WILLIS.

(5.)

Major Hillier to the Hon. Mr. Justice Willis.

Sir, Government House, 4th June 1828.
I HAVE the Honour to acknowledge the Receipt of your Letter of Yesterday, which I have laid before the Lieutenant Governor. I have been commanded by his Excellency to acquaint you, that your Letters to the Secretary of State and to Mr. Stephen will be forwarded.
If those Circumstances should occur to which you call the Attention, not of this Government, but of the Secretary of State, it will remain for his Excellency to pursue whatever Course such Circumstances may appear to him to require.

The Hon. Mr. Justice Willis, I have, &c.
 &c. &c. &c. (Signed) G. HILLIER.

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(6.)

Mr. Justice Willis to Major Hillier.

York, Upper Canada, 5th June 1828.

Sir,
I most unequivocally declare, or rather repeat, that by leaving the Letters I inclosed to you open, and requesting them to be laid before the Lieutenant Governor, my Object was to call the Attention of his Excellency, as well as that of the Secretary of State for the Colonies, to the *Whole* of their Contents.

I have, &c.

To Major Hillier, P. S.

(Signed) J. W. WILLIS, Judge.

(7.)

Duplicate Letter from Mr. Justice Willis to Major Hillier.

York, Upper Canada, 17th June 1828.

Sir,
ALTHOUGH, from the Communications I have already made, his Excellency must be apprised of my Opinion respecting the Constitution of the Court of King's Bench in this Province, yet as I publicly declared my Sentiments on this Subject in the Court House Yesterday, (the First Day of Trinity Term,) in recalling an Order, so far as I was concerned in it, which was made without the Aid of the Chief Justice of this Province, I have to request you again to acquaint the Lieutenant Governor, that, in my Judgment, the Court of King's Bench, as established by the Provincial Legislature, cannot, without an *express Violation* of the Statute, be held, unless the Chief Justice, together with the Two Puisné Justices of the Province, preside therein. I think, therefore, I should be acting illegally were I to sit on the Bench, and assume, either alone or in conjunction with the other Puisné Judge, those Powers which are delegated, according to my Construction of the Act, to the Chief Justice together with Two Puisné Justices, and not to any *One* or *Two* of them particularly, without the Presence of the Chief Justice.

I shall, however, await his Excellency's Commands on this Subject. In the meantime I am, and always shall be, most desirous to discharge such of the Duties as, under existing Circumstances, I can legally perform.

I have, &c.

To Major Hillier,
Private Secretary, &c. &c. &c.,

(Signed) JOHN WALPOLE WILLIS.

(8.)

Copy of Opinion delivered on Monday 16th June 1828, respecting the necessary Constitution of the Court of King's Bench established in Upper Canada.

York, Upper Canada, 17th June 1828.

Sir,
I HAVE inclosed, for the Information of his Excellency the Lieutenant Governor, a Copy of the Opinion I delivered Yesterday. I beg most particularly to call the Attention of his Excellency, not only to that Part of it which relates to the Establishment of the Court by the Provincial Legislature, but also to the British Statutes to which I have referred respecting Leave of Absence, and the *Consequences* (in case those Acts have not been strictly complied with) so far as they may affect the present State of the Court of King's Bench, and the general Administration of Justice in this Colony.

I have been prevented, by not having a regular Clerk, sending it sooner. I also inclose, for the same Purpose, a Copy of the Minutes of the late Proceedings made by the Deputy Clerk of the Crown, and of an Application left with me by some Members of the Bar this Day; with which I have so far complied, as to direct a Copy of my Opinion to be made for them, and to express my Readiness to act in any Way I legally can for the Furtherance of

Justice.

Justice. I informed Mr. Justice Sherwood, so long since as the 3d Ultimo, of the Conclusion I had come to on that very important Subject. May I request the Inclosures, after Perusal, may be transmitted to the Colonial Secretary.

I have, &c.
(Signed) J. W. WILLIS.

To Major Hillier,
Private Secretary, &c. &c. &c.

Court of King's Bench, 16th June 1828.

The Evil (owing to the Absence of the Chief Justice) of the frequent Difference in the Opinions expressed on the last Day of last Term by the Senior Puisné Justice and myself, in those Cases which had been argued before us, and a Suggestion which I received on the Subject, has since led me minutely to investigate the Power and Constitution of this Court. The Practice hitherto has been oftentimes for Two, and sometimes for One only of the Judges to sit in Bank; and I admit that I have on some few Occasions, and particularly during the last Term, incautiously followed this Practice, which I found had been previously pursued by the Senior Judges of this Court; I say incautiously, from the Conviction I now feel, and which it is my bounden Duty just publicly to declare, that all that has been or may be done contrary to the express Provisions of the Local Legislature is altogether nugatory.

First Section of the Provincial Statute of the 34 G. 3. cap. 2., to establish, &c. in these Words, (*read the Title of the Act. and the First Section, verbatim.*) These Powers are given not to the Individual personally, but to the Court; in which it is expressly provided, that His Majesty's Chief Justice of this Province, together with Two Puisné Justices, shall preside. The Judges, therefore, have collective Authority, except in those Cases where it is otherwise especially provided for by the Legislature. The Origin and Existence of the Superior Court, or Court of King's Bench, as it is called, in this Colony, is entirely derived from the Act of the Provincial Parliament. The Constitution of the Superior Courts of Common Law in England is essentially different. The English Courts of Common Law originally emanated from the *Aula Regia*, which, according to Bracton (lib. 3. p. 1. c. 7.), was established by the Conqueror. These Courts, the King's Bench, Common Pleas, and Exchequer, now consist of a Chief Justice and Three Puisné Judges in each Court. But, according to Dugdale (Orig. Jurisd. c. 18.), this Number has varied considerably in different Reigns; for it appears that Edward the Third had Nine Judges of the Common Pleas; Richard the Second, Five; that Henry the Sixth changed the Number Four Times; that Edward the Fourth reduced it to Four; and that Edward the Sixth increased the Number from Three to Six, and afterwards to Seven. Blackstone also states that James the First, during the greater Part of His Reign, appointed Five Judges in the Courts of King's Bench and Common Pleas, *for the Benefit of a casting Voice in case of Difference of Opinion*, and that the Circuits might at all Times be fully supplied with Judges of the Superior Courts; and in subsequent Reigns, upon the permanent Indisposition of a Judge, a Sixth has been sometimes appointed. See Blac. Com. 40. citing Raymond, 475. note (21.) These Prescriptive Courts, unlike Courts of Statutory Erection, exercise, as Lord Coke justly observes (see 4th Inst. 73. and 1st Blac. Com.), the judicial Power delegated to them from the Crown according to immemorial Usage, and have gained a known and stated Jurisdiction, regulated by certain and established Rules, which our Kings themselves cannot alter without the Aid of Parliament. (See also 2 Hawk. P. C. 2.) The Justices of these Courts do not sit by virtue of any Statute which says that the Chief and other Justices and Barons shall preside in each or any of such Courts; neither do their Commissions, which are founded on immemorial Usage, render this imperative. Serjeant Hawkins, indeed, says (vol. ii. page 2.), that regularly, when there are divers Judges of a Court of Record, the Act of any One of them is effectual if their Commission do not expressly require more; or I may add, which is the same Thing, if not otherwise provided for by the original Constitution of the Court, or subsequent Legislative Enactment, on which those Commissions are founded. I shall now proceed to shew, that whenever any additional Power is given by Parliament

to

to the Judges of a Prescriptive Court of Record, or that Court becomes in anywise the Object of any Statute, and wherever a Court is originally constituted by Act of Parliament, the Statutory Provisions must, in all such Cases, be strictly complied with, whether the Judges act by virtue of any Commission founded on those Statutes, or immediately under the Acts themselves. Thus, with respect to the present Justices of Assize, those Judges came in use in the Room of the ancient Justices in Eyre, *Justiciarii in itinere*, but are more directly derived from the Statute of Westminster 2, (13 Edward 1. 30.) That Act directs them to be assigned out of the King's Sworn Justices, associating to themselves One or Two discreet Knights of each County. In consequence of this and subsequent Statutes, Commissions of Assize and *Nisi Prius*, and also of Oyer and Terminer, are now directed to them, accompanied with Writs of Association; but in order to prevent the Delay of Justice from the Absence of any of the Persons therein named, there is always issued, as of course, a Writ of *Si non omnes*, which directs that if all cannot be present, any Two of them, a Justice or Serjeant being one, may proceed to execute the Commission; plainly shewing, that without this Writ of *Si non omnes*, all who are named in the Commission must necessarily be present. (See 3 Bl. Com. 58, 60.) Thus, too, when according to the Preamble of the Statute 13th Elizabeth, c. 18., it was found expedient to alter the System of trying Issues triable in Middlesex, at the Bar of the Superior Courts, or to use the Words of the Preamble (which see and read, 3 Evans's Stat. p. 253.) That Statute enacted, (see and read the enacting Part of it,) the Chief Justice or Two Judges, &c. This Statute having expressly required the Presence of Two of the Judges of such Courts whereof the Chief was absent, and this being found inconvenient, it was not attempted to get through the Business by One *Puisné* Judge, sitting of his own Accord, instead of Two, as prescribed by the Act; but Recourse was again had to Parliament, and the Statute of 12 Geo. 1. c. 31. sec. 3. (Evans, 265.) after stating in the Preamble that (read it,) enacted (read the first Section), any other Judge. The important Statutory Duties which are now discharged, and discharged most admirably, by the present excellent Chief Justice of England, have recently become so numerous as to prevent his Attendance in many Instances in the Court of King's Bench of the Mother Country, when it is sitting in Bank. The present Attorney General of England, who I am proud to call my Friend, lately alluded to this Circumstance in the British Senate, in the following Manner: — "I think" (said Sir Charles Wetherall, in the Debate on the State of the English Laws) "that no Question of Law should be decided in the Absence of the Chief Justice of the King's Bench. "At present, from the Number of Causes he has to decide at *Nisi Prius*, "actually about 800 a Term, it is impossible he can attend to his highest "Functions; and the other Judges only are therefore left to sit in Banco, "and decide all Matters of Law in which the combined Opinion of the Court "should be taken. When the Chief Justice was the first Common Lawyer in "England, it was a Solecism in the Practice of the Common Law of the "Country that a Case should be decided in his Absence." In that Opinion I most cordially agree. I will now advert to those Statutes which relate more particularly to the Locality of these Courts. The Court of King's Bench in England, the Style of which is *Coram ipse Regis*, or *Coram nobis*, (see 4 Inst. 73,) and not like that of the Statutory Court of King's Bench established in this Province, which, according to Mr. Taylor's Report of *Boulton v. Randal*, is *Coram vobis*, or (before His Majesty's Justices) is not, nor can it, from its original Nature and Constitution, be confined to any particular Place. The Statute 18 Elizabeth, however, as may be remembered, directed Issue joined in the Court of King's Bench, in Matters arising in the County of Middlesex, to be tried by the Judges of that Court in Westminster Hall: when, therefore, the King's Bench could no longer be held there, owing to the necessary Reparation of that Edifice, the Judges did not of themselves, presume to try such Issues elsewhere, but resorted to Parliament, and the Statute 1 Geo. 4. cap. 21. (see Evans's Collection, 3d vol. p. 281.) was passed, to enable the Chief Justice, or, in his Absence, any other Judge of that Court, with the Consent of His Majesty, thus referring to the original Constitution of the Court, after the next Trinity Term, and in any future

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Terms, to try all Issues wherein Trial ought to be in the County of Middlesex, in any Place in the City of Westminster, in the same Manner as they might be tried in Westminster Hall. The Court of Common Pleas, in respect to its Locality, was, very early in our History, the Object of statutory Regulations. The 11th Chapter of Magna Charta enacts, that *Communia Placita non sequantur curiam Regis, sed teneantur in aliquo loco certo*. This certain Place, says Blackstone (13. Com. 38.), was established in Westminster Hall, the Place where the Aula Regis originally sate when the King resided in that City; and there it has ever since continued. With respect to the Locality of the Court of Exchequer, it has, according to Lord Coke (4 Inst. 119.), been commonly held at Westminster, the usual Place of the King's Residence; but it has sometimes been holden at other Places, as the King pleased; as at Winchester, and elsewhere. The Exchequer, it will be recollected, was included in the Statute of Elizabeth, which facilitated the Trial of Issues joined in that Court in Matters arising in the County of Middlesex, and directed such Issues should be tried in Westminster Hall, or in the Place where the Court of Exchequer is commonly kept in the County of Middlesex; and because such Court had been commonly kept in Westminster Hall, it was considered necessary, when that Court was recently about to be rebuilt, to pass the Stat. 3 Geo. 4. cap. 87. for the Court to sit elsewhere, &c.; read the Title and the first Section verbatim (Evans's Coll. p. 379.) With regard to the Locality of the Court of King's Bench, as established in the Colony, the Provincial Statute, as has been already stated, directs that "the Court shall be holden in a Place certain;" that is, in the City, Town, or Place where the Governor or Lieutenant Governor shall usually reside; and until such Place be fixed the said Court shall be holden at the last Place of Meeting of the Legislative Council and Assembly. Thus it appears that the original Constitution of the Courts of Common Law in England is essentially different from that of the Court of King's Bench, as established in this Province; that the English Judges are strictly bound by the Constitution which their Courts have acquired by Prescription, and also by the express Words of such Statutes as have been made respecting them both, in regard to the Right and Jurisdiction of such Judges, and the Locality of the Courts; and that in both these latter Instances the first Section of the Act of the Local Legislature, which establishes the Court of King's Bench here, is clear and explicit. I shall now proceed to shew, that when the Origin of a Court is purely statutory, a strict Compliance with the express Terms of the Provisions of the Legislature is considered indispensable. As the first English Court of this Kind that I shall notice is a Court of Appeal, I avail myself of this Opportunity to say a few Words on that Subject. The 36th Section of the Provincial Statute of the 34 Geo. 3. c. 2. limits Appeals from all Judgments given in the Court of King's Bench in this Province to those Cases where the Matter in Controversy shall exceed £100; Cases which but rarely occur. In case of a Division of the Court, therefore, if such an Event can ever, according to the present statutory Constitution of this Court, legally take place, should the Matter of Controversy not exceed £100, no Appeal will be, nor can any Controul be exercised, in case of an erroneous or imperfect Verdict having been rendered at Nisi Prius, erroneous or imperfect at least in the Mind of One Judge, though not in that of the other, except perhaps by the Party supposing himself injured suing out a Writ of Error, a Proceeding which hitherto in this Province is, I believe, little understood, and rarely resorted to. The Parties, therefore, remain without Redress; they are compelled to submit, but they submit with Repugnance; and thus the next great Object to doing Right in the Administration of Justice, which, according to Sir William Blackstone, should be to give Public Satisfaction, is in this Colony altogether defeated. It is not so, however, in England. The Wisdom of our Progenitors, of whom there is so much Reason to be justly proud, foresaw and prudently provided against this Evil; an Evil which, I cannot but think, the Legislature of this Province also intended to prevent, by specifically stipulating, that Three Judges, a Chief Justice, together with Two Puisné Justices, shall preside in this Court. If in England the Court of King's Bench or Common Pleas be equally divided, or apprehend great Difficulty in the Case, it may, according to Lord Coke (Co. Lit. 71.) and Chief Baron

Comyns (Dig. tit. Courts, 5.) be adjourned into the Exchequer Chamber, to be argued by all the Justices of England; and this, say the same Authorities, was by the Stat. 14 Edw. 3. c. 5.; for before it was determined at the next Parliament, by a Prelate, Two Earls, and Two Barons, with the Advice of the Lords Chancellor and Treasurer, the Judges, and other of the King's Council, as deemed convenient. But, says Chief Baron Comyns (citing 2 Bulstrode, Rep. 146, 7.), if after Adjournment a Judge dies, the Cause goes on; though, if after Argument another Judge be made, he shall not give his Opinion. But a Cause shall not be adjourned to the Exchequer Chamber before Argument, and after Argument only if the Court be divided, or for Difficulty adjourn it of themselves. The Court of Exchequer Chamber, to which I have now alluded, is that which was erected by the Statute of 27 Eliz. c. 8., in imitation of the original Court of Exchequer Chamber, established by the Act of 31 Edw. 3. c. 12., to determine Cases of Error from the Court of Exchequer; and it is the Constitution of this last-mentioned Court, One of the earliest in our History of purely statutory Creation, to which I am anxious to draw particular Attention. This Statute is in the following Words (see Evans, 349., and read it verbatim.) This Statute, says Lord Coke (Coke, 4 Inst. 62.), raiseth a new Court, and before new Judges, and is introductory of a new Law, by giving Cognizance of Error in the Exchequer, which shall be reversed in the Exchequer Chamber, before the Chancellor and Treasurer, calling to them the Justices, &c.; but the Chancellor and Treasurer, that is, the Treasurer of England, and not of the Exchequer, (4 Inst. 1067.), alone are Judges in the Writ of Error and the like. It was said by Sir Bartholomew Shower (Rex v. Bishop of London, Arg. Shower, Rep. 432.), "that as the Statute of Edward the Third prescribes the Form of redressing Error in the Court of Exchequer Chamber, it is held to exclude all other Methods, being introductive of a new Law; and though it be a peculiar Expression affirmative, yet it implies a general Negative too, for both can never take place; and all Prescriptions and Customs will be foreclosed by a new Act of Parliament, unless expressly saved. A Custom cannot be prescribed against an Act of Parliament, because the Statute is a Matter of Record, and the highest Record we know." This Statute of Edward the Third, then, being a new affirmative Law, excluding all previous Customs and all other Methods of proceeding in the Court thus created, but those which are expressly pointed out, has been construed, as all other similar Statutes must be, in the strictest Manner. Thus it has been held, that though by this Statute the Chancellor and Treasurer are alone, as has already been said, Judges of this Court of Error, and the Justices and others merely Assistants, yet, if the Justices be not so taken, they being directed to be taken by the Act, it is Error. This is expressly declared in the Case in the Year Book, 8 Hen. 7. 13., and in Brook's Abridgment, tit. Judgment, placitum 125, fol. 49., which I have examined; and the Effect of these Authorities is stated, nearly almost in the Words I have made use of, in Viner's Abr. tit. Judges (H.), under the Head of "Who shall have judicial Power." Thus also it was held, according to Chief Baron Comyns, (Dig. tit. Courts, 46.), after this Statute of Edward 3d, if the Court of Exchequer Chamber, thereby created, was adjourned, and at the Day of Adjournment, both the Lord Chancellor and Lord Treasurer did not attend, the Writ of Error was discontinued, and the Plaintiff in Error was obliged to begin anew. To remedy this the Stat. of 31 Eliz. c. 1. s. 1. was passed. (See Evans's Coll. p. 353., and read the Title and the whole of the 1st Section.) But this Statute did not provide a Remedy for the Absence of these Officers at the Day of the Return of the Writ, therefore another Act, that of the 16 Car 2. c. 2. was passed. (See 3 Evans's Coll. p. 354., and read the Title and the whole of the Act.) But as both the Statute of Elizabeth and that of Charles 2d provided that no Judgment should be given unless both the Lord Chancellor and Lord Treasurer should be present, and there being then no Lord Treasurer, the Stat. 20 Car. 2. c. 4. (see Evans's Coll. p. 355., and read the Title and the whole of the Act.) was passed.

I know of nothing that can prove more strongly than the legal Decisions and Parliamentary Enactments respecting this statutory Court of Exchequer Chamber, for reversing Errors in the Exchequer, the absolute Necessity of a

scrupulous Compliance with a Statute which introduces a new Law by erecting a new Court. But the Court I have mentioned is not a solitary Instance of the Obligation to a rigid Adherence to Legislative Enactments in such Case. The Stat. 3 Hen. 7. c. 1., by which the Court of Star Chamber was, if not established, at least remodelled, (a Court indeed afterwards in the Reign of Car. 1. altogether abolished, to the general Joy of the whole Nation, (see 16 Car. 1. c. 10. 4. Bl. Com. 267.), is too remarkable and applicable to the present Subject to pass unnoticed. It is introduced with the Preamble. (Read the Preamble and 1st Section of the Act.) It has been held under this Statute also, as well as that of Edward 3d, that none are Judges but the Chancellor, Treasurer, and Lord Privy Seal, by these Words, and that the others are but Assistants. Lord Coke indeed (4 Inst. 62.) insists, that this Statute did not raise a new Court, admitting that if it had done so, all, except the Lord Chancellor and Lord Treasurer and Lord Privy Seal, would be but Assistants; but he says, as the Court formerly subsisted, and all the King's Privy Council were Judges of the same, that the Chancellor, Treasurer, and Privy Seal are Judges also. Lord Coke's Opinion respecting the Court of Star Chamber must be taken with great Allowances; but it matters not for the present Case whether all were Judges or were merely Assistants, for it was determined by all the Justices according to the Authorities cited in Viner's Abridgment, which I have already mentioned, that as the Statute appointed them all to be called to the Court, and they were not so called, it was Error. I will not stop to mention the Necessity of a strict Compliance with the Legislative Provisions which give Criminal Jurisdiction to the Court of Admiralty, in the Cases mentioned in the Statutes; nor shall I do more than merely allude to the statutory Jurisdiction exercised in England in Cases of Bankruptcy, and the Necessity of complying, not only with those Statutes, but even with an Order of the Judge, directing Commissions which were authorized to issue by the Statutes not to be executed in the Country, unless he who is called the *Quorum Commissioner* be a Barrister. (See Lord Loughborough's Order, 12th August 1800.) If this Order be evaded, according to my Friend Mr. Whitmarsh's very correct Book on the Bankrupt Laws, and which, from Practice, I know to be the Case, it is considered a good Ground for superseding the Commission. To my Mind, from what I have stated, the inevitable Conclusion is, that if all the Judges directed to preside by a Statute which erects a Court should not be present, and indeed if those even whom the Judges are required to take to their Assistance should not be called and present when the Business of the Court is transacted, any thing which may be done in their Absence will be altogether erroneous and void. It follows, therefore, that unless there be some Exception in the subsequent Provincial Enactments, which I have not hitherto mentioned, authorizing the Absence of the Chief or any of the Justices of this Court, the Business, according to the Terms of the Provincial Act, cannot be legally transacted by the Court, as the Chief Justice, together with Two Puisné Judges, must preside in it. In the Sister Colony, and in that legal Division of it which adjoins this Province, it has been lately said, and the Fact can be easily ascertained, that when Sentence was very recently about to be passed on one Edward Burke (a Name too remarkable to escape Observation), for having returned from Transportation, contrary to the Condition of a Pardon which had been granted to him in 1818, when condemned to Death for a Burglary, it was discovered that the Provincial Statute of Lower Canada, of 3 Geo. 4. c. 9., continued by that of 5 Geo. 4. c. 23., (neither of which I have been able to procure), enabling Two Puisné Judges to hold the Criminal Court of Montreal, in the Absence of the Chief Justice, had expired on the 1st May 1827, and consequently the Lower Canadian Statute of the 34 Geo. 3. c. 6., (which I have seen), and which by the 3d Section requires the Presence of Two Judges in that Court, of whom the Chief Justice must be One, was revived, and the Trial having taken place before Two Puisné Judges only, was held to be a Nullity. The Absence of the Chief Justice of the Island of Prince Edward, in the Gulph of St. Lawrence, has recently been the Subject of a Discussion in the House of Assembly of that Settlement, of the deepest Interest, not only to those immediately affected by it, but with reference to such Persons as may have been appointed to Office in any of the British Colonies.

Colonies. The Speech of the Attorney General, on the Message of the Lieutenant Governor of that Island, relative to the Situation of Assistant Justice of the Supreme Court, is worthy of Attention. The Chief Justice of that Province is universally admitted to be a Gentleman of the first Attainments and the highest Respectability; but his Absence from the Island (which it seems he only visits periodically) is said to be felt there as the *greatest Evil*. In the Course of the Debate I have alluded to, the Manner in which Leave of Absence is directed by the British Statutes to be granted to Public Officers in the Colonies formed a principal Topic; and I shall now advert particularly to that Subject, as it is, in my Opinion, a Matter of the first Importance, to ascertain whether the Commissions which have been granted to any of the Officers of this Colony are affected by those Acts. The first I shall mention is the Stat. 22 Geo. 3. c. 75. (read it; Governor and Council, not the Governor alone); the other is the more recent Act of the 54 Geo. 3. c. 61. (read it; Governor and Council to grant Leave.) It appears to me, then, from the Acts, that Absence from the Province without Leave is a Forfeiture of the Commission of the Person so absenting himself; that Leave of Absence must be granted to all who hold Office in the Colonies, by the Governor or Lieutenant Governor and Council, and not by Governor or Lieutenant Governor *alone*, as, I am informed, has (though contrary to the Statutes' Regulations, and, in my Opinion, to every Principle of Law) frequently been the Case. On Inquiry at the Council Office here, I find Leave has *always* been granted by the Lieutenant Governor alone. As well might His Majesty the King determine an Appeal from this Colony without the Aid of His Privy Council. The King can do no Wrong; and I suppose that Maxim equally applies to His Representative. But the Law has wisely provided, that the King should act through the Intervention of his Ministers, who are responsible for their Acts. If Leave be improperly granted by the Lieutenant Governor, who is to be responsible? If granted to him with the Assistance of his Council, or, as the Statutes have provided, "by the Governor or Lieutenant Governor and Council," the Council is responsible in case of any Impropriety. It is evident such Leave cannot be granted, or even extended, in any other Manner, according to those Statutes, than by the Governor and Council, even the Secretary of State has merely the Power of *confirming*, not of *granting* or extending such Leave. If, then, such Leave of Absence should not have been so granted, reported, and confirmed, as the Acts expressly require, or if any Officer should at any Time have absented himself from the Province, without first having obtained Leave according to the Statutes, or should have remained absent for any Period to which such Leave granted by the Governor or Lieutenant Governor and Council did not expressly extend, the inevitable Consequence, in my Opinion, is, that according to the Words of the Statute of 54 G. 3. c. 61. (which is a Penal Act, and to be construed strictly), such Officer must, by his Absence without such Leave, be deemed to have vacated his Office, and his Appointment must be considered, to all Intents and Purposes, void and of none Effect. But this is a Matter which may possibly have already attracted the Attention of the Legal Advisers of this Government. The Consequences of having assumed the Exercise of Office after Forfeiture of the Commission is too serious, I should imagine, to have escaped Observation; and I now mention it, that in case it has not hitherto been noticed Steps may be taken to obviate the Evil which must necessarily have occurred. I allude more particularly to this Circumstance, as it materially serves to strengthen the Arguments I have urged to shew the absolute and invariable Necessity of a strict and rigid Adherence to the Provisions of the Legislature. It now only remains for me to examine such other Enactments of the Provincial Parliament as relate to the Number of Judges required for the Performance of any Part of the Business of this Court. I have hitherto postponed this necessary Enquiry, from the Conviction that nothing will appear which can in any Manner affect the Doctrine I have endeavoured to enforce, or obviate the Necessity of the Chief Justice, together with Two Puisné Judges, presiding in this Court. The 4th and 5th Sections of the Provincial Statute of 34 Geo. 3. cap. 2. enacts,—(Read them.) What has been said respecting the Presence of all the Judges in the Exchequer Chamber, at the Return of the

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Writ, may not have been forgotten. These Sections are repealed by the subsequent and recent Provincial Act of 2 Geo. 4. cap. 1. sec. 1.; but the 4th Section enacts as follows, (which read). On these Provisions I must observe, that if the Process of this Court be considered as analagous to original Writs in England, such Writs may, and frequently do, according to the Case of Whithead and Buekland, in Styles' Reports, p. 401., bear Teste, and are issued out of Term; and even if the original Process of this Court be considered merely as a judicial Writ which only issues in Term, yet there is so great a Difference between Teste of Writ, (which is the Beginning of an Action, and may be as well in the Name of one Judge as another, provided the Law so permits it,) and the deciding a Case on solemn Argument in Court, and in which Court the Statute says the Chief Justice, together with Two Puisné Judges, shall preside, that it is impossible for any rational Mind to believe that this implies Permission for the Court to be held in the Absence of the Chief Justice. The Senior Puisne Justice may act alone in the solitary Instance of the Teste of a Writ, but in no other. The 19th Section of the 1st Statute enacts. (Read it.) The 16th Section of the subsequent Act, by which this is repealed, says. (Read it.) In respect to the Trial of Issues in the Home District, here the analagous British Statute in regard to the Trials of such Issues when arising in the County of Middlesex, which I have mentioned, may perhaps be remembered. The Exception made by the Legislature in providing for the Absence of the Chief Justice in this Instance, strongly shews the Necessity of his Presence in all others, when it is not specifically dispensed with; and I need scarcely say how great the Distinction is between sitting in Bank, to correct the Errors that may have been committed at Nisi Prius, and presiding in a Court of the latter Description. The 26th and 27th Sections of the 1st Statute enact. (Read them.) These are repealed, but re-enacted by the subsequent Statute, the 39th and 40th Sections, which are as follows. (Read them.) And surely if the Presence of the Chief Justice be necessary to make a Commission for taking Affidavits of Bail, it is much more so to decide important Questions of Law. The 45th Section of this last Act, that of 2 Geo. 4., enacts, &c. (Read it.) The recent English Statute, 3 Geo. 4. c. 69., of a somewhat similar Nature. (See 3 Evans's Coll. Add. to. 369., and read the Title and the First Section, and remark on the Words, together with any Three or more of them.) By "the Court," in the Provincial Statute, I think is clearly intended, the Court as previously constituted; that is, the Court in which the Chief Justice, together with Two Puisné Justices, shall preside. These, I believe, are all the Enactments of the Provincial Legislature which have any Reference to the present Subject; none of which, I am convinced, permit this Court to be held otherwise than as expressly directed by the 1st Section of the Local Statute of 34 Geo. 3., by which the Court is created. After much Reflection on all the Opinions which I have publicly and deliberately delivered in this Court, there is not One which I could now wish in any Manner to alter, save indeed so far as I may have sanctioned the illegal Practice, as I consider it, of this Court being held without a full Attendance of the Judges. Those Opinions, however, which have been pronounced, as well as an Order, though in my Opinion a very necessary one, which was made last Term in the Absence of the Chief Justice, and which Order, as far as I am concerned, I now recall, cannot, I firmly believe, be of any Avail until reiterated in this Court, when it shall be filled according to the specific Directions of the Local Statute. Severe Industry and legal Application has from long Use become so habitual to me, independently of the solemn Obligation to endeavour usefully and properly to apply whatever Talent I may possess in discharge "of the Duties of that State of "Life to which it has pleased God to call me," that the Interruption of the Business of this Court, as it regards me individually, will be rather irksome than pleasurable. I shall remain at Hand to attend to any of those Functions which I can legally discharge.

I have now endeavoured to perform a solemn and imperative Duty. I blame myself for having, under any Circumstances, entered upon my judicial Functions without sufficient Examination of the statutory Provisions for the Judicature of the Colony. I trusted to what I found to be the Practice on my

Arrival, believing that my Brethren had, in the Course of their long Professional Career in this Province, made themselves acquainted with the Distinction which, in England at least, subsists between Prescriptive Courts and Courts constituted by Statute. I am deeply sensible of the Public Inconvenience which must result from the Conclusion at which I arrived. No Man can be more alive to the fearful Consequences which the Public and Individuals cannot but suffer from the awful Fact, that the Administration of Justice in this Province has not in many Instances been according to Law; and that much which affects the Rights, the Interests, and every thing dear to a Community, cannot be rescued from Jeopardy in the present State of the Laws, which must (until altered) be *rigidly observed*.

A true Copy.
(Signed) *John Small.*

(9.)

Memorandum of Deputy Clerk of the Crown.

Trinity Term, 9 Geo. 4. 16th June 1828.

Present, The Honourable Mr. Justice Sherwood and
The Honourable Mr. Justice Willis.

Upon the Judges taking their Seats Mr. Justice Willis stated, that by the Provincial Statute 34 Geo. 3. c. 2., which established the Court of King's Bench in this Province, it is enacted, that the Chief Justice of the Province, together with Two Puisné Judges, shall preside in the said Court. That the Chief Justice being absent, in his Opinion Two Puisné Judges could not legally constitute the Court; that therefore he should decline interfering, except in such Matters as he could dispose of as a single Judge of the Court. Whereupon Mr. Justice Sherwood ordered the Court to be adjourned till To-morrow at Twelve o'Clock, against which Mr. Justice Willis protested, as in his Opinion there was no Court to adjourn, and thereupon withdrew; when Mr. Henry Draper was sworn a Barrister, and the Court adjourned, by Order of Mr. Justice Sherwood, till To-morrow at Twelve o'Clock.

Ordered by Mr. Justice Willis, that the Rule of this Court made in Easter Term last be rescinded, so far as his Authority is concerned, the same having been granted, in his Opinion, contrary to Law, the Court not being full at the Time of passing the same.

A true Copy.
(Signed) *John Small.*

Easter Term, 3 Geo. 4., from 22d April to 4th May 1822.

Present, Honourable W. Campbell.
Honourable D'Arcy Boulton.

Trinity Term, 3 Geo. 4., from 1st July to 13th July 1822.

Present, Honourable W. Campbell.
Honourable D'Arcy Boulton.

(10.)

Application made by Dr. Baldwin and others, relative to the State of the Court of King's Bench, 17th June 1828.

May it please your Lordships.

The Opinion delivered Yesterday by his Lordship Mr. Justice Willis, on the present State of the Court of King's Bench, is of such Importance to the Public, and so deeply involving ourselves in the Discharge of our Professional Duties to our Clients, that it becomes indispensably necessary to consider the Matter of that Opinion most maturely. Feeling that such proposed Consideration may be imperfect, without also having the deliberate Opinion of his Lordship Mr. Justice Sherwood, we beg Leave to express our Hope that we shall hear such his Lordship's Opinion also.

It

It would be very satisfactory to us to be favoured with written Copies of those Opinions, yet knowing this to be in the Option of your Lordships, we trust you will excuse this Part of the Application, if at all unpleasant. We do not wish to trust to the hasty Notes taken by ourselves, or the Editors of Public Prints. We would not willingly press upon your Lordships with any inconvenient Haste; but under the present Circumstances Time is not at our Disposal, and therefore trust, that if his Lordship Mr. Justice Sherwood should decline an early Delivery of his Opinion, so very desirable to us, that he would be pleased to withhold his Judgment in any Case wherein our Clients may happen to be interested, until, as their Counsel, we be better advised as to the Course to be adopted.

W. W. BALDWIN.
J. WASHBURY.
ROBT. BALDWIN.

A true Copy.
(Signed) John Small.

Inclosure, No. 2.

Report of the Executive Council respecting the Circumstances which have lately occurred in relation to His Majesty's Court of King's Bench in this Province.

Executive Council Chamber at York, Friday, 27th June 1828.

Present, — The Honourable James Baby, President Councillor.
The Honourable Peter Robinson.
The Honourable George H. Markland.
The Honourable James B. Macaulay.

To his Excellency Sir Peregrine Maitland, K.C.B., Lieutenant Governor of the Province of Upper Canada, and Major General commanding His Majesty's Forces therein, &c. &c. &c.

May it please your Excellency.

THE COUNCIL having considered your Excellency's Reference of the 18th Instant, with the accompanying Documents, respecting the Circumstances which have lately occurred in relation to His Majesty's Court of King's Bench for this Province, and requesting any Suggestions the Board might have to offer, with a View to remedy the Inconveniences that may accrue to the Public, as well with regard to the present Term as to the approaching Circuits, most respectfully report as follows:

It appears that the Honourable Mr. Justice Willis (who was sworn in a Puisné Judge of the said Court on the 11th October last) recently inclosed to your Excellency's Private Secretary Two unsealed Letters, addressed respectively to His Majesty's Principal Secretary of State for the Colonies, and Mr. Stephen, the Counsel for the Colonial Department, with a Request "that they might be officially forwarded." These Letters were, by your Excellency's Commands, returned to Mr. Willis unopened, your Excellency "not having been made aware that they related to any Public Matter connected with the Government, or to any Subject of which it was necessary your Excellency should be apprized." Mr. Willis in answer requested them to be laid before your Excellency, as "relating to Public Business, in his Opinion, of the greatest Consequence to the Colony," attributing his not having done so in the first Instance to "a Want of Acquaintance with official Forms," not from any Disrespect to your Excellency, and in the Presumption that they would not have been forwarded should any Part have met with Disapprobation.

Reference and No. 2.

No 3.

No. 4.

No. 5.

Mr. Willis was informed, that his Communication would be transmitted; and at the same Time it was intimated to him, that should those Circumstances occur to which he had called the Attention, not of this Government, but of the Secretary of State, it would remain for your Excellency to pursue such Course

as

No. 6. as they might seem to require. In reply to which his Words were, that he " unequivocally declared," or " rather repeated," that by the Course he had taken his Object was to call your Excellency's Attention to the whole Contents of his Correspondence.

On the 17th Instant Mr. Willis, adverting to his former Communications, stated, that he had in the Court House the Day previously publicly declared his Sentiments respecting the Constitution of the Court, in recalling, so far as he was concerned in it, an Order made without the Aid of the Chief Justice of the Province; and requested that your Excellency might be informed, that in his Judgment the said Court, as established by the Provincial Legislature, could not, without an express Violation of the Statute, be held, unless the Chief Justice, together with the Two Puisné Justices, should preside therein; adding, however, that " he awaited your Excellency's Commands on the Subject, and " that in the meantime he was most desirous to discharge such Duties as he " could legally perform."

No. 8. On the same Day he inclosed to your Excellency, to be transmitted to the Secretary of State for the Colonies, when perused, a Copy of the Opinion he had delivered the Day before; and begged to call your Excellency's Attention, not only to that Part of it relating to the Establishment of the Court, but also to the British Statute to which he had referred, respecting *Leave of Absence*, and to the Consequences (had they not been complied with) so far as they might affect the present State of the Court of King's Bench, and the general Administration of Justice in the Colony.

No. 9. He likewise, for the same Purpose, transmitted a Minnte of the Proceedings on the First Day of Term, furnished by the Deputy Clerk of the Crown; as also a Copy of an Application from Three Members of the Bar, soliciting the deliberate Opinion of Mr. Justice Sherwood on the Subject in Question, and a Transcript of that delivered by Mr. Willis. With the latter he expressed his Intention to comply. Mr. Justice Sherwood, the Senior Puisne Judge, who presided in Court on the first Day of the Term (16th Instant), reports to your Excellency, that on that Morning he repaired to the Judges' Room in the Court House, at the usual Hour, for the Purpose of holding the present Term of Trinity in the Court of King's Bench; that Mr. Willis was in the Room, robed in the Costume of a Judge; that they entered the Court Room attended by the Sheriff, in the usual Manner, when the Court was opened; after which Mr. Willis stood up, and addressed the Audience in a public Manner, standing all the while as a Counsel at the Bar; that he stated at great Length his Opinion, that the Court could not be held without the Presence of the Chief Justice and Two Puisné Judges; that all heretofore done by Two Judges was null and void; that upon Examination at the Council Office, he found the Chief Justice was absent from the Province without Leave of the Governor and Council, and consequently had forfeited his Office, under the British Statute of 1814; that after ending his elaborate Address, he declared his Intention to retire from the Bench; when Mr. Sherwood informed the Bar, he should continue in Court, and transact such Business as the established Practice allowed to be done by a single Judge; that Mr. Willis still standing up publicly protested against his doing any Business in Court, or adjourning the Court to any other Day; and after loudly repeating his Protest twice, retired from the Bench; that Mr. Sherwood then adjourned till the next Day, and that he intended to proceed with the Public Business during the Term, unless any Directions from your Excellency should change that Intention.

In the Opinion delivered by Mr. Justice Willis, he insists upon Two principal Points, namely;

1st. That under the Provisions of the 1st Sec. of the Prov. Stat. 34 Geo. 3. cap. 2. the Court of King's Bench cannot be legally holden without the actual Presence of the Chief Justice and Two Puisné Justices; and that consequently all Courts heretofore composed of a less Number of Judges were illegal, and their Proceedings void.

2dly. That under the Provisions of the British Statutes 22 Geo. 3. cap. 75. and 54 Geo. 3. cap. 61. Leave of Absence cannot be granted to any Officer of the Government by the Governor alone, it being competent to the Governor and Council only so to do; and that if any Officer shall have absented himself from

from the Province without Leave obtained according to the Statutes (so explained), he must be deemed thereby to have vacated his Office, and his Appointment must be considered to all Intents and Purposes null and void.

Before entering upon the first Point, the Council deem it proper to turn their Attention to the very important Subject of Leave of Absence.

Upon this Head your Excellency has been pleased to lay before the Board the Opinions of the Law Officers of the Crown; after whose satisfactory Report they forbear considering at Length the Soundness of the Arguments adopted by Mr. Justice Willis.

Nos. 11 & 12

Upon the Question of Leave generally, however, it may not be improper to remark, that by the 7th Sec. of the Royal Instructions to his Excellency the Governor in Chief, bearing Date the 26th March 1816, Two Years after the passing of the Imperial Act 54 Geo. 3. cap. 65., it is declared, that "if any Members of the Executive Council residing in the Province shall wilfully absent themselves for the Space of Six Months without Leave from his Excellency, or for One Year without Leave from His Majesty, their Places shall become void;" and in Mr. Huskisson's Circular of the 30th January last upon the same Subject, he speaks throughout, of the Leave obtained in the Colonies as being granted by the Head of the Government; and without doubting his Power to extend such Leave, he requires Applications for that Purpose to be accompanied by the written Authority of the Governor, or to be made before the Expiration of the first Leave, at a Period sufficiently early to enable the Secretary of State to obtain the Opinion of the Governor before he complies with the Request.

No. 13.

No. 14.

It is likewise to be remarked, that in this Province, and the Council believe in other Colonies, Leave of Absence has usually, if not at all Times, been granted by the Governor alone in his Discretion; and that such Leave, so far from being disallowed as illegal or irregular, has been not only sanctioned, but frequently extended by His Majesty's Government.

Independent, however, of this Question in the Abstract, the extra-judicial Character of Mr. Justice Willis's Opinion has not failed to attract Notice.

It appears that a few Weeks ago, without the Sanction of your Excellency, he took upon himself to visit the Executive Council Office, one of the most confidential belonging to this Government, and there enquired from Mr. Lee, the Junior Clerk, "whether, when the Judges made Applications to go Home, it was communicated to the Council?" who replied, that he never saw any such Communication entered in the Council Books; but thought Applications for Leave of Absence were made to the Lieutenant Governor.

Upon this Answer, so obtained, and which it may be doubted whether a Court of Justice could have exacted, he, uncalled upon by any judicial Proceeding, gratuitously passed his Judgment upon the Validity of many Commissions to Patent Officers of the Colony, every one of which, thus prejudged, might, by Possibility, hereafter be brought before him on Seire facias for regular Adjudication.

It is not competent to a Judge to notice, judicially, any Facts, unless admitted by the Nature of the Pleadings before him, or ascertained by the Verdict of a Jury; and the Assumption of an inquisitorial Authority, sought to be exercised in the present Instance, the Council consider incompatible with the good Order and Security of the Government. They find nothing in the Discussion of a similar Topic by the Attorney General in another Colony, in his political Capacity as a Member of Assembly, to call for or warrant its attempted Adjudication by a Judge of this Province in his judicial Capacity as a Member of the Court of King's Bench.

Adverting to that Part of the Opinion delivered by Mr. Justice Willis which respects the Legality of holding the Court of King's Bench in the Absence of the Chief Justice, it appears upon Examination, that previous to the Division of the late Province of Quebec into Upper and Lower Canada, Courts of Civil and Criminal Judicature were established therein by the Ordinances 17 Geo. 3. c. 1 and 5., passed by the Governor and Council, exercising a Legislative Authority in that Province; and that at the Time of the Division of the Province of Canada, by virtue of the Imperial Act 31 Geo. 3.

cap. 31., that Part now composing Upper Canada was divided into Four Districts, namely, Lunenburg, Mecklenburgh, Nassau, and Hesse; in each of which was established a Court of Common Pleas, the Duties whereof were discharged by several Judges, generally selected from Gentlemen of the first Character and Qualifications resident in the District wherein they officiated; at least in all except the Westernmost District (Hesse), wherein, those nominated in the first Instance having declined to act, the Honourable William Dunmer Powell, late Chief Justice of this Province, first Judge in that District, performed the judicial Functions alone.

In July 1792, after the Division of the Province, the late William Osgoode was, by the late Lieutenant Governor Simcoe, appointed, under the Great Seal of Upper Canada, "Chief Justice of and in the Province of Upper Canada, in America," during Pleasure, and his Residence in the said Province, "with full Power and Authority to hold the Supreme Courts of Judicature at such Places and Times as the same might and ought to be held within the said Province."

On the 9th of July 1794 (Mr. Osgoode then being Chief Justice of this Province), the Provincial Stat. 34 Geo. 3. cap. 2. was passed, for establishing a Superior Court of Civil and Criminal Jurisdiction, and to regulate the Court of Appeal.

The First Section enacts, "That there be constituted and established, and there is hereby constituted and established, a Court of Law to be called and known by the Name and Style of His Majesty's Court of King's Bench for the Province of Upper Canada, which shall be a Court of Record of original Jurisdiction, and shall possess all such Powers and Authorities as by the Law of England are incident to a Superior Court of Civil and Criminal Jurisdiction, and may and shall hold Plea in all and all Manner of Actions, Causes, or Suits, as well Criminal as Civil, Real, Personal, and Mixed, arising, happening, or being within the said Province; and may and shall proceed in such Actions, Causes, or Suits, by such Process and Course as shall tend, with Justice and Dispatch, to determine the same; and may and shall hear and determine all Issues of Law; and shall also hear and, by and with an Inquest of good and lawful Men, determine all Issues of Fact that may be joined in any such Action, Cause, or Suit as aforesaid, and Judgment thereon give, and Execution thereof award, in as full and ample a Manner as can or may be done in His Majesty's Court of King's Bench, Common bench, or, in Matters which regard the King's Revenue, by the Court of Exchequer in England; and that His Majesty's Chief Justice of this Province, together with Two Puisné Justices, shall preside in the said Court, which Court shall be holden in a Place certain, that is, in the City, Town, or Place where the Governor or Lieutenant Governor shall usually reside; and until such Place be fixed, the said Court shall be holden at the last Place of Meeting of the Legislative Council and Assembly."

Provision was then made for the Sitting of this Court; and Four "Sessions or Terms" were appointed in each Year, in which each alternate Day was to be a Return Day. The Practice and Course of Proceeding was in various Respects established. Adjournments from one Return Day to the next immediate Return Day were sanctioned. All Writs were directed to be tested in the Name of the Chief Justice, or, in his Absence, by the Senior Puisné Judge. All Issues joined in the said Court, triable in the Home District, or the District in which the Court was holden, to be tried by the Chief Justice, or, in his Absence, by any other Judge, either in Term Time or within Ten Days thereafter. The Justices of the said Court, or any Two of them, whereof the Chief Justice to be One, were authorized to appoint Commissioners for taking Bail and administering Affidavits in the said Court. The Courts of Common Pleas were abolished, and Provision made for Actions pending therein, and the Governor or Chief Justice of the Province, together with Two or more Members of the Executive Council, were constituted a Court of Appeal.

Provision was likewise made for holding the said Court at the Seat of Government, and for removing the same in Time of actual War. This Act has from Time to Time been altered and amended; and other Provincial Statutes refer to the Court and its Judges; but as the elaborate Opinions of the Attorney

General

- Sec. 2.
- Sec. 3, 6, &c
- Sec. 3.
- Sec. 4.
- Sec. 19.
- Sec. 26 & 27.
- Sec. 30.
- Sec. 31.
- Sec. 33.
- Sec. 36.

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General and Solicitor General, in which the Subject is copiously and ably discussed, refer to them in common, with the various Legal Authorities bearing upon the Question, the Council deem Repetition unnecessary and superfluous.

No. 15.
No. 16.

Upon the same Day that the Provincial Statute 34 Geo. 3. cap. 2. was passed, the Honourable William Dunmer Powell (until that Time a Judge of the Common Pleas) was appointed a Puisné Judge "of the said Court of King's Bench during Pleasure, and his Residence within the Province, with full Power and Authority to hold the said Court of King's Bench at such Places and Times as the same might and ought to be held." His Commission bears Date at Niagara, then the Seat of the Provincial Government. In 1797 the Seat of Government was removed to York, where it has ever since continued. The late Chief Justice Osgoode framed this Statute; and being by the Act authorized to preside in the Court as "His Majesty's Chief Justice of the Province," appointed to "hold the Supreme Courts of Judicature," it does not appear that any new Commission was deemed necessary for him. The Circumstance of his being Chief Justice of the Province, commissioned to hold the Supreme Courts of Judicature, not any particular Court by Name, at the passing of the Statute above recited, may seem to explain that Part of the First Section which provides, not that a Chief Justice with Two Puisné Justices, but that His Majesty's Chief Justice of the Province (aluding to an Office already created, of which Mr. Osgoode was the Incumbent,) should preside, together with Two Puisné Judges; not that the Three should preside, but that the Chief Justice of the Province, with the Two others, should form the Establishment of the Court in which the Chief Justice was to preside. As the Chief Justice uniformly presides in other Courts consisting of Two or more Judges, of which he is Head, he presides over the Court at all Times, but not being always present cannot personally preside at every Sitting of the Court.

No. 17.

In November 1794, by a Commission under the Great Seal, tested in the Name of the late Lieutenant Governor Simcoe, reciting that "the Bench was empty by the Removal of the late Chief Justice, and that a Second Puisné Judge had not as yet been appointed," the late Mr. Russell was authorized to act in His Majesty's Bench with the Honourable William Dunmer Powell, at all Times when his Presence should be necessary, during the Term of Easter then next.

No. 18.

Mr. Powell was the only Judge of the Court named in the Commission of Oyer and Terminer and General Gaol Delivery, and of Assize and Nisi Prius, in the Year 1795 and 1796; and Mr. Russell was on various Occasions appointed, in the Terms above mentioned, a temporary Judge of the Court.

In November 1796 the late John Elmsley, (who succeeded Mr. Osgoode,) was appointed Chief Justice of the Province in Words similar to those used in the Commission of Mr. Osgoode, not Chief Justice of the Court of King's Bench, but "of the Province of Upper Canada."

In 1797 Mr. Russell was several Times appointed "to sit on the Bench" with the last-named Chief Justice, by reason of the Absence of Mr. Justice Powell, each Commission limiting the Appointment to the next succeeding Term; but in the Commissions dated respectively in December 1797 and March 1798, a Deviation in the Form took place. In these is recited that Part of the Provincial Statute which enacts "that the Chief Justice, together with Two Puisné Judges, shall preside in the said Court, and that the vacant Seat of Second Puisné Judge had not been filled," wherefore he is appointed "to fill such vacant Seat for the next ensuing Term."

No. 19.

In 1798 the late Henry Alcock was appointed to fill the Place of Second Puisné Judge, and now for the first Time was the Bench full.

Since the latter Period various Appointments have taken place, both in the Office of Chief Justice and of Puisné Judge, of which a Schedule is herewith respectfully submitted.

Upon comparing the Commissions, it appears that all those to the Chief Justices follow the Terms of Osgoode's in 1792, and that all issued to Puisné Judges are similar to those granted to Mr. Powell in 1794, on his first Appointment to the Court of King's Bench.

The Return from the Office of the Clerk of the Crown and Pleas exhibits the State of the Court as respects the Judges present during each Term, from its

No. 20.

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its Formation to the present Day; and it establishes the Facts, that out of 135 Terms, 56 only have been held by the Chief Justice and Two Puisné Judges; that 59 Terms have been held by a Chief Justice and One Puisné Judge; that 15 have been held by Two Puisné Judges; and 5 by One Puisné Judge alone; so that it may be inferred, from the immediate Appointment of Mr. Justice Powell as a Puisné Judge, without any Associate, with the Knowledge of the Learned Individual at that Time Chief Justice of the Province, under whose Superintendance the Bill was prepared and the Court organized, and from the Practice ever since prevailing, that, independent of other Construction or Authority, the constant Presence of Three Judges was not contemplated, although the Appointment of that Number was provided for.

The Council have carefully perused the Opinion submitted by Mr. Justice Willis, as well as those of the Attorney and Solicitor General; and though upon a Question purely legal they conceive themselves warranted in acting under the Reports of the Law Officers of the Crown, without attempting the Discussion of technical Points, with which they cannot be supposed to be familiar, yet on the present Occasion they think it proper to declare, that, after the best Consideration they have been enabled to give the Matter, they not only concur in the Opinions expressed by the Crown Officers, but find them sustained by the Practice of every Judge who has hitherto held Office in Upper Canada, and by the positive Declaration of Mr. Powell in a Communication dated 10th August 1809.

No. 21.

Viewing the Subject in this Light, and referring to the accompanying Legal Opinions for its full Elucidation, the Board proceed to consider the Embarrassment occasioned by the Steps publicly taken by Mr. Justice Willis.

They readily admit that, unless corrupt Conduct can be imputed to a Judge in the legitimate Discharge of his official Duties, the Independence of the Bench, as well as the Interests of the Government and the Community, require that he should not be amenable to account for the Opinions he may form, or the Judgments he may pronounce.

Without, therefore, attaching any Blame to Mr. Willis for exercising his Judgment as to the Construction of the King's Bench Act, the Council nevertheless dissent from the Manner in which he made public that extra-judicial Opinion upon a Question of the greatest Moment never before agitated.

The Council consider it not only extra-judicial, but exceedingly indiscreet, as tending to disturb a Practice of Thirty Years, under the Sanction of all the Learned Judges hitherto appointed to the Court; as calculated to excite Public Alarm, and to create Distrust in the constitutional Authority of the Tribunals of Justice.

The Decision of a single Judge could not set at rest the Question, even in the King's Bench itself; and the Course adopted obviously tends to procrastinate the Business of the Court, to delay and perplex Suitors, and to check the due Administration of the Law as hitherto enjoyed, without affording any Opportunity of Appeal to a higher Jurisdiction.

As a Judge of the Court, and as a Public Servant of the Crown, his Duty was to communicate his Opinion to the Government of the Colony, in order that, if found just, Measures might be adopted to obviate the Difficulties that would otherwise follow; and in the meantime, unless called upon to deliver a judicial Opinion by some Plea to the Jurisdiction, Things should have been suffered to continue in their usual Course.

The following serious Evils must arise from the Secession of Mr. Willis from the Bench, unless a timely Remedy be provided.

1st. The Obstruction experienced during the present Term in all the important Business of the Court.

2d. The Want of Courts of Assize and Nisi Prius.

As the Circuits uniformly take place in the Summer Seasons, and Once only within the Year, a Delay most injurious to the Public must attend their threatened Interruption.

3dly. The Want of an efficient Court in Michaelmas Term, which will commence on the 3d of November next.

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For should Mr. Justice Willis even deem it competent to him to act as a Judge of Assize, and to try Nisi Prius Records, passed in the Absence of the Chief Justice, yet it may be questioned whether Consequences worse than a total Suspension of Civil Business might not be apprehended. It cannot be expected that a Number of Judges sufficient to hold a Court, in his Construction of the Law, will be present in the Province in Michaelmas Term; and as he, of course, would not otherwise attend himself, nor recognize its Legality, if assembled without the Presence of the Chief Justice, it is not probable he would, when required, report the Particulars of any Cases tried before him on the Circuit; and as various Points of Law would demand the Consideration of the Court upon Motions for new Trials, Points reserved, and the like, during that Term, the obvious Prejudice to which the Rights and Interests of Suitors must be exposed need not be pointed out.

With a View to remove these Embarrassments, the Expediency of the temporary Appointment of an additional Judge suggested itself to the Council; but the Crown Officers, in their Report upon Lord Bathurst's Dispatch of the 9th April 1827, referred to them by his Lordship's Direction, express much Doubt as to the Prerogative Right to increase the present Establishment, without the Sanction of a Legislative Provision; and they advise, that, under such Doubts, it would be inexpedient to act without that Authority.

The Attention of the Council was next turned to the Consideration, whether a Suspension of Mr. Justice Willis until His Majesty's Pleasure should be made known would enable your Excellency to prevent the Inconveniences which must result from the Want of the usual practical Administration of the Law? This Enquiry led to the Conclusion, that as no actual Vacancy would be produced by such a Measure, your Excellency would still be precluded from affording the desired Relief.

Thus circumstanced, the only remaining Alternative necessarily became the Subject of most anxious Deliberation.

The Council were aware that the Colonial Offices are held during Pleasure, and they had been advised of the Power of this Government to remove a Judge of the King's Bench, upon Grounds justifying the Measure. But while they themselves felt the utmost Reluctance to propose such a Course, unless driven to it by extreme Emergency, they were also well assured, that it would always be more satisfactory to your Excellency, and less liable to Exception by the Parties implicated, that the Exercise of such Discretion should be suffered to rest with His Majesty's Government.

They did not fail to consider that in England, so long ago as the 13th W. 3., it was enacted, that the Judges of the Superior Courts in that Country should hold their Commissions not, as formerly, during Pleasure, but during good Behaviour, removable, however, upon the Address of both Houses of Parliament; and that by the 1 Geo. 3. c. 23. they are continued in Office notwithstanding the Demise of the Crown. Nor were they unmindful that His late Majesty had been pleased to declare, that "he looked upon the Uprightness and Independence of the Judges as essential to the impartial Administration of Justice, as one of the best Securities of the Rights and Liberties of His Subjects, and as most conducive to the Honour of the Crown."

In accordance with these Principles, the Council were strongly impelled to submit to your Excellency, that it would be desirable, as far as possible, to make them practically applicable to those high Offices here, referring it to His Majesty's Pleasure to determine when the Public Welfare should render a Removal necessary.

But these Sentiments were met by the Conviction, that there would not be Time to receive an Answer to my Reference before the approaching Circuits; and that, in the meanwhile, the Public, having most extensive Interests involved, would look with Confidence to your Excellency's Wisdom to prevent the Course of legal Administration, which has existed for so long a Period, from being unnecessarily interrupted.

With the sincerest Desire, therefore, of avoiding the immediate Removal of Mr. Willis, and of still maintaining the beneficial Operation of the Laws, the Council, on the 25th Instant, addressed to him a Letter, in which, referring to that Passage of his Note of the 17th Instant, where he stated, "That he was

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and always should be most desirous to discharge such of the Duties as, under existing Circumstances, he could legally perform ;” and intimating to him, that “ the Government had ever been of Opinion that the Court of King’s Bench had been legally held, and the Duties of the Judges well understood ;” the Board requested any Explanation “ he might be pleased to offer respecting the Duties he contemplated, as well with regard to the Terms and Chamber Business, as to the Circuit Courts, including the Trial of all Records emanating from the King’s Bench, whether containing Pleadings of the present or any preceding Term, and whether passed before or since the Departure of the Chief Justice.” The latter Clause was inserted because a great Number of the Civil Cases on the Circuits are conducted to issue in Trinity Term, and the Records are generally passed in the following Vacation, on the Eve of the Assizes, at which Courts, if a Judge were to decline trying them, the most serious Inconvenience and Expence would accrue to some Hundreds of Persons.

No. 25. In answer, Mr. Justice Willis said, “ That he should have much Pleasure in affording the utmost Explanation in his Power on the very important Topics referred to by the Council, at as early a Period as the Magnitude of the Enquiry should permit.”

No. 26. The Urgency of the Case called for a more certain and definite Reply ; and to remove all Doubt as to the true Object of the Board, another Note was addressed to Mr. Willis, stating “ the Desire of the Council to receive an explicit Declaration as to which, if any, of the Duties enumerated in the previous Communication he was prepared to discharge ; and that the Public Service required his early Answer.”

No. 27. In reply, he said, “ He felt legally, judicially, and religiously bound, by virtue of his Oath of Office, to declare his Opinion, of the 16th Instant, in rescinding, so far as he was concerned, an Order of Court he had joined in, and expressing what he considered the Result of his Deliberations.” That “ all or every of the several Duties permitted by the Legislature in the enactments of this Province to be discharged by One Judge, or in conjunction with the Chief Justice, he should always be ready to perform. That the precise Nature of those Duties, if questioned, he could only give an Opinion upon judicially when legally before him.” And after citing the Case of Ship Mouey, and quoting some Passages from a Note to Lord Coke’s Commentary upon Littleton, on the Subject of the King’s consulting his Judges in Cases in which the Crown is materially interested, and of such Judges delivering extra-judicial Opinions, he submitted whether he could be legally requested to give any such by the Executive Council? adding, that “ whatever his private Wish might be, Respect must be had to his Oath, and the established and constitutional Law.”

See Note 129, Co. L. 1102.

The Council are quite at a Loss to conceive how Mr. Justice Willis could have misunderstood their plain and obvious Meaning. No extra-judicial Opinion was solicited. He was, in the first place, merely asked to explain a Passage in his own Letter ; and, to prevent any Misconception, the King’s Bench Terms, the Chamber Business, and the Circuit Courts, were separately enumerated : afterwards, when it was feared he had not comprehended the Object of the Board, a more “ explicit Declaration was desired.” Knowing, as the Council did, that Mr. Justice Willis had, Three Weeks before it was pronounced, made a voluntary Communication of his Opinion to His Majesty’s Secretary of State for the Colonies, and to Mr. Stephen, the Counsel for the Colonial Department, it was not unreasonable to expect that he would have been both prepared and willing to give them any Information on that Subject which the Public Service might require. And the Council cannot forbear contrasting the present Caution of Mr. Willis on this Head, not only with his previous voluntary Communications, but also with that Part of his Opinion which he represents to have been judicially delivered on the 16th Instant, relative to *Leave of Absence*, and his Enquiries at the Council Office. The Board have searched in vain for any Proof that this Subject was “ judicially or “ legally before him.”

Without any satisfactory Answer to their Enquiries, the Council are left to interpret for themselves the Opinion of Mr. Willis, as respects his individual Share of the Public Business ; and, connecting it with his formal Protest and

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Departure from the Court, they are constrained to infer, that, under his Construction of the Law, he cannot, during the Absence of the Chief Justice, be expected effectually to discharge the Duties of a Judge commissioned to hold the Court of King's Bench in this Province.

Thus situated, and deeply impressed with the imperative Necessity of immediately supplying an efficient Court, in order to ensure the due and regular Administration of Justice in the Country, the Council, in the sincere Desire to discharge their Duty to His Majesty's Government, to this Province, and to your Excellency, and relying upon the ultimate Sanction of His Majesty, feel it a Duty incumbent upon them to recommend that Mr. Willis be forthwith removed from the Office of one of the Justices of His Majesty's Court of King's Bench for the Province of Upper Canada, until His Majesty's Pleasure be known; and that, in the meantime, the Vacancy thereby occasioned be supplied by a temporary Appointment, in the Wisdom of your Excellency.

All which is most respectfully submitted.

(Signed) J. BAYB, Presiding Councillor.

(Signed) P. M.

A true Copy.

(Signed) John Small.

Schedule of Judicial Appointments in Upper Canada from 1792 to 1828.

INCUMBENTS	OFFICE	Date of Commission.
W. Dunner Powell -	First Judge of the Court of Common Pleas for the District of Hesse. The Commission not recorded in the Secretary's Office.	
W ^m Osgoode - -	Chief Justice - - - - -	29 July 1792.
Peter Russell - -	Third Justice of the Court of Common Pleas - - - - -	27 June 1793.
W. Dunner Powell -	Judge of the Court of King's Bench	9 July 1794.
Peter Russell - -	To be Puisné Judge for Easter Term -	19 Nov. 1791.
Peter Russell - -	Do. Do. for Trinity Term -	15 July 1795.
Peter Russell - -	Do. Do. for Michaelmas -	26 Oct. 1795.
Peter Russell - -	Do. Do. for Hilary -	13 Dec. 1796.
Peter Russell - -	Do. Do. for Easter -	7 April 1796.
Peter Russell - -	Do. Do. for Trinity -	7 June 1796.
Peter Russell - -	Do. Do. for Michaelmas -	5 Oct. 1796.
J. Elmsley - - -	Chief Justice - - - - -	21 Nov. 1796.
Peter Russell - -	Puisné Judge for the Term of Easter -	16 April 1797.
Peter Russell - -	Do. for Michaelmas -	5 Sept. 1797.
Peter Russell - -	A Puisné Judge - - - - -	17 Sept. 1797.
Peter Russell - -	A Puisné Judge - - - - -	17 March 1798.
H ^r Alcock - - -	Justice of the Court of King's Bench	30 Nov. 1798.
H ^r Alcock - - -	Chief Justice - - - - -	7 Oct. 1802.
A ^s Cochrane - -	Judge of the Court of King's Bench	25 June 1803.
R ^t Thorpe - - -	Judge of the Court of King's Bench	24 July 1807.
Thomas Scott -	Chief Justice - - - - -	6 Aug. 1806.
W ^m Campbell - -	Judge of the Court of King's Bench	18 Nov. 1811.
W ^m Dunner Powell	Chief Justice - - - - -	1 Oct. 1816.
D'Arey Boulton -	Judge of the Court of King's Bench	12 Feb. 1818.
Levius P. Sherwood	Judge of the Court of King's Bench	17 Oct. 1825.
W ^m Campbell - -	Chief Justice - - - - -	17 Oct. 1825.
Ja ^s B. McAulay - -	Judge of the Court of King's Bench	3 July 1827.
John Walpole Willis	Judge of the Court of King's Bench	26 Sept. 1827.

Secretary's Office,
20th June 1828.

(Signed)

SAMUEL P. JARVIS,
Deputy Secretary.

A true Copy.

(Signed)

John Small.

Inclosure, No. 3.

Sir,

York, 17th June 1828.

I have considered the Commands of his Excellency the Lieutenant Governor I have considered the several Questions referred to me by your Letter of this Day, to which as early an Answer as possible is required; and I have perused Mr. Justice Willis's Paper transmitted with your Letter, and containing a Report of Statements publicly made by him on the first Day of the present Term, which have given Occasion to the Reference made to me by his Excellency.

The First Question is, Whether in the Absence of the Chief Justice of the Court of King's Bench from this Province, that Court can be legally holden?

Our Court of King's Bench derives its Existence from the Provincial Statute of 34 Geo. 3. c. 2. By the First Clause of that Statute it is enacted, "That there be constituted and established, and there is thereby constituted and established, a Court of Law, to be called and known by the Name and Style of His Majesty's Court of King's Bench for the Province of Upper Canada, which shall be a Court of Record of Original Jurisdiction; and shall possess all such Powers and Authorities as by the Law of England are incident to a Superior Court of Civil and Criminal Jurisdiction; and may and shall hold Plea in all and all Manner of Actions, Causes, or Suits, as well Criminal as Civil, Real, Personal, and Mixed, arising, happening, or being within the said Province, and may and shall proceed in such Actions, Causes, or Suits, by such Process and Course as shall tend, with Justice and Dispatch, to determine the same; and may and shall hear and determine all Issues of Law; and shall also hear, and by and with an Inquest of good and lawful Men determine, all Issues of Fact that may be joined in any such Action, Cause, or Suit as aforesaid, and Judgment therein give, and Execution thereof award, in as full and ample a Manner as can or may be done in His Majesty's Court of King's Bench, Common Bench, or in Matters which regard the King's Revenue by the Court of Exchequer in England.

"And that His Majesty's Chief Justice in this Province, together with Two Puisné Justices, shall preside in the said Court; which Court shall be holden in a Place certain, that is, in the City, Town, or Place where the Governor or Lieutenant Governor shall usually reside; and until such Place be fixed the said Court shall be holden at the last Place of Meeting of the Legislative Council and Assembly."

The Three next succeeding Clauses are proper to be considered; they are in the following Words:—

"And in order that certain stated Times be fixed for the Sitting of the Court, be it enacted by the Authority aforesaid, That Four Periods of Sessions or Terms be appointed in each Year successively, to be known by the Names of Hilary, Easter, Trinity, and Michaelmas Term; that the Hilary do commence on the Third Monday in January, and end on the Saturday of the ensuing Week; that Easter Term do commence on Monday next after the Sixteenth Day of April, and end on the Saturday of the ensuing Week; that the Trinity Term do commence on the Third Monday in July, and end on the Saturday of the ensuing Week; and that the Michaelmas Term do commence on the first Monday in October, and end on the Saturday next ensuing; and that the first and last Days of every Term, and every alternate Day from the first, not including Sunday, be Return Days.

"Provided always, and be it hereby further enacted, That when the Court shall have good Reason to believe there will not be sufficient Business to require their daily Attendance throughout the Term, they may be at liberty to adjourn the Court on any Return Day to the next immediate Return Day.

"And be it further enacted by the Authority aforesaid, That all Writs to be sued out of the said Court shall issue in the King's Name, and be tested by the Chief Justice, or in his Absence, by the Senior Judge of the Court, and be returnable on some Return Day in Term Time; and that not less than Fifteen Days inclusive shall always intervene between the Teste and Return of the first Process that shall be directed to the Sheriff of the Home District, or the District in which the Court shall be holden, and that not less than

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“ Forty Days inclusive shall always intervene between the Teste and Return of the first Process into every other District.”

The Commissions to the Judges, who are appointed by Patent, issue to them individually; and every Commission which I have seen, authorizes and commands the Judge whom it appoints, “to hold the Court of King’s Bench at such Times and in such Places as the said Court may and ought by Law to be holden.”

I advert to the Terms of the Commission, not under any Impression that they can have an Operation repugnant to the Provisions of the Statute, but because I think it material that the whole Case should be fully placed in View—and because, if the Words of the Statute are such as to leave it uncertain what the Legislature may have meant, which, however, I do not conceive they are, then the Terms of the Commissions which the King has uniformly issued under the Statute, may, I think, very fairly be regarded as of some Importance, and especially if they are found to be in direct Accordance with that Construction which may appear the most sensible.

This Question having presented itself incidentally in answering a Reference made by the Government to the Solicitor General and myself some Months ago, we gave an Opinion upon it, which I beg now to advert to, as shewing the View taken by us of the proper Construction of the Statute of 34 Geo. 3. at a Time when no contrary Opinion had been advanced. It did not seem necessary then to enter minutely into the Question, because it arose indirectly; and as all the Judges, in common with all the rest of Mankind, had invariably given that Construction to the Statute which we adopted, its Correctness was rather assumed than attempted to be proved.

I continue to be of the same Opinion. I think that the Court of King’s Bench in this Province continues to exist, although the Chief Justice be dead or absent from the Province; and that the remaining Judges or Judge of that Court can legally sit in Term, and hold the Court, although the Chief Justice be not present; and I submit these Reasons for my Opinion:—

1st. Although it is an acknowledged Maxim of Law, “that a Statute ought sometimes to have such Construction as is contrary to the Letter; and although a Thing which is within the Letter of the Statute is not within the Statute unless it be within the Intention of the Makers,” I do not consider it necessary, in this Case, to resort to these admitted Rules for the Construction of Acts of Parliament. The legal Operation of the Words on which the Question turns, even considered without reference to the Nature of the Subject to which they are applied, and without reference to any other Part of the Statute, or to any subsequent Statute, is not in my Opinion at variance with the Construction which they have invariably received.

“To preside” is, according to Dr. Johnson, “to be set over”—it is by other Compilers stated to mean the same Thing as to “superintend, to manage.” A President is defined to be “one placed with Authority over others;” “one at the Head of others.” The Word has no express Reference to the actual Presence of the Object. “*Præsens*” and “*Præsidens*” I take to be very distinct in their Signification, as they are in their Derivation; and the Latin Verb “*præsideo*” is thus rendered, “to have the Management, Care, Government, or Charge of.” When, therefore, it is declared that “His Majesty’s Chief Justice of this Province, together with Two Puisné Justices, shall *preside* in the said Court,”—looking at no other Part of the Act, and setting aside every Argument *ab inconvenienti* that must attend any other Construction, I understand it to be meant that the Court is to consist of Three Judges—that over the Officers of the Court, and over the Court generally, there shall preside a Chief Justice and Two Puisné Judges. I look upon the Statute as a Warrant and Instruction for the Appointment of so many and such Judges, not perhaps limiting the Number, so that more cannot be appointed, (that need not now be discussed); but as providing for an Establishment of Judges to that Extent—an Establishment, like all others, subject to Casualties—and leaving it to be inferred from the remaining Provisions of the Act, or to be settled by Practice, or, more naturally and obviously, by the known Principles which govern the Proceedings of similar Courts, whether the Presence of all, or of a Majority of the Judges thus appointed “to *preside*,” shall be necessary to the Performance

formance of any Act of the Court, or whether One alone, in the Absence of others, is not necessarily invested with the Authority of the Court.

There is a "Court of King's Bench"—a Court of *Record of Original Jurisdiction*" always existing in the Province, although its Sittings are confined to certain Terms. In this Court, or over this Court, (for I consider the one Proposition so used to have the same Meaning as the other,) a Chief Justice and Two Puisné Judges preside—that is, "*usually preside.*" It is not necessary, in my Opinion, that in the Hall in which they are to sit, they must all be present. No Clause of this or of any other Statute enacts *that* in Terms; every Argument of Inconvenience, and many Arguments *ex absurdo*, would apply against such a Construction; and there is accordingly, as I shall presently shew, clear enough Evidence to be found, in more than One of our Statutes, that the Legislature never intended it, but that they certainly thought and meant otherwise. The Error, as I conceive it, of such a Construction arises from the attaching to the Word "Court" no other Idea than that of a substantial visible Court, occupying its Hall or Apartment; in considering the Word as used solely with reference to the "*Court being in actual Session.*" But I conceive that a Person is a Judge of the Court of King's Bench, and may, with perfect Accuracy, be said to be a Judge "*in the Court of King's Bench*" in this Province, while he is confined to his Room by Illness, or is absent from the Country on Leave; and as much so as if he were on the Bench in the Discharge of his Duty. So a Man is said to be "*in the Privy Council*" who may never have been in the Council Chamber, or a Captain in a Regiment which he has never joined, or from which he is absent on Leave. Both ordinary and legal Phraseology warrant this Construction. With respect to Boards and Bodies of various Kinds, numerous Instances might be produced of such an Application of the Term.

In legal Proceedings a Man is said to be "*in Court*" when he has been served with the Process of the Court, and is regarded as being "*in Court*" for the Purpose of moving or being moved against—not that he has necessarily been, or that he must be, within the Walls of the Court while it is sitting, but he is in that Court which is created by the Act of Parliament—which is manifested by the Commission to the Judges, and by their Proceedings, and which does not die, and revive, as often as any individual Judge in it vacates his Seat, and another is appointed. The Court exists by Commission, independently of any Building or Hall in which it discharges its Functions.

A President of a Court or Council is the Person "*who presides in*" such Court or Council. I think the Substantive is strictly reducible into the very Words under Consideration. The Chief Justice "*presides in*" the Executive Council, *ex officio*, in the Absence of the Lieutenant Governor; but though he may be absent, there is a Council, and without the Person appointed to preside in it. It presides nevertheless in the Council, in my Understanding of the Term, at the very Moment that from his Illness or Absence the senior Member of the Board presides of Necessity at any particular Sitting.

I submit, that if any Stranger should enter the Court of King's Bench during Term Time, and ask a By-stander "who presided in that Court?" he might, consistently with the just and common Understanding of Words, be told that the Chief Justice of the Province *presided in it*, but that he was not *then present*. I conceive that a Person may preside in a Court without presiding in every Session of that Court.

The Expression, "*shall preside in the Court,*" is to be understood in the common Acceptation of the Words. It is not a legal or technical Phrase which has a certain known Meaning necessarily attached to it, and it is in its most ordinary Sense that the Legislature must be supposed to have used it. If we give to Expressions of similar Import such a Construction as would make them refer only to the actual Sitting of the Court, and to take them in that Sense strictly, we shall find that the most respectable Writers upon the Constitution of the Courts in England misrepresent them, as in this Respect, subject to Restrictions and Conditions which they certainly are not subject to. For instance, a Writer on the Court of King's Bench says, "the Judges of the King's Bench are composed of the Lord Chief Justice of England and Three Puisné Judges, *all of whom sit*, in that Part of Westminster Hall

“ known by the Name of the Court of King’s Bench, every Day in the Four
“ Terms.”

Now it is so notorious that *all* the Judges do *not sit every Day in Term*, (the Illness and Absence of one or more of them frequently preventing,) that the Author can but have meant that they may sit — that they are “ appointed to “ sit,” or, as our Statute has it, “ to preside in the Court.” I cite this merely to shew the Sense in which such Language is used. Mr. Justice Blackstone uses precisely the same Words in describing the Court of Common Pleas.

If the Words, “ preside in the said Court,” are not so frequently used in the Constitution of Courts, as the Expression “ that the Court shall consist,” or “ be composed of,” &c. I shall be able, I think, to shew very satisfactorily that they were not used by the Legislature in order to produce a different Effect; and, in the meantime, I will add that I think their Introduction is rationally accounted for, by observing, that the Court *consists* of other Officers besides the Judges. The Judges are Officers of the Court; so are the Sheriffs; so are the Clerks; so are various other Persons attached to it. These latter, however, do not *preside in the Court*. The Judges do; and the Expression I understand to have been applied to the Judges in that Sense, and without particular Reference to their actual Sitting in Term, any more than to their acting either collectively or singly in Vacation.

I will not insist further upon the Meaning to be imputed to the Words abstractedly, though many other Arguments on that Point occur to me, because I feel that the Question has been set at rest, not merely by the concurring Practice of all the Judges who have presided in the Court, but by the declared Sense of the Legislature; and indeed I have only said thus much on this Point, because I think it satisfactory, in a Matter so important, to shew that the Construction invariably given to the Language of the Statute is not repugnant to the Letter, but is strictly consistent with the common Understanding and fair Meaning of the Words themselves.

If we take a more comprehensive View of the Question, I think it clear that the Words, “ preside in the Court,” are capable of no other Construction than I have given to them — when we consider *the Nature of the Object to which they are applied*, and when we look at *other Clauses* of the same Statute, and at *other Statutes expressly relating to the Court*.

The Practice and Proceedings and the Powers of the Court are all similar to those of the King’s Bench in England. It is surely not consistent with the Nature of a Court, constituted with the Powers and for the Purposes expressly assigned to this Court in the very Clause in which the Words occur, namely, for the “ *regular*” as well as “ the general Administration of Justice,” that it should never be certain whether there will be a Court on any Return Day in Term, — never be certain that an Argument can be heard to the End, or a Cause tried even after it is begun. I have known, a few Years ago, a Trial at Bar in Ejectment for a large Property in a remote District; the Special Jury were necessarily brought from that District; the Trial lasted from an early Hour of one Day to Three o’Clock in the Morning of the next. If one of the Judges, overcome by the Exertion, had expired in a Fit upon the Bench — and the Effect of such a Casualty had been to annihilate the Court, and so effectually as to prevent even the Power of Adjournment, (for that is now expressly affirmed,) — then the Jurors must have been allowed to walk out of the Box, and separate to their Homes, and the Case must have ended in a general Dispersion, without Authority, of Parties, Judges, Officers, and all.

Again, by Law and the Practice of the Court, a Party complaining of an illegal Verdict has the first Four Days of the following Term in which to move: he unluckily, perhaps unavoidably, defers it to the last; a Judge is ill on that Day, and cannot attend in his Place; there is no Court, it is said, and he cannot move; for it is impossible, if a new Commission were required whenever a Judge is absent or ill, that it can always be completed and issued on the Instant: the next Day his Adversary enters up his Judgment before or after the Hour for the Meeting of the Court, and without enquiring whether the Judge was well or ill, or whether he would be or was absent or present on the Bench. He does *his* Act in the Office of the Court, which is always in
existence.

existence, but in which, by the way, no Business of any kind ought to be transacted if there is no longer a Court.

And indeed I am at a Loss to understand how the ordinary Chamber Business of the Judges could be legally transacted at a Time when, by the Absence of the Chief Justice, (admitting the Absence to have that Effect,) there is no longer a Court—since, clearly it is only as a Judge of the Court of King's Bench, and in that Court supposed to be always existing, that any Proceeding in a Cause can take place before him, either in Vacation or in Term.

At this Moment there are, doubtless, in the several Gaols of this Province, Prisoners in custody for Debt upon Process of the Court of King's Bench. It is utterly repugnant to suppose that they can be held in custody under the Authority of the Court of King's Bench, and yet that, if from Defect or Irregularity in the Process, they are irregularly confined, there is, by reason of the Absence of One Judge, no Court which can grant them Redress, and that even in a Term appointed by Law for the Sitting of the Court.

This would lead to the Absurdity, that Acts which, *out of Court*, One Judge in Vacation can do, and must do, *Two Judges* cannot do *in Court*.

Again, it is a Principle that no Man can be a Judge in his own Case; and I can hardly suppose it will be thought that the Legislature, taking the English Courts evidently for their Model, intended absolutely to exclude from the Means of Redress, for the most ordinary as well as the greatest Injuries to Person or Property, all the Judges of our Court of King's Bench. A Judge, it has been decided, cannot legally form One of a Court sitting in Judgment upon a Case in which he is a Party; but then, if for that Reason he must withdraw, he would, according to the Construction lately advanced, leave in this Province no Court capable of acting, and consequently must be without Remedy.

If the Words of the Statute were (contrary to Reason, and, as I think, to their common Acceptation,) to be so construed as to render inevitable a Dissolution of the Court, or to disable it from sitting in Term, whenever Death or Absence diminished the Number of the Judges, then the Legislature will be found to have created many Absurdities by their Provisions, and then also it will be seen that the Judges must be incurring the Risk of producing Evil and Inconvenience by almost every Act done by them in Vacation.

When an Insolvent Debtor is entitled to his Discharge from Custody by reason of Failure in paying him the weekly Allowance, it is directed by the Statute of 1822, that he shall be discharged by the Court *in Term Time*, or by a Judge *in Vacation*: it is clear then that a single Judge cannot discharge him during Term; yet surely the Legislature can never be supposed to have intended that the Chief Justice and One Judge, or that Two Judges should be unable, in a Term appointed by Law for the regular Transaction of the Business of the Court, to do that, even in favour of the Liberty of the Subject, which One Judge may do in Vacation.

Again, by a Provincial Statute passed in the Year 1797, a dilatory Plea may be argued before a Judge *in Vacation*, to prevent vexatious Delays; but it would seem a strange Inconsistency if, from the Chief Justice being ill or absent in the Term in which it is set down for Argument, as the Statute directs, Two Judges could not hear and determine it, and yet clearly their Right to sit as a Court for that Purpose must depend upon the same Construction as their Right to sit for all other Purposes. It seems quite clear that if we are to adopt the Conclusion, that there is not a Court of King's Bench capable of discharging its Functions in Term, there can be no legal Court of King's Bench existing in the Province; for surely nothing could be more absurd and repugnant than to hold that a Court exists for the Purpose of enabling Judges to do Acts individually in their Chambers, which, if erroneous, could only be redressed in Term Time; and yet, to deny that the same Judge associated with another Judge can in Term Time grant that Remedy, or do any other Act. One Judge in Vacation may, in case of Tort or unliquidated Damages, grant an Order to hold to Bail; he may chance to do this on an insufficient Affidavit; but if, in the ensuing Term, the unavoidable

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able Absence of a single Judge disables the Court from proceeding, there is no Opportunity of relieving the Defendant from Custody.

Upon what Principle it is that the Judges transact much of the Business of the Court out of Term is very clearly explained in the Case of *Rex v. Almon*, in Lord Chief Justice Wilmot's Arguments and Opinions, which confirms, in several Points, the View I have taken of the Question submitted to me. There would indeed be no End to the Contradictions, the Absurdities, and Mischiefs, that we must be exposed to, if the 34th Geo. 3. is to have any other Construction than that which has been always hitherto given, and it is unnecessary to multiply Instances; at the same Time I am ready to admit that the Force of Arguments drawn from Consequences has its Limit, and that a Legislature might, in its Folly, use Terms which would admit only of a Construction such as is contended for. What I mean to state is, that a Court would with extreme Reluctance adopt a Construction which must involve them in such Absurdities, and would gladly and readily rescue themselves from it by finding in other Parts of the Statute, or in subsequent Statutes, Expressions and Provisions which shew the Meaning of the Legislature to have been sensible and rational, though apparently repugnant to the Letter.

Such Helps and Guides to the Construction are certainly at Hand in our Statute Book. The Provision in the 4th Clause of the same Act can, in my Opinion, be reconciled with no other Construction than that hitherto acted upon. The Writs, by the Course and Practice of the Court, and upon every Principle which governs its Proceedings, bear *Teste in Term*. They are supposed to be awarded by the Court while sitting, and it is for that Reason they do bear *Teste in Term*; but the 4th Clause referred to expressly provides, that in the Absence of the Chief Justice they shall be tested by the Senior Judge of the Court. This Provision, therefore, evidently supposes that the Court may be sitting in Term without a Chief Justice; and, in declaring how the Writs shall be tested, it has regard to that probable Occurrence, and guards against an Exception which might have lain if it had declared that the Writs should be tested by the Chief Justice. To have provided that the Names of all the Judges should be used, would have been inconvenient; to have required that the Name of the Chief Justice should be used, when there might for a Time be none in the Province, would have been leaving the Provision imperfect; and the Act, therefore, prudently provides, that where the Chief Justice's Name would be used when there is a Chief Justice, that of the Senior *Puisné* Judge may be used when there is not.

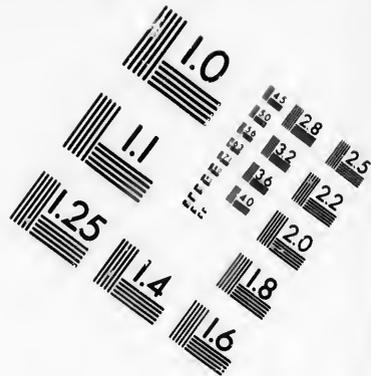
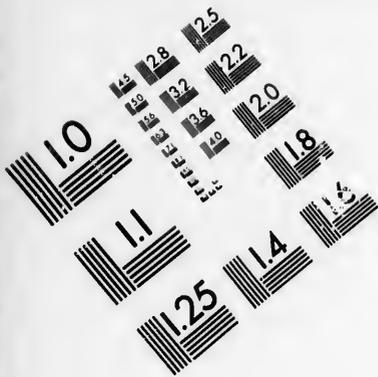
But it may and has been objected that the inserting this Provision shews that the Legislature intended to authorize this one Act, and this *only* to be done in the Absence of the Chief Justice. It would, however, serve to little Purpose to authorize a Writ to issue under Circumstances that would permit of no Proceeding beyond it.

There can be no Chasm in legal Proceedings; and if, when the Writ is made returnable, which the 4th Clause declares must be in Term Time, there should be no Court that could legally sit, the Proceedings must unavoidably be discontinued.

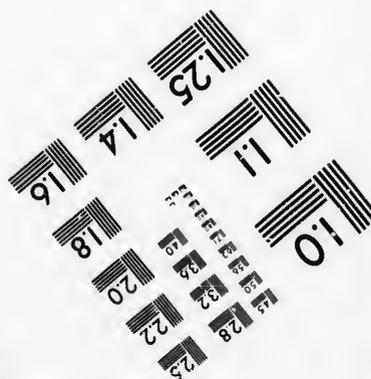
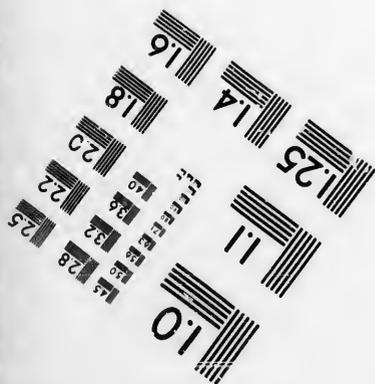
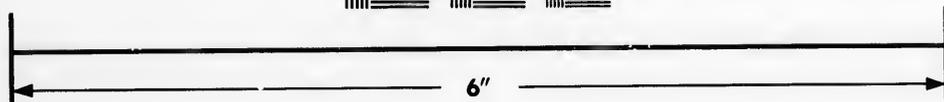
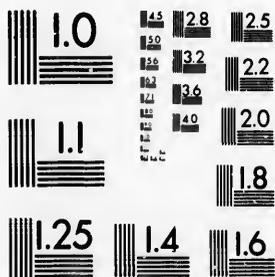
The Necessity for declaring how the Writ should be tested here arose from the Fact, that in England the original Process emanates from Chancery; the Similarity, therefore, intended to be established between the Two Courts failed in the first Step, and it was felt to be necessary to provide expressly for the Object, this was done by declaring that the Writ should be tested in the Name of the Chief Justice, or, in *his Absence*, (and the Writ is necessarily tested in Term,) by the Senior Judge.

Again, the 19th Section of the same Provincial Statute, 34 Geo. 3., provides, that "upon all Issues joined in the said Court, in any Suit or Action which shall arise or be triable within the Home District, or in the District where the Court shall be holden, the *Chief Justice*, or, in *his Absence*, any other *Judge* of the said Court, shall, as Justice of *Nisi Prius* for the said District, at their Discretion, either in *Term Time* or within Ten Days next after the End of every Easter and Trinity Term respectively, try all manner of Issues joined in the said Court which ought to be tried by Inquest of the said District, and that Commissions and Writs of *Nisi Prius* shall be for





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“ that Purpose from Time to Time awarded; and it shall and may be lawful
 “ for any Person or Persons upon reasonable Notice, as herein-after set forth,
 “ given to the adverse Party, or their Attorney, to take and sue forth such
 “ Writs and Records of Nisi Prius as may be necessary for the Trial of such
 “ Issues as aforesaid.”

Here, again, is evidently contemplated the possible Occurrence of the Chief Justice being absent in Term Time, and Provision is expressly made for the Contingency.

The 37 Geo. 3. cap. 9. provides, that “ all Commissions of Assize and Nisi Prius shall be issued after the Terms of Hilary and Trinity respectively, and shall be tested on the last Day of each of those Terms; and the Chief Justice, or any other Judge of the said Court *in his Absence*, shall, as Judges of Assize and Nisi Prius, issue his Precept to the Sheriff of the said District, for the summoning of Jurors for the trying of all such Issues as may be joined in the said Court, and arise and be triable in the said District, as by Law he is authorized to do, so that the same may be in no Instance holden sooner than Eight Days from the End of Hilary and Trinity Terms respectively.”

Both the Language and the Nature of this Provision appear to me to shew that the Legislature contemplated in this Statute also the possible Occurrence of the Absence of the Chief Justice in Term.

The 43 Geo. 3. cap. 3. was passed for enabling the Government, in the early Settlement of this Province, to admit Persons by Licences to practise as Attornies who had not served a legal Apprenticeship. The Second Clause enacts, “ that before any Person shall apply to the Governor, Lieutenant Governor, or Person administering the Government of this Province, for such Licence as aforesaid, such Person shall apply to the Judges of His Majesty’s Court of King’s Bench, and shall procure *from that Court* a Certificate, under the Hand of the Chief Justice, or, *in his Absence*, of the Senior Puisné Judge of the said Court, that such Court is satisfied of the Ability and Fitness of the Party so applying to be admitted to practise as a Barrister and Attorney in this Province.”

Though from the first Part of the Clause it may seem that the Examination of the Applicant may take place before the Judges out of Court, it is from the Court of King’s Bench he is to receive his Certificate, and that Certificate obtained *from the Court* is to be under the Hand of the Chief Justice, or, *in his Absence*, (that is, *Absence from the Court*,) of the Senior Puisné Judge.

In the same Year (1803) another Statute was passed, so perfectly declaratory of the Sense of the Legislature on the Point now in question, that I annex a Copy of it. It was passed for enabling Married Women to convey their Real Estates, and is carefully framed, keeping distinctly in View the different Courts through whose Intervention the Conveyance is to be perfected. The Third Clause evidently provides for the Probability that when the married Woman shall present herself to the Court sitting in Term, (as married Women for a similar Purpose present themselves in the Court of Common Pleas in England,) she may find the Chief Justice absent; and renders sufficient in that Case the Certificate of the Senior Puisné Judge. For this Certificate a Fee is to be paid to the Clerk of the Crown, who only sits in open Court in the Court of King’s Bench in Term Time; and yet it is maintained, that without a Chief Justice there can be no such Court sitting, and that the other Two Judges have not even the Power of adjourning. The Legislature could scarcely have meant to direct Recourse to be had to a Court so constituted that it could not sit; for it is to be remembered that the Act does not authorize *Two Judges* in Term Time, or the Senior Judge, to take the Examination, &c. but directs that the Married Woman is to appear “ in open Court in the Court of King’s Bench,” and directs what shall be done if she finds the Court of King’s Bench sitting in Term Time as an open Court without the Chief Justice.

The 57 Geo. 3. cap. 9. enacts, “ that when any Session of Oyer and Terminer and Gaol Delivery for the Home District shall have been begun to be holden before the First Day of any Term, the said Session shall continue to be holden, and the Business thereof finally concluded, notwithstanding the sitting of His Majesty’s Court of King’s Bench within the said District; and that all Trials and Proceedings as well as Judgments had, at

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“ such Session continued to be holden, shall be good and effectual to all Intent and Purposes as if the said Session of the Court of King’s Bench had not been.”

The Judges of the King’s Bench in this Province are all of them included in every Commission of Oyer and Terminer, and are of the Quorum in the Commissions. The Criminal Court in the Home District, therefore, could not be sitting simultaneously with the King’s Bench (which the Statute was meant to provide for) without the Absence of some One Judge from the latter Court.

I assume the reasonable Construction of the Act to be, that *both* Courts were to be enabled to sit within the ordinary Business Hours of the Day.

In 1823 an Act was passed in this Province to provide for the Publication of the Reports of the Decisions of the Court of King’s Bench, and it enacts, that the Reports taken by the Public Reporter shall, after Examination by the whole Court, be signed in open Court *by all the Judges present*; an Expression which, I think, clearly implies, that the Court may be openly sitting as a Court without all the Judges being present; and the Words “*whole Court*,” which precede, cannot consistently with this Expression mean any thing else than the “*whole of the Court or of the Judges present*.”

I think these References sufficient to shew what the Legislature intended, and that they leave little Room for Doubt, when it is considered on the other hand that not one Provision in any one Statute can be adduced in Confirmation of the Construction, that without a Chief Justice and Two Judges there can be no Court. Were the Law now so, a Necessity would exist for instant legislative Provisions for preventing a total Failure of Justice; and had the Legislature intended to use the Words in that Sense at the Time, or so understood them afterwards, they must have felt the Necessity of applying some Remedies for the Confusion which must inevitably occur.

That they have not done so, nor have ever been moved to do so, is the strongest Evidence of the prevailing Sense of Mankind that no such Necessity exists.

But the Legislature, though the best Expounders, are not the only Expounders of their own Statutes; and perhaps there never was an Instance of the Sense in which the Legislature seems to have intended their Act to be taken, being supported by a more constant and uniform Adherence to the same Construction by those appointed to carry each Act into Effect.

Lord Coke says, “ great Regard ought, in construing a Statute, to be paid to the Construction which the Sages of the Law, who lived at the Time or soon after it was made, put upon it, because they were best able to judge of the Intention of the Makers. It is moreover a Maxim that *contemporanea e. positio est fortissima in lege*.”

It is a Fact very notorious, and even capable now of being legally proved, that the Act of 1794, in which is contained the Expression that “ a Chief Justice and Two Puisné Judges shall preside ” in the Court of King’s Bench, was framed by the late Mr. Osgoode, at that Time Chief Justice of this Province, and a Member of the Legislative Council, into which Branch of the Legislature he introduced the Bill. Mr. Osgoode was an English Barrister well known to Men of great Eminence at the Bar and on the Bench, and himself a Man of high professional Attainments; of his profound Knowledge of his Profession he had given Proof before he came to this Country. To him the Task was expressly committed by His Majesty’s Government, of organizing the Judicature of this Province; and not many Years before his Death, I believe, he was selected in England for a similar Public Service in Guernsey or Jersey.

He was the first to act under the Statute he had framed; and during the Time he remained here, he never, as I believe, *sat on the Bench* together with Two Puisné Judges: I do not know what stronger Evidence could be given of the *contemporanea expositio* spoken of by Lord Coke as “*fortissima in lege*,” — or who could better judge of the Intention of the Makers of this Statute than Mr. Osgoode, who framed it and assisted in passing it.

After Mr. Osgoode’s Time the Court was more frequently not full than full; Casualties, against which it was impossible to provide, frequently occasioned

sioned this. Mr. Elmsley and Mr. Powell sat alone in Bank; Mr. Scott and Mr. Thorpe; Mr. Scott and Mr. Powell for several Years, I think from 1807 to 1811; Mr. Powell and Mr. Campbell; Mr. Campbell and Mr. Boulton; Mr. Sherwood and Mr. Willis sat alone during the whole of the last Term; and from the Indisposition of one or other of the Judges it has frequently happened, even when there were Three Judges in the Province, that on some Day in Term they could not all be present.

It seems to me that this concurring Practice of all the Judges must be deemed, in a Case of this Description, fully equivalent to an express Declaration of their Opinion; for although, under a trite Maxim, it is held that some Errors or Irregularities are not cured by Usage, as they may have been passed in Silence and unobserved, it never can be supposed that the Court and Judges of the Court have been for ever inattentive to the Provisions of the Statute which creates their Jurisdiction and under which they sit; and that they never reflected upon the Effect of a Removal of a Judge, by Death or otherwise, on the Constitution of the Court. Questions have been argued, and solemn Judgments have been given, in Cases in which a Chief Justice of the Court, or a Puisné Judge, was a Party on the Record, and therefore withdrew from the Bench; and it cannot be assumed that the direct Illegality of such a Proceeding, (if they gave to the Statute the Construction alluded to,) could have escaped their Attention.

If the Construction uniformly given by the Judges of the Land to the Words of a Statute, even when that Construction is supported, as in the present Case, by the Reason of the Common Law, by the Necessity of the Case, and by the general Nature of the Provisions contained in the same Act, and in others relating to the same Object,—I say, if a Construction thus uniformly acted upon, and thus confirmed, is not to be considered as settled, but may be overturned by any succeeding Judge, there is no longer Certainty or Safety in the Law. There are many Cases in which the Judges will be found to have held themselves rigidly bound by the Construction which their Predecessors have given to a Statute, and which has in consequence been acted upon for a long Series of Years, even although such a Construction appeared not the most obvious; and, while adopting it as Law too firmly settled to be shaken, the most learned and venerable Judges have declared their Disapprobation of the Construction, and their Inclination to have adhered to the Letter of the Statute, if the Question could now have been considered open. The Exceptions which, contrary to the Letter of the Statute, are allowed to prevail against the Statute of Limitations, so as almost wholly to defeat it; the Constructions of the Statutes of Frauds, which dispense with Production of Evidence in Writing, when the Words of the Statute require it; and many other Cases of the same Kind, might be readily cited: even in Criminal Cases the Construction given by former Judges to positive Statutes is adopted and acted upon, though apparently at Variance with the express Words.

It has been declared by very high Authority that the Footing on which the System of Conveyance by Lease and Release is maintained is exceedingly doubtful; but, it is added very emphatically, that the Courts would not now suffer a Question to be raised which would disturb a great Portion of the Landed Estates in the Kingdom.

There can be no Question that if all those Proceedings have been invalid, which have taken place in the Court of King's Bench without the Presence of a Chief Justice and Two Judges, a very great Proportion of the Property in this Province, Real and Personal, has been illegally transferred, under Executions upon void Judgments. An Infinity of Actions might be sustained for Acts done in accordance with the uniform Practice of the Court; and a Scene of Confusion would ensue, of which the Extent cannot be foreseen. Serjeant Hawkins (book 1st, ch. 17. s. 39.) says, "that in doubtful Cases the Reason of the Common Law ought to govern the Construction of the Statute."

The Power of construing a Statute (says Bacon in his Abridgment, title Statutes,) "is in the Judges, who have Authority over all Laws, and more especially over Statutes, to mould them according to Reason and Convenience, to the best and truest Use," &c. Plowden, 109.

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Among the Rules for construing Statutes, given by the best Authorities, it is laid down, "that the most natural and genuine Way of construing a Statute is, to construe one Part by another Part of the same Statute, for this best expresseth the Meaning of the Makers."

"Such a Construction ought to be put on a Statute as may best answer the Intention which the Makers had in view; for *qui hæret in literâ hæret in cortice.*" 11 Reports, 73. Plowden, 57.

"Every Statute ought to be construed for the preventing Delay as much as possible."

The Act professes to create a Court for the "regular Administration" of Justice.—It does in Terms create one as similar to the Court of King's Bench as Circumstances will permit, and evidently intended to resemble it in Principle and Practice.

I think neither the Words of the Statute nor the Reason of the Common Law favour the Construction recently advanced, but that both are entirely consistent with the Manner in which the Statute has been ever acted upon. Other Provisions of the same Statute, and other Statutes in pari materia, require clearly the former Construction; and the unvarying Usage of the Court, comprehending the Practice of Mr. Justice Willis, no less than of every preceding Judge, I consider to have put the Question beyond the Reach of Doubt.

Since the Opinion of Mr. Justice Willis, publicly announced, and reduced to Writing, has been submitted to me, I will consider what appears in it to enforce the Necessity of departing from the former Construction of the Statute. As to the Inconvenience of the Want of a casting Voice, and the marked Stress laid upon a Reason given for a former Number of Judges in the King's Bench in England, namely, *the Benefit of a casting Voice in case of Difference of Opinion*, it is to be observed, that in the Common Law Courts in England they have long preserved, and at this Day preserve, an even Number of Judges; that they are not unfrequently divided in Opinion; and that even when Five or Nine Judges presided, the Illness, or Absence from other Cause, of One Judge, left the Court exposed to this Inconvenience, but was no Argument against the Existence of the Court; and it can hardly escape Attention that when in later Times a Fifth Judge has been sometimes appointed "*in consequence of the Indisposition of One of the Four,*" as has been mentioned, such Appointment must have had the very Effect of giving the Number deprecatèd.

With respect to any Argument drawn from the Writ of "*Si non omnes,*" which accompanies the Circuit Commissions, it is to be observed, that to assume that every Provision in an Act of Parliament, or every Commission or Writ, or Clause in a Commission or Writ, is of absolute Necessity, is a very unsafe Principle to argue upon; since, from great Caution many Things are done to prevent Questions arising, which, if they had arisen, would probably not have resulted in a Decision that such Precaution was necessary. But on reference to the 13 Ed. 1. ch. 30. it will, I think, be seen very clearly, that no Argument can be drawn from it. That Statute provides, that "Two Justices should be assigned, before whom, and no other, *Assizes, &c. shall be taken*; and they shall *associate unto them One or Two of the discreetest Knights, and shall take the aforesaid Assizes.*" They are appointed pro hac vice, and have Authority to do a particular Act. They do not, like the Court of King's Bench, form a Court which it is necessary should be always in existence. No perpetual Jurisdiction is constituted; no Court with a distinct Name, and various Functions; but it is merely provided that certain Persons may be assigned to do certain Acts.

It is pretty clear, however, that independently of this obvious Distinction, no very satisfactory Argument can be drawn from the present Usage of issuing Writs of *Si non omnes*; since we are told that they were not generally used 'till 1722, more than Four hundred Years after the Statute of Edw. 1. was passed, which is assumed to render such Writs necessary. That whatever was done in the meantime was void for Want of them, will not probably be contended.

With respect to the 18 Eliz. ch. 18., and 12 Geo. 1., amending it, from which it is inferred that, without a corresponding Amendment of our Act, the Presence of all the Judges cannot be dispensed with, it is only necessary, I think, to read the Statutes, to be convinced that there is no Resemblance in the Two Cases.

By the Statute of Elizabeth, the Chief Justice of the King's Bench, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, are empowered at a certain Time and Place to try Issues proceeding from their respective Courts; and it is provided in as many Words, that "in case any one of them be absent, Two Justices of the same Court may discharge the same Duty." Here, also, no continuing Court or Jurisdiction is created; but certain Individuals have Power to do a specific Act. In the same Manner summary Jurisdiction is, under many Penal Statutes, committed in certain Cases to Two Magistrates; it never was conceived that One Justice could execute the Power in these Cases; nor if the Statute had enacted, that all the Judges sitting together "might arrest a Judgment," or that the "Chief Justice and One Judge might grant a new Trial," would it ever have been conceived that these specific Acts could have been done in any other Manner.

With respect to the Sentiments ascribed to Sir Charles Wetherall in a Debate in Parliament, I know not what Argument can be built upon them, unless we are to suppose, which I do not, that he intended to be so literally taken as that we should conceive him to maintain that no Judgment ought to be given in the King's Bench unless in the Presence of the Chief Justice. He spoke evidently of the Chief Justice's frequent Detention by other Duties; and could hardly affirm, that if the Chief Justice were dead, or ill, or inevitably absent, it would be expedient that the whole Business of the Court should stop, rather than the remaining Majority of the Judges should proceed. With respect to the *Locality* of the Court, although much is said upon it, no Conclusion is expressed; but I presume it was not adverted to unless for some Purpose. The Statutes cited as creating parallel Cases, certainly, in my Opinion, have a very distant and unimportant Bearing upon the Question; they are absolute and unqualified in their Provisions. *Our Statute of 1794* is altogether in different Terms. When that Statute was passed, Newark was the Seat of the Provincial Government, but it was in Contemplation to appoint another Place:—that has since been formally done. If "any Place can be said to be fixed upon" as the usual Place of Residence for the Governor, it is certainly the "Town of York," in which the Court has been holden, I believe, since the Year 1797; at least I venture to say no Act of Government or the Legislature can be produced "fixing upon any other Place."

If no Place has been fixed upon, then, by the very Terms of the Statute, the Court must be holden at the last Place of the Meeting of the Legislature, which York undoubtedly is, and has been for these Thirty Years; but besides that the Statute of 1794 makes this Provision, there are several Legislative Enactments recognizing the Home District as that in which the Court of King's Bench is holden. With regard to the supposed Cases of Hardship occurring in this Province, from the Circumstance that Appeals are limited to Cases in which the Matter in controversy shall exceed £100, I cannot avoid remarking, that the Hardship is not correctly illustrated by reference to Cases of "erroneous or imperfect Verdicts at Nisi Prius, with which one of the Judges or one of the Parties may be satisfied, though others may not be." The Remedy of a new Trial lies strictly and exclusively in the Breast of the Court from whence the Issue proceeded; and if in England the Court should be equally divided upon such an Application, as they not unfrequently have been, the Parties would be precisely in the same Situation as in this Country, and a Writ of Error would give no Aid.

Other Cases may indeed occur in which Diversity of Opinion upon Matters assignable for Error might produce Inconveniences here, for which we have not a suitable Remedy. In England, the Judges sometimes, when they differ in Opinion, concur formally in their Judgment, in order that one Party may (if the Matter be such that Error can be assigned) bring his Writ of Error, and apply to a higher Court. It is true that here, unless the Case amounted to

£100 in Value, or affected some continuing Right, &c., no Appeal would lie from such Judgment; but if that be an Evil, it rests with the Legislature to remedy it, by constituting a Court of Error to revise the legal Judgments of the Court of King's Bench in all Cases; and another Remedy would be found, to a great Extent, in that earnest and studious Desire in the Judges to reconcile their Opinions, and arrive, from Conviction, at the same Conclusion, which is so admirably assigned by Lord Mansfield as the Reason of that Unanimity of Judgment that was for so many Years exhibited in the Court of King's Bench. I cannot conceive that an Inconvenience of this Kind sometimes occurring is, either in Law or in Reason, an Argument for so constraining the Statute of 1794, as to occasion every now and then a Discontinuance of all the Proceedings in the Court, and to produce a total Failure of Justice.

The Statutes of 31 Edw. 3. c. 12. and 27 Eliz. c. 8. seem to be much relied on; but I confess they appear to me, for the Reasons I have stated, to be wholly inapplicable, and very clearly so. The first Statute gives a Power to certain Officers named, taking to them the Justices, &c., "to examine "erroneous Judgments given in the Exchequer." Here again there is constituted no Court of Original Jurisdiction, affording the only Redress for the most ordinary Wrongs, and the only Means of Decision in most of the Cases litigated between Party and Party; a Court which, from its Nature, must be always in existence and always in operation. Certain Officers have Power to do a certain Act in a certain Manner; such a Provision is, in Principle, not unlike the Enactment which gives Power to an Officer of Customs, *taking with him a Peace Officer*, to enter a House in the Day-time, and search for uncustomed Goods. If the Officer, affecting to proceed under this Statute, should go *without* a Peace Officer, and in the Night-time instead of the Day, he would be acting in violation of the Statute, and not in accordance with it. The Distinction in my Opinion is, that by the Statute of 31 Edw. 3. c. 12. the Direction of Parliament, the operative Words of the Statute are applied to the Manner in which a specific Power shall be exercised by Individuals to whom it is committed. By our Statute of 1794 a Court of Record of Original Jurisdiction is constituted, which is required to be in constant Exercise; and although a Chief Justice and Two Judges are appointed to preside in that Court, that is, *are assigned to it*, it does not therefore follow that, spite of Death and Casualty of all Kinds, such a Number of Judges must be always together when the Court is acting. To me the Distinction appears obvious and reasonable.

The Statute of 18 Eliz. c. 8., besides that the above Remarks apply to it, seems to me rather to afford an Argument against the Purpose for which it is cited; for there Parliament seems to have felt it necessary, after reposing the Power of amending Errors in many collectively, to add the Restriction that *Six at the least* should exercise it.

The Statute 3 Hen. 7. c. 1. is so strictly framed, as really to bear no Point of Comparison with our Statute. Its Language admits but of One Construction; and no more Doubt can exist upon it than upon the Power of trying a Cause or a Prisoner without the Presence of any of the Commissioners who are expressly assigned to be of the Quorum upon such Trial. The same may be said of the Statutes 31 Eliz. and 16 Car. 2. and 20 Car. 2., which have been cited. It is but necessary to read and compare them with the Statute under Discussion, and the Difference, which appears to me decisive, will present itself at once. The same may be said of the Instance referred to of Bankrupt Commissions, which it is declared by Statute shall not be executed in the Country, unless he who is called the Quorum Commissioner be a Barrister. It would not endanger the Existence of the Court of King's Bench to admit here, that if the Statute of 1794 had contained a Clause declaring that no *Judgment should be given* unless the Chief Justice were present, or unless one of the Judges were an English Barrister, such Provision would be strictly binding.

The Statute of Lower Canada, 34 Geo. 3. c. 6., which has also been referred to in support of the same Train of Argument, stands on the very same Footing. I have read it; its Language admits of but One Construction. A similar

similar Provision in our early Statutes, respecting the holding the Sittings in this District, though in Terms much less particular, was conceived to require the same Construction, or, at least, to occasion Doubt; and it was accordingly altered by the late Act.

Upon our Statute of 1794 I have already remarked, except in relation to that Part of it which provides that the Chief Justice shall join in the Appointment of Commissioners to take Bail, &c. Many Appointments in the King's Bench in England rest exclusively with the Chief Justice; and whether the Legislature meant to respect any Right of Patronage, or to provide for discreet Appointments, does not appear; but I do not see what can be inferred as to the general Power or Constitution of the Court from this Provision for a purely ministerial Act; an Act which may be clearly performed out of Court, and at any Time, as well in Sickness as in Health; which may, in the Absence of the Chief Justice, be deferred for a Time without fatal Injury to Parties; and which certainly is not of that consequence, as compared with Acts which a single Judge out of Court constantly and necessarily performs, that any Inference can be drawn from it of the Desire of the Legislature to ensure the Concurrence of the Chief Justice in the general Business of the Court.

The Imperial Statute 3 Geo. 4. c. 69., referred to, is precisely the same in Principle with the 31 Edw. 3. c. 12., on which I have already remarked, and very distinguishable in its Terms from the 45th Section of our Statute 2 Geo. 4., to which it is compared. The former says, that certain Persons, together with certain other Persons, shall do a particular Act; the latter says, "the Court" shall do a similar Act. What constitutes or may constitute that Court, involves the whole Question.

I imagine there can be no Ground for assuming that the present or former Judges of the Court have failed to consider the Terms of the Statute under which they have acted, or to acquaint themselves with the Distinction between Prescriptive Courts and Courts constituted by Statute.

On the latter Point I would remark, that certain Maxims which pervade our Books do not seem to me to have been correctly applied. It is true that new and inferior Courts, created by Statute, are strictly limited by the Powers given to them by the Statute, both as to the Extent and Manner of proceeding. Such Jurisdictions are generally in derogation of the Common Law; and it is for the Protection of the Subject that the Laws creating them are strictly construed. But the Court whose Powers are in question has an unlimited Jurisdiction. It is modelled after a similar *Common Law Court* in England, and is to proceed in the same Manner. Its Authority, and the constant Discharge of its Duty, is of absolute Necessity to the Protection of Person and Property. It is created expressly "for the general and regular Administration of Justice throughout the Province;" and it is my Opinion that, in support of such a Jurisdiction, those Rules for the Construction of Statutes are rather to be applied, which declare that a Statute shall be so construed "ut Res magis valeat quam pereat;" that in the Construction of Statutes, "the Ends contemplated are to be considered;" and that for Necessity, that there be not a Failure of Justice, "a Statute shall be expounded even contrary to the Words."

Having expressed my own Opinion on the Question, perhaps at unnecessary Length, I should have forborne any Examination of the Arguments publicly adduced by Mr. Justice Willis, if, after the Paper containing them had been referred to me, I could have omitted all Notice of it without an Appearance of intentional Disrespect. I disclaim all Desire to examine them critically, or in the Spirit of Controversy; and indeed I must say, in Conclusion, that for any other Reason than I have just mentioned, it was not, in my Opinion, necessary to have adverted to those Arguments at all. If, indeed, neither in the Act of 1794, nor in other Acts, the Legislature had so explained their Intention as to give a reasonable and consistent Meaning to the Words "preside in the Court," and if the Question were now raised as a new Question upon the first Vacancy occurring, then such Arguments would naturally present themselves; and though I do not think they would lead me to the same Conclusion, they would require to be met. But I repeat that the Question has, in my Opinion, long been set at rest both by the Legislature and by the Judges who are to expound the Acts.

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The Second Question referred to me is, whether the Appointments of such Civil Officers of this Colony as have been absent from the Province, without Leave of the *Governor and Council*, are at this Moment absolutely void and of none Effect, as has been pronounced from the Bench.

Upon this Matter I must remark, that if the Operation of the Statutes had been rightly stated, which I think it has not, still the Forfeiture is one to be pursued by the Crown, and to be judicially declared, in each individual Case, upon a proper legal Proceeding, in which the Facts shall have been found as the Law requires, and the Judgment of the Court properly given, after an Opportunity being afforded to the Parties interested of discussing the Question in the usual Manner.

To have found the Facts, and pronounced Judgment upon them, before any Exception had been raised on the one Hand, or any Person called to answer on the other, I cannot but think was much out of the Course of the Administration of Justice; and was not, I think, well sustained by the Precedent, reported from a Newspaper, of similar Remarks made in a Debate in the Assembly of Prince Edward Island.

But however much Individuals may be entitled to complain that a supposed Forfeiture of their Offices is communicated to the Public from the Bench, not in any judicial Proceeding, but as mere Matter of important Information, and the Facts in support of the Forfeiture vouched for by the Judge, as having been ascertained by his personal Enquiry, it is certain that the Question cannot be affected by the Manner of bringing it into Discussion.

It is therefore necessary to consider it closely. I have done so; and am of Opinion, that, supposing Mr. Justice Willis's Information to be correct, it is obvious that the Consequence deduced from it by no means follows.

The 22 Geo. 3. c. 75. was evidently passed to remedy the single Grievance which it recites; namely, the granting Patents in England for Offices in the Colonies to Persons *resident and intending to reside in Great Britain*. That was an Inconvenience both to the local Governments and to the People of the Colonies; and the Intention of Parliament was to place a Remedy in the Power of the Governor and Council. The Statute to that end enabled the Governor and Council to do what certainly, before the Statute, was beyond their Competence; that is, to remove Officers appointed in England by Patent, who were not resident within the Jurisdiction of the local Government, and who probably held their Offices for Life.

It is scarcely necessary to enquire whether the Words used in the enacting Clauses are not more extensive in their Signification than was necessary for preventing the Mischief recited, and whether they are or are not to be controlled by the Preamble, and construed with reference to it. The Fact is, that Offices in this Colony, and in the Colonies generally, are granted during Pleasure, as the 4th Section of that Statute contemplates they may be. Such Officers are removable at Pleasure; and with respect to them, the Aid of this Statute is not wanted, nor were its Provisions meant to extend to them; but admitting that they do, then it does but follow that, "any Officer who may have been wilfully absent without reasonable Cause, to be allowed by the Governor and Council, is subject to be removed by the Governor and Council."

The Absence must be a *wilful* Absence; the Governor and Council have a Discretion in judging of the Cause that may be adduced by the Party, when he is brought by them to answer; and they have, besides, a Discretion in proceeding against the Officer, or not, according to their View of the Case: there is, moreover, an Appeal provided to the King in Council.

It is the 54 Geo. 3. c. 61. which is chiefly relied on by Mr. Justice Willis for convincing the Public that the Chief Justice of the same Court, with himself, and many other Officers of the Civil Government in this Colony, have forfeited their Offices.

Whether that Statute was intended only to apply to Appointments made in England by Patent or otherwise, or whether it extends to all Appointments to Offices in the Colonies, however made, it is not very material to enquire.

The Intention of the Act in other Respects, and its legal Construction, appear to me to admit of no Question; and the Manner in which it has been constantly

understood and acted upon by His Majesty's Secretaries of State for the Colonies is perfectly well known.

It can scarcely be made a Question on this Occasion, what is understood in Law by the Word "*Residence*;" for I conceive it to be well established, that a Householder in any Town or Place is held to be a Resident of that Town or Place if he retains his Domicile there, or leaves his Family or Goods, for a Time "*animo revertendi*." This has been adjudged even in Criminal Cases, requiring, from their Nature, a very strict Construction. When therefore Parliament, by the First Clause of this Act, requires that Commissions to Officers in the Colonies shall, in Terms, require their *Residence* in the Colony, the Word *Residence* must be looked upon as used with a View to its legal, and indeed I may say its ordinary Construction, for such I conceive to be the Interpretation above given; but besides that it would, in my Opinion, be repugnant to this Construction, to hold that a Civil Officer absent with Leave can be said to have forfeited his Office by Non-residence. It is against the express Provision of the Statute to maintain that the actual being in the Colony at all Times, and discharging the Duty always in Person, are indispensable Conditions to the Tenure of the Office, and that neither Illness nor temporary Absence with Leave can be accepted as an Excuse. The very next Clause of the Statute (the Second) relates to "*Absence on Leave*;" and there can remain, therefore, only the single Question, what Leave shall be sufficient?—whether the Leave of the Governor will do, or whether it must be the Leave of the Governor and Council. The Opinion that has been advanced is, that nothing but the Leave of the Governor and Council will suffice; and that the Offices of those Persons who have been absent without that Leave are at this Moment absolutely null and void. That the latter Consequence would not follow, except as the Result of a proper and well-known legal Proceeding, I have already stated. The Facts must be found by a Jury; and the legal Consequence of those Facts is to be judicially pronounced by a Court, not extra-judicially declared, for the Information of the Public, and in prejudice of the Officer whose Rights are to be affected.

But it seems to me very clear that there is no Ground of Forfeiture; if there is, it is certain that not only the Government of this Country, but His Majesty's Government in England, have been ignorant of the Intention of the Statute ever since its passing, for they certainly have constantly given to it a Construction very different from that contended for, and which I think much more consistent with the Sense and Language of the Statutes.

The 3d Clause of the 22 Geo. 3. c. 75. is the only Clause of that Statute which has any Reference to Leave of Absence to be obtained by the Officer; and that is, in my Opinion, intended to give to the Colonial Governments a Right that either did not exist or was not exercised before; namely, the Right of allowing Officers appointed in Great Britain by Patent, and who were not resident within the Limits of the Colonial Government, to remain absent from the Colony, and that for an unlimited Time.

There is nothing in that Statute to take away the Right of the Lieutenant Governor, as representing His Majesty, to exercise, within the Limits of his Government, the ordinary Prerogative of granting to a Colonial Officer, resident in a Colony, a temporary Leave of Absence; neither is there anything in the 54 Geo. 3. c. 61 abolishing that Prerogative, which, with respect to resident Officers, must always have existed, and which it was not the Intention of the 22 Geo. 3. c. 75. either to confer or restrain. On the contrary, the Object of the last-mentioned Statute was to protect the Colonies against an Abuse which was practised in England, but of which the Colonies felt the Effect. It seemed to have occurred, that the Provision of the First Clause of that Statute, if carried literally into Effect in all Cases, might produce Instances of Injustice and Hardship; and a discretionary Power of affording Indulgence was therefore vested in the Colonial Authorities, because the Knowledge which must exist there of the Exigencies of the Public Service would enable them more judiciously to exercise it. But I cannot conceive, and I know that it has not been considered by the Secretary of State in England, and certainly not by Mr. Goulburn, who framed and introduced the Act of 54 Geo. 3., that it was intended to interfere with the Rights which before existed, of granting a temporary

temporary Leave to resident Officers, whose Appointments placed them, at all Times, completely under the Controul of the local Government.

The Second Clause of the Statute 54 Geo. 3. c. 61. is indeed so expressed as to shew that in the Mind of the Makers of it it was not always necessary that Leave should be granted by the Governor and Council; in the Second Clause the Expression Governor or Council occurs; and in the Third Clause it is expressly provided, that the Governor shall report to the Secretary of State all such Leaves of Absence as have been granted "by him."

But it is next to be considered with what Degree of Reason it can be stated that Offices in this Colony have been forfeited under the Provisions of this Act. It is truly said, in the Statement made from the Bench, that penal Statutes are to be construed *strictly*; but the Maxim is not to be applied in the Manner in which it seemed to be intended. A penal Statute is to be construed *strictly*, to the end that no Person may be punished for the new Offence created by it, unless he comes plainly within the Letter; but it is not to be construed *strictly*, or, as it were, *severely*, against the Person charged, so as to punish him by Construction and Implication, when he does not come within the express Provision. In applying this Rule, I consider, that under the Second Clause of 54 Geo. 3. c. 61. (which is the only Clause in either Statute declaring that an Office shall be void) there can be no Forfeiture, unless, *first*, the Officer has gone from England with the Leave of the Governor and Council; and, *secondly*, the Secretary of State in England has refused to confirm that Leave; unless the Officer, notwithstanding such Refusal, has neglected to re-appear in Office within the Time limited.

If Mr. Justice Willis has obtained accurate Information at the same Time, it seems that no Officer has ever gone from the Province with such Leave of the Governor only; then, clearly, this Clause can never apply to such Officers; and if it did, the next Step to be proved is, that the Secretary of State has not confirmed the Leave; and I am at a Loss to understand how this Provision can be brought to bear upon those whose Leaves, whether granted regularly or irregularly, the Secretary of State has not only confirmed, but, perhaps, by positive Order extended, and that too (I speak of my own Case) for a Period which the Officer felt to be exceedingly inconvenient.

Again, how can it apply to Officers whose Leave of Absence was merely for a short Period, to enable them to go to the adjoining Colony, or to the United States of America; and which Leave must have expired, and the Officer must have returned to his Duty, long before the Secretary of State could have received any Report of his Absence? I venture to affirm, that, taking the Statute 54 Geo. 3. according to its Language, and according to the Sense in which it has been uniformly acted upon here by successive Governors, and by the Secretary of State in England, no Office in this Colony could be found to be forfeited, even if the Crown were to institute the proper legal Proceeding.

The Statute 22 Geo. 3. was evidently passed altogether *diverso intuitu*; and at any rate it creates no absolute Forfeiture, but gives a Power to remove, which has not been exercised, and for the Exercise of which I imagine the Government is well aware there exists no Pretence, unless an Officer can be said to have been "wilfully" absent from his Office, who had the official Leave of the King's Representative, confirmed by the Secretary of State.

I have the Honour to be, Sir,

&c. &c. &c.

JOHN B. ROBINSON, Attorney General.

Major Hillier, Esq.

Inclousure, No. 4.

Opinion of the Solicitor General in respect to giving Leave of Absence to any Officer.

Sir,

Solicitor General's Office, York, 25th June 1828.

I HAVE perused the Statutes of the 22d and 54th Years of His late Majesty's Reign, respecting the Grant of Offices in the Colonies, upon the Operation whereof, in respect to the giving Leave of Absence to any Officer,

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my Opinion is required by his Excellency the Lieutenant Governor. The First Clause of the 22 Geo. 3. c. 75. restrains the Appointment to any Offices in the Colonies by Patent, which I apprehend means Patent under the Great Seal of England, to such Persons only as shall discharge the Duty thereof in Person.

The Second Clause provides for the Amotion of any Officer from such Office, that is an Office under the Great Seal of England, who shall be wilfully absent from the Colony without a reasonable Cause, to be allowed of by the Governor and Council.

The Third Clause authorizes the Governor and Council to give Leave of Absence to such Officer, and to provide for the due Discharge of the Duties of such Office, until the King's Pleasure shall be known. All these Provisions evidently relate to Officers appointed by Commission under the Great Seal of England, and not to Officers appointed in the Colonies. But supposing, for the sake of Argument, that they do apply to Officers appointed by Commission under the Great Seal of the Colony, how is such Office to be forfeited? Not *ipso facto* by departing from the Colony without Leave of Absence by the Governor and Council, but by a Decision or Judgment of the Governor and Council upon the whole of the Conduct of such Officer; and they are to determine whether he had a reasonable Cause for such Absence; and if the Officer is dissatisfied with such Determination, he may appeal to the King in Council. This shews clearly that the mere Circumstance of his being absent without Leave is not *ipso facto* a Forfeiture of his Office.

Now suppose that an Officer were called before the Governor and Council to show Cause why he left the Colony, and he should produce a written Leave of Absence from the Governor, with an Extension thereof by His Majesty's Principal Secretary of State for the Colonies, is it possible that such Leave and Extension would not be deemed a reasonable Cause by the Governor at least who granted it, and without whose Negative upon his own Act the Officer could not be removed? But in the Instances in which a Leave from the Governor and Council is required, they are also authorized to provide for the Performance of the Duties of such Office during the Absence of the Incumbent, which, if he were appointed by Patent under the Great Seal of England, they could not do without the Authority of this Act, because the Seal of the Colony could not revoke the Seal of England, or in any Manner modify or controul the Power given by it; therefore I am of Opinion, that the only Case of Absence to which this Act applies is to one where an Officer appointed by Patent under the Great Seal of England, the Duties of whose Office cannot be dispensed with for some important Reasons, requires Leave of Absence for an inconvenient Period, in which Case the Governor and Council grant the Leave, and then appoint a Locum tenens to discharge the Duties of his Office during his Absence, which could not be done without the Authority of the Act, because it would create a kind of double or joint Incumbency in several Offices.

The First Section of 54 Geo. 3. c. 61., commonly called Mr. Goulburn's Act, provides, that no Office shall be granted for any longer Term than during such Time as the Grantee thereof shall reside in the Colony, and execute the Duty of his Office in Person, and behave well therein.

The Second Section requires the Governor, within One Week after any Leave shall have been granted by himself and Council, to report the same to One of His Majesty's Principal Secretaries for Confirmation; and declares, that in case said Leave of Absence shall not be confirmed within One Month from the Date of such Report having been received by the Secretary of State, the Person shall return to the Colony, and in default thereof shall be deemed to have vacated his Office, and his Appointment shall be void and of none Effect. Now this as well as the former Act of 22 Geo. 3. are penal Acts, and therefore, as Mr. Justice Willis correctly states, must be construed strictly, that is, in favour of the Persons to be affected by the Acts, and not, as he means, rigidly against them. Penal Acts are strictly construed in favour of the Subject, to the Exclusion of all Cases not strictly or expressly named in them; but the only Case of Forfeiture put by Mr. Goulburn's Act is that of the Officer not forthwith returning to the Colony upon the Negleet or Refusal of

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of the Secretary of State to confirm the Leave granted by the Governor and Council, and therefore that is the only Case in which he can, *ipso facto*, forfeit his Office under this Act.

Now, although the Words of Mr. Coulburn's Act are sufficiently large, perhaps, to embrace Officers appointed by Commission in the Colonies, yet the Term "reside" does not mean he "personally present in," and therefore a Man is said to reside in Canada if his Family and Home are there, although he may be temporarily absent in London. Suppose a Gentleman from this Town should meet a Stranger in New York, who should say to him "Pray, Sir, where do you reside?" would he create any Surprise in the Stranger's Mind on account "the peculiar Meaning he gave to his Words, if he were to answer "In York, in Upper Canada?"

Place of Residence clearly means Home; and it would be as absurd to contend, that a Man resided in a Place through which he was travelling, or at which he was stopping for some temporary Purpose, as it would be to say, that he resided in the Coach that brought him there, or that a Man bathing in the Thames could be said to reside in the Water. Therefore his temporary Absence is no Breach of the Words of his Commission, requiring him to reside in the Colony, and execute the Duty in Person; but if such temporary Absence could avoid it, the Act does not so declare it, and therefore, at most, the Commission could be only voidable upon a Scire facias brought at the Suit of the Crown to repeal the Patent, where the Matters must be tried in a legal Manner. But I am fully convinced these Acts were never intended to have, nor have they ever had, such Construction by His Majesty's Government, inasmuch as His Majesty's Principal and Upper Secretaries of State for the Colonies have frequently confirmed and extended Leaves of Absence granted by the Governors of Colonies alone, and have granted Leave themselves to Officers when at Home.

I am, therefore, of opinion, that no Officer incurs the Penalty of Forfeiture of his Office by reason of any Absence from the Colony wherein his Office is to be executed, which is sanctioned by the Governor of the Colony or His Majesty's Government in England.

I have, &c.
(Signed)

H. J. BOULTON,
Solicitor General.

Major Hillier, &c. &c.

Inclosure, No. 5.

Extract from His Majesty's Instructions to Sir John Coape Sherbrook, G.C.B. Lieutenant General and Governor in Chief of the Province of Upper Canada; dated at the Court at Carlton House, the 26th March 1816, in the 56th Year of His Majesty's Reign.

7th Section. — "And whereas We are sensible that effectual Care ought to be taken to oblige the Members of Our Executive Council to a due Attendance; it is Our Will and Pleasure, in order to prevent the many Inconveniences which may happen for Want of a Quorum of the Council to transact Business as Occasion may require, that if any of the Members of Our said Executive Council, residing in Our said Province, shall hereafter wilfully absent themselves from the Province, and continue absent above the Space of Six Months together, without Leave from you first obtained, under your Hand and Seal, or shall remain absent for the Space of One Year, without Our Leave given them under Our Royal Signature, their Places in the said Executive Council shall immediately thereupon become void."

Truly extracted.

(Signed) John Small.

Inclosure, No. 6.

Circular Letter from Mr. Secretary Huskisson to his Excellency Major General Sir Peregrine Maitland, K.C.B., relative to frequent Applications having been made by Colonial Officers for a Renewal of their Leave of Absence.

Downing Street, London, 30th June 1828.

Sir,
APPLICATIONS having been frequently made to the Secretary of State, by Colonial Officers, for a Renewal of Leave of Absence originally obtained from the Governors of the respective Colonies, the Expediency or Inexpediency of granting which renewed Leave could not be known to the Secretary of State, without previous Reference to the Governors; and such Applications having, nevertheless, been generally made at a Time when the original Leave was on the Point of expiring, and when, therefore, the Applicant could not have reached the Colony in Time, without a Renewal of his Leave; I am to desire that you will make known to such Officers as may in future obtain Leave of Absence from you, that if they should seek a Prolongation of such Leave from the Secretary of State, they will be expected either to produce your written Authority for the Application, or to apply at such a Period before the Termination of their original Leave, as will enable the Secretary of State to obtain the Opinion of the Governor before he grants or refuses the Application.

I have, &c.

Major General Sir Peregrine Maitland, K.C.B.
&c. &c. &c.

(Signed) W. HUSKISSON.

Inclosure, No. 7.

Opinion of the Solicitor General as to holding the Court of King's Bench in the Absence of the Chief Justice.

York, 19th June 1828.

Sir,
IN obedience to the Commands of his Excellency the Lieutenant Governor, I have the Honour to report to you, for his Excellency's Information, my Opinion upon the following Question:

Whether the Court of King's Bench in this Province can be legally holden in the Absence of the Chief Justice of the Province?

Mr. Justice Willis, I am informed, has publicly expressed his Opinion, that the Court cannot be holden in the Absence of the Chief Justice; and that all Acts done in Court in his Absence will be nugatory and void.

From this Opinion I entirely dissent; but having been publicly expressed, although in an extra-judicial Manner, I am bound to regard it as the Sentiment of a Judge, and therefore entitled to the most grave and serious Consideration by every Person who shall not be enabled to bring his Mind to the same Conclusion. The Court of King's Bench is constituted by an Act of the Provincial Legislature passed in the Year 1794. The Preamble and first enacting Clause of this Act are as follows: "For the general and regular Administration of Justice throughout this Province, be it enacted, That there be constituted and established, and there is hereby constituted and established, a Court of Law," &c. (to the End of the Clause.)

Here it is necessary to bear in mind that the Intention of the Legislature is to establish a Court of Supreme Jurisdiction, and intended to fill the same Space in the Judicature of Upper Canada that all the Superior Common Law Courts of Westminster Hall fill in England; and, therefore, I can hardly imagine that at a Moment when a Court of such extensive Jurisdiction was about to be constituted, the same Legislature could expect their Enactments, in relation to that Object, to be construed as if their Intention had been merely the Creation of a Jurisdiction inferior to one already in existence, whose Powers were and ought to be controuled by that Superior Court of Judicature. The Court is established by the Act; and, therefore, the Term "Court" does not mean

the Judges of the Court, who were appointed afterwards, nor the Building in which it was to be holden, which was not then erected, but the Jurisdiction and Authority which was to be exercised. The Court existed before Judges were appointed or a Building appropriated for their Reception.

The Expression upon which all the Difficulty has been raised is, that His Majesty's Chief Justice of this Province, together with Two Puisné Justices, shall preside in the said Court. In construing the Act we must take notice of the actual State of Things at the Time it became a Law.

At the Time of the passing of this Act, in July 1791, there was a Chief Justice of the Province of Upper Canada, but there were not Two Puisné Justices, which will probably account for his being called the Chief Justice of Upper Canada, instead of Chief Justice of the Court of King's Bench; and for the Expression "together with," used for coupling the Two Puisné Judges with the Chief Justice of Upper Canada, which would otherwise more naturally have been "and." When the Puisné Judges were subsequently appointed, their Commissions, as well as that of the Chief Justice, constituted and appointed each a Judge, with full Power and Authority to hold the said Court of King's Bench at such Places and Times as the same might and ought to be holden within the Province. Therefore, unless the Commissions of all the Judges are in this Respect void, each One is authorized to hold the Court in like Manner as any Judge of the Superior Courts of Record may do in England. The King, by his Prerogative, might unquestionably have established a Common Law Court, and appointed His Judges, without any Act of the Legislature; but the Legislature having established a Court, the Question is, Whether the King has by his Commission contravened the Intention of the Legislature, of which he was a Part, by the Manner of his appointing the Judges? and I think he has not. The Act does not say they shall collectively preside at the same Time and in the same Place; it says that the Chief Justice, with Two Puisné Judges, shall preside, which they may do separately. They each and all of them preside when they superintend the Business and regulate the Practice of the Court at their Chambers, as well as in Court; that is, they watch over, manage, and direct the Proceedings of the Court, which I apprehend to be the Meaning of the Word preside, as it is used in this Act; and they can frequently be more usefully employed separately than together; the Propriety of which Course they, as Judges of a Court of Supreme Jurisdiction, must necessarily have Discretion given them to determine.

Their Presidency is not limited to Place, but another Term is used when the Locality of Court is spoken of; namely, "holden." Three Judges shall "preside in the said Court, which Court shall be holden in a Place certain." If the Act had meant that they could only preside in the "Place certain," it would have been so expressed; and the Words "which Court should be holden" would naturally be omitted. Then the Act would have read thus, "and that His Majesty's Chief Justice, together with Two Puisné Judges, shall preside in the said Court in a Place certain;" but this is not the Language of the Act, which does not, in my Opinion, limit the Superintendance of the Judges to the Place certain where the Court is to be holden; consequently the Word "preside" cannot be made to mean sit together in the Place certain to discharge their Functions; which would deprive the Judges of the Powers and Authorities incident to the Judges of the Superior Courts in England, and would deprive them of the Means of proceeding by such Course as "shall tend with Justice and Dispatch to determine" the Actions, Causes, or Suits instituted before them. If the Act is to be construed with that Degree of Rigidity to the Letter, which would be adopted in expounding an Act establishing a new Court of Summary Jurisdiction, the Court is deprived of the extensive Powers evidently intended to be conferred upon it. How could a single Judge in Chambers make an Order, if Two in Court cannot? The whole of the Chamber Business of a Judge of a Superior Court would necessarily vanish; and the whole Business of the Court would necessarily be confined to the Four Terms of Sitting, to the manifest Injustice and Delay of Suitors, instead of Justice and Dispatch. In Contemplation of the Law of England, the whole Term is but one day, and what is done during Term has relation to the first Day of Term; but should this new Reading of the Law be correct,

correct, this Idea must be exploded, and Parties might require the Names of all the Judges to be entered on the Record as present at every Step of the Cause, and their Absence alleged as Error; so all Proceedings in Vacation have relation to the last Day of Term, when the Act contemplates the occasional Absence of the Chief Justice. All Judgments, notwithstanding they are entered by the Clerk, are, in Contemplation of Law, severally pronounced by the Court, and therefore if a Judgment is entered in Vacation, it might be alleged for Error that the Chief Justice was not present on the last Day of Term when the Judgment was given, although the Law contemplates his occasional Absence on that Day, when it authorizes Writs issued in his Absence to be tested by the Senior Puisné Judge. Again, Continuances are entered on the Record to the last Day of the issuable Term invariably, and yet, if the Chief Justice were absent, and no Court could on that Account be holden, the Cause would abate; so would the Death, or Absence even from Sickness, of any Judge on any Return Day, if no Court could be held without the Three, cause the Writs then returnable to abate. The Writs require the Parties to appear on such a Day before the Justices, which, in Contemplation of Law, they do personally or by Attorney in open Court, although in fact their Appearance is recorded by the Officer of the Court, upon a Precipe to that Effect filed in the Office of the Clerk; therefore if no Court can be held without the Three Judges, it is manifest the Defendant in such Case would not appear in Court, and therefore the Writ would abate. Such a State of Things would produce anything but a "regular Administration of Justice;" and the Delay and consequent Injustice thereby produced would be intolerable. Every Time a Judge was sick, and unable to attend in Court, numerous Discontinuances would be the Consequence, to the great Ruin of the Suitors.

I apprehend it matters not how this Court is established, whether by Common or Statute Law, so long as its Authority is unlimited, and as the Provisions of its Constitution are not violated in endeavouring to carry those Provisions into Effect. *Cessante ratione cessat et lex.* The Reason why Courts erected by Act of Parliament in England are to be confined strictly within the Letter of their Constitution is, that every new Court infringes and encroaches upon the Jurisdiction of some other Court already in existence, of which all Courts are jealous; and also, in many Cases, these new Jurisdictions tend to abridge the Liberty of the Subject.

These Reasons cannot be urged here; and therefore this Act, having for its Object the Creation of a Court of Superior Jurisdiction in a Colony previously possessing no efficient Tribunal at all, should be construed liberally, without which Construction the Intention of the Legislature never can be attained; and not strictly, by which latter the Intention will be effectually frustrated.

In the Instances put by Mr. Justice Willis, in Illustration of his Argument, the Authority is differently conferred, and for a different Purpose. In the Case of Writs of Error in the Exchequer Chamber, the Court is not substantively appointed to hear Errors; and there certain Persons designated to preside, but certain Persons, are required to hear and determine Errors in a certain Place, and consequently the particular Individuals named must attend, the Duty being personal, and not vested in a Court possessing a given Jurisdiction; but in the Case strongly relied upon by Mr. Justice Willis, and to which he desires to draw particular Attention, namely, the Court of Exchequer Chambers, created by Act 31 Edw. 3. c. 12., which directs that the Chancellor and Treasurer (the latter is not now required) shall cause to come before them in any Chamber of Council nigh the Exchequer, the Record, &c., taking to them the Justices and other sage Persons, and thereupon duly examine, &c., I find it to be the Practice for the Chief Justice of King's Bench and the Chief Justice of Common Pleas to hear these Errors argued alone. See 1 T. R. 511. which is much stronger than the present Case. These Two Judges heard a Cause previously decided by a Court composed of Four Judges, and upon their Judgment the former one was reversed. This being a Court of Appeal might be a strong Reason for requiring the Justices, which means all the Judges of King's Bench and Common Pleas, with the Chancellor and Treasurer, to hear Appeals from Superior Courts; and yet the Chief Justices of each Court are now considered sufficient to hear the Cause, and to answer the

the Exigency of the Statute, which is any thing but a strict Construction. But I am of opinion, that the fair, reasonable, and natural Construction of the Law is in favour of One or Two Judges holding the Court; and so the Legislature have frequently shewn by their Enactments. In the Year 1803, Nine Years after the passing the Act establishing the Court of King's Bench, and during which Period the Chief Justice of the Province had been absent more than Once for a long Interval, and during which Period also Two Judges had usually sat and transacted the Business of the Court, an Act to enable Married Women having Real Estate more conveniently to alien and convey the same was passed, in the Third Clause whereof it is provided that a certain Certificate, therein required to be given of an Examination of such Married Women in open Court, "shall be signed by the Chief Justice, or, in his Absence, "by the Senior Puisné Judge of the said Court," expressly recognizing the Sitting of the Court without the Chief Justice. By the last King's Bench Act, passed in 1822, the Sitting of the Court is also contemplated when he is not giving a personal Attendance in Court. By the 6th Clause, privileged Persons (of whom the Chief Justice is the principal) are authorized to proceed by Bill in the Court of King's Bench; but no Person can sit in Judgment in his own Cause. Therefore, unless a Court can be holden without the Chief Justice, he can neither sue nor be sued in the Colony. The Puisné Judges would be, of course, in the same Predicament. At Common Law, when there are divers Judges of a Court of Record, the Act of any One of them is effectual, especially if their Commission do not expressly require more. 2 Haw. P. C. ch. 1. sec. 10. This is recognized in Bac. Ab. as good Law. And although it has been said, that the Act of the Provincial Legislature must be taken as Part of the Commission, and therefore, the Act saying all shall preside, the Commissions are so far void; yet, as the Act does not expressly require them all to act jointly together, the Common Law and the King's Prerogative shall not be abridged without express Words to that Effect. In Truth, the other Construction is in Contravention of the Act, which says, that "the Court shall possess all such Powers and Authorities as by the Law "of England are incident to a Superior Court of Civil and Criminal Jurisdiction;" and it is a most important Incident to all such Courts of England, that each of the Judges shall have Power to hold the Court. There is no Quorum in these Courts. One acting in Court in the Name of the Whole is effectual.

If such a confined Construction is to be given to the Act establishing the Court of King's Bench, because it creates a new Court, and is to be strictly construed, the same Rule will apply to the 31st of the late King, constituting the Provincial Legislature; and then what Power has either the Legislature, Council, or House of Assembly to appoint a Quorum, consisting of a Part only of the Members constituting each Body?

Perhaps, however, instead of looking at this as a Question open for Discussion, the more correct Mode of treating it would be, to regard it as already judicially determined; which it most unquestionably has been, by the uniform Practice of all the Judges who ever sat in the Court from its Creation, which, if the Words admitted of ever so strong an Interpretation the other Way, would, until their Judgments were appealed from to a higher Tribunal, and reversed on that Ground, be binding on all Judges of the same Court at the present Day.

I am, therefore, clearly of opinion, that the Court of King's Bench may legally be holden by One or both of the Puisné Judges in the Absence of the Chief Justice.

I have, &c. &c.

(Signed) H. J. BOULTON, Solicitor General.

Major Hillier, &c. &c. &c.

Inclosure, No. 8.

Copy of a Commission to the Honourable William Dunmer Powell, as a Puisné Judge of the Court of King's Bench in Upper Canada; dated 9th July 1794.

GEORGE the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. &c. &c. To all to whom these Presents shall come, greeting: Know ye, that having taken into Our Royal Consideration the Loyalty, Integrity, and Ability of Our trusty and well-beloved William Dunmer Powell, Esq., have constituted and appointed him, the said William Dunmer Powell, to be One of Our Justices of Our Court of King's Bench within Our Province of Upper Canada, in America, to have, hold, execute, and enjoy the said Office unto him the said William Dunmer Powell, for and during Our Pleasure and his Residence within Our said Province; together with all and singular the Rights, Profits, Privileges, and Emoluments unto the said Place belonging, in the most full and ample Manner, with full Power and Authority to hold the said Court of King's Bench at such Places and Times as the same may and ought to be held within Our said Province. In Testimony whereof We have caused these Our Letters to be made Patent, and the Great Seal of Our said Province of Upper Canada to be hereunto affixed. Witness, Our trusty and well-beloved John Graves Simcoe, Esq., Our Lieutenant Governor and Colonel commanding Our Forces in the said Province, at Our Government House, Navy Hall, this Ninth Day of July, in the Year of Our Lord One thousand seven hundred and ninety-four, and of Our Reign the Thirty-fourth.

(Signed) WM. JARVIS, Sec.

Inclosure, No. 9.

Copy of a Commission to the Honourable Peter Russell, as a Puisné Judge of the Court of King's Bench in Upper Canada; dated 10th November, in the Thirty-fifth Year of the Reign of George the Third.

Upper Canada.

GEORGE the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. &c. &c. To the Honourable Peter Russell, Our Receiver General, and to all others, greeting: Know ye, that for as much as Our Bench is empty by the Removal of Our late Chief Justice, and We have not yet appointed a Second Puisné Judge, and because We are apprehensive that full and complete Justice cannot be administered in Our said Province, We have thought fit to appoint you to sit on Our Bench, with Our trusty and well-beloved the Honourable William D. Powell, at all Times when his Presence shall and may be necessary, during the Term of Easter now next ensuing the Date of these Presents. Given under the Great Seal of Our Province. Witness, Our trusty and well-beloved John Graves Simcoe, Our Lieutenant Governor and Colonel commanding Our Forces, this Tenth Day of November, at Navy Hall, in the Thirty-fifth Year of Our Reign.

Be it remembered, that this Commission was made out by the Attorney General.

(Signed) WM. JARVIS, Sec.

Inclosure, No. 10.

Copy of a Commission to the Honourable Peter Russell, as a Puisné Judge of His Majesty's Court of King's Bench; dated 17th December 1797.

GEORGE the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. &c. &c. To the Honourable Peter Russell, and to all Our loving Subjects, greeting: Whereas by an Act of the Parliament of Our Province, passed in the Thirty-fourth Year of Our Reign, intituled "An Act to establish a Supreme Court of Civil and Criminal Jurisdiction, and to regulate the Court of Appeal," it is directed, "that Our Chief Justice of Our Province of Upper Canada, together with Two Puisné Judges, shall preside in the said Court;" and because We have not yet appointed a Person to fill the vacant Seat of the Second Puisné Judge of the said Court of Our Bench; and We, being well assured of your Loyalty and Integrity, have thought fit to appoint, and do hereby appoint you, the said Peter Russell, to fill the said vacant Seat for and during the Term of Hilary now next ensuing. In Testimony whereof We have caused the Great Seal of Our said Province to be hereunto affixed. Witness, Our trusty and well-beloved the Honourable Peter Russell, Our President administering the Government of Our said Province, this Seventeenth Day of December, in the Year of Our Lord One thousand seven hundred and ninety-seven, and in the Thirty-eighth Year of Our Reign.

Secretary's Office,
23d June 1828.

(Signed) WILLIAM JARVIS, Sec.

Inclosure, No. 11.

Crown Office, 19th June 1828.

A Statement of the Names of the Judges of the Court of King's Bench actually present in Court at the several Terms since its first Constitution.

Michaelmas Term, 34 Geo. 3.—6th October 1794.

Present — The Hon. Wm. D. Powell, J.

Hilary Term, 35 Geo. 3.—19th January 1795.

Present — The Hon. Wm. D. Powell, J.

Same Term, 26th January 1795.

Present — The Hon. Wm. D. Powell, J.

— P. Russell, J. (Private Gentleman).

Easter Term 1795.

Present — The Hon. Wm. D. Powell, J.

— Peter Russell, J.

Part of the Term, the Hon. Peter Russell only.

Trinity Term 1795.

Present — The same Judges.

Michaelmas Term 1795.

Present — The same Judges.

Hilary Term 1796.

Present — The same Judges.

Easter

Easter Term 1796.

Present — The same Judges.

Trinity Term 1796.

Present, Part of the Term — The Hon. Wm. D. Powell, J. only.

Remainder of Term { — Wm. D. Powell, J.
— Peter Russell, J.

Michaelmas Term 1796.

Present — The same Judges.

Hilary Term 1797.

The Hon. John Elmsley, sworn in Chief Justice.

— Peter Russell, sworn in a Judge during the Term.

— Wm. D. Powell, absent.

Easter Term 1797.

Present — The Hon. J. Elmsley, C. J.

— Peter Russell, sworn in a Justice during Term.

Trinity Term 1797.

Present — The Hon. J. Elmsley, C. J.

— Peter Russell, sworn in a Justice during Term.

Michaelmas Term 1797.

Present — The Hon. J. Elmsley, C. J.

— W. D. Powell, Senior Puisné Judge.

Hilary Term 1798.

Present — The same Judges.

Easter Term 1798.

Present, Part of the Term — The Chief Justice only.

Remainder of Term { The Chief Justice.
The Hon. W. D. Powell, J.

Trinity Term 1798.

The same as last Term.

Michaelmas Term 1798.

The same as last Term.

Hilary Term 1799.

Present — The Hon. J. Elmsley, C. J.

— H. Alcock, sworn in a Judge.

Easter Term 1799.

Present, On the First Day { The Hon. W. D. Powell, J.
— H. Alcock, J.

Remainder of Term { The Hon. J. Elmsley, C. J.
— W. D. Powell, J.
— H. Alcock, J.

Trinity Term 1799.

Present Part of the Term { Hon. J. Elmsley, C. J.
— W. D. Powell, J.

Remainder of Term { Hon. J. Elmsley, C. J.
— W. D. Powell, J.
— H. Alcock, J.

Michaelmas

Michaelmas Term 1799.

Present — The Hon. J. Elmsley, C. J.
— W. D. Powell, J.
— H. Alcock, J.

Hilary Term 1800.

Present, Part of the Term { The Hon. J. Elmsley, C. J.
— H. Alcock, J.
Remainder of Term — All the Judges.

Easter Term 1800.

Present, Part of the Term, only Two Judges; the Remainder of the Term,
all the Judges.

Trinity Term 1800.

Present, the same as last Term.

Michaelmas Term 1800.

Present, Part of the Term, only Two Judges; the Remainder of the Term,
all the Judges.

Hilary Term 1801.

Present, as in last Term.

Easter Term 1801.

Present — The Hon. J. Elmsley, C. J.
— Wm. D. Powell, J.

Trinity Term 1801.

Present, Part of the Term, only One Judge; the Remainder of the Term,
all the Judges.

Michaelmas Term 1801.

Present — The Hon. J. Elmsley, C. J.
— Wm. D. Powell, J.

Hilary Term 1802.

Present, Part of the Term — The Hon. J. Elmsley, C. J.
Remainder of Term { The Chief Justice.
The Hon. W. D. Powell, J.

Easter Term 1802.

Present — The Hon. J. Elmsley, C. J.
— H. Alcock, J.

Trinity Term 1802.

Present, Part of the Term, the Hon. the Chief Justice only; Remainder of
the Term, the Three Judges.

Michaelmas Term 1802.

Present — The Hon. Henry Alcock, C. J.
— W. D. Powell, J.

Hilary Term 1803.

Present, the same as last Term.

Easter Term 1803.

Present, the same as last Term.

Trinity Term 1803.

Present, the same as last Term.

Michaelmas Term 1803.

Present — The Hon. Henry Alcock, C. J.
— W. D. Powell, J.
— Thomas Cochrane, J.

The Chief Justice absent One Day ; Mr. Justice Cochrane absent Two Days.

Hilary Term 1804.

Present — The Hon. Henry Alcock, C. J.
— W. D. Powell, J.

Easter Term 1804.

Present, the same as last Term.

Trinity Term 1804.

Present, the same as last Term.

Michaelmas Term 1804.

Present — The Hon. W. D. Powell, J.

Hilary Term 1805.

Present, the same as last Term.

Easter Term 1805.

Present, the same as last Term.

Trinity Term 1805.

Present, the same as last Term.

Michaelmas Term 1805.

Present — The Hon. W. D. Powell, J.
— Robert Thorpe, J.

Hilary Term 1806.

Present — The Hon. W. D. Powell, J.
— Robert Thorpe, J.

Easter Term 1806.

Present, the same as last Term.

Trinity Term 1806.

Present, the same as last Term.

Michaelmas Term 1806.

Present — The Hon. Thomas Scott, C. J.
— W. D. Powell, J.
— Robert Thorpe, J.

Each of the Puisné Judges absent Part of the Term.

Hilary

Hilary Term 1807.

Present — The Hon. Thomas Scott, C. J.
— Robert Thorpe, J.

Each of the above Judges was absent Part of the Term.

Easter Term 1807.

Present — The Hon. Thomas Scott, C. J.
— Robert Thorpe, J.

Trinity Term 1807.

Present, same as last Term.

Michaelmas Term 1807.

Present — The Hon. Thomas Scott, C. J.
— William D. Powell, J.

Hilary Term 1808.

Present, same as last Term.

Easter Term 1808.

Present, same as last Term.

Trinity Term 1808.

Present — The Hon. Thomas Scott, C. J.
— W. D. Powell, J.

Michaelmas Term 1808.

Present, the same as last Term.

Hilary Term 1809.

Present — The Hon. Thomas Scott, C. J.
— Wm. D. Powell, J.

Easter Term 1809.

Present, the same as last Term.

Trinity Term 1809.

Present, the same as last Term.

Michaelmas Term 1809.

Present, the same as last Term.

Hilary Term 1810.

Present, the same as last Term.

Easter Term 1810.

Present, the same as last Term.

Trinity Term 1810.

Present, the same as last Term.

Michaelmas

Michaelmas Term 1810.

Present, the same as last Term.

Hilary Term 1811.

Present, the same as last Term.

Easter Term 1811.

Present — The Hon. Thomas Scott, C. J.
 — W. D. Powell, J.

Trinity Term 1811.

Present, the same as last Term.

Michaelmas Term 1811.

Present, the same as last Term.

Hilary Term, 52d Geo. 3. 1812.

Present — The Hon. Thomas Scott, C. J.
 — W. D. Powell, J.
 — William Campbell, J.

Easter Term 1812.

Present, the same as in last Term.

Trinity Term 1812.

Present, the same as in last Term.

Each Judge absent at Times during the Term.

Michaelmas Term 1812.

Present, the same as in last Term.

Mr. Justice Campbell absent at Times during the Term.

Hilary Term 1813.

Present — The Chief Justice.
 The Hon. W. D. Powell.
 — William Campbell.

Easter Term 1813.

Present — The Chief Justice.
 The Hon. W. D. Powell.
 — William Campbell.

Trinity Term 1813.

Present, same as last Term.

Michaelmas Term 1813.

Present — The Hon. Thomas Scott, C. J.
 Mr. Justice Powell was present One Day only.

Hilary Term 1814.

Present — The Hon. Thomas Scott, C. J.
 — W. D. Powell, J.
 — William Campbell, J.

Easter

Easter Term 1814.

Present, the same as in last Term.

Trinity Term 1814.

Present, the same as in last Term.

Michaelmas Term 1814.

Present — The Hon. Thomas Scott, C. J.

— W. D. Powell, J.

— W. Campbell, J.

The Hon. W. Campbell, absent Part of the Time.

Hilary Term 1815.

Present, the same Judges as last Term.

The Chief Justice absent Part of the Term.

Easter Term 1815.

Present — The Hon. Chief Justice, and Mr. Justice Powell.

The latter absent Part of the Term.

Trinity Term 1815.

Present — The Hon. Thomas Scott, C. J.

— Mr. Justice Powell.

Michaelmas Term 1815.

Present — The Hon. Thomas Scott, C. J.

— William D. Powell, J.

— William Campbell, J.

Hilary Term 1816.

Present, the same as last Term.

Easter Term 1816.

Present — The Hon. Thomas Scott, C. J.

— Mr. Justice Powell.

— Mr. Justice Campbell.

Trinity Term 1816.

Present — The Hon. Thomas Scott, C. J.

— Mr. Justice Campbell.

Michaelmas Term 1816.

Present — The Hon. W. D. Powell, C. J.

— W. Campbell, J.

Hilary Term 1817.

Present, the same as last Term.

Easter Term 1817.

Present — The Hon. Wm. D. Powell, C. J.

— Wm. Campbell, J.

Trinity Term 1817.

Present, the same as last Term.

Michaelmas Term 1817.

Present, the same as last Term.

Hilary Term 1818.

Present, the same as last Term.

Easter Term 1818.

Present — The Hon. Wm. D. Powell, C. J.

— D'Arcy Boulton, J.

— Mr. Justice Campbell, Part of the Time.

Trinity Term 1818.

Present — The Hon. the Chief Justice.

— Mr. Justice Campbell.

— Mr. Justice Boulton.

Michaelmas Term 1818.

Present, the same as last Term.

Hilary Term 1819.

Present, the same as last Term.

Easter Term 1819.

Present, the same as last Term.

Trinity Term 1819.

Present — The Hon. the Chief Justice.

— Mr. Justice Campbell.

— Mr. Justice Boulton.

Michaelmas Term 1819.

Present, the same as last Term.

Hilary Term 1820.

Present, the same as last Term.

Easter Term 1820.

Present, the same as last Term.

Trinity Term 1820.

Present, the same as last Term.

Michaelmas Term 1820.

Present, the same as last Term.

Hilary Term 1821, 1 Geo. 4.

Present, the same as last Term.

Easter Term 1821.

Present, the same as last Term.

Trinity Term 1821.

Present, the same as last Term.

Michaelmas

Michaelmas Term 1821.

Present, the same as last Term.

Hilary Term 1822.

Present, Part of the Term—The Chief Justice and Mr. Justice Boulton ;
Part, Mr. Justice Boulton only ; Remainder of the Term, Mr. Justice Campbell
and Mr. Justice Boulton.

Easter Term 1822.

Present — The Hon. Mr. Justice Campbell.
—— Mr. Justice Boulton.

Trinity Term 1822.

Present, the same as last Term.

Michaelmas Term 1822.

Present — The Hon. Mr. Chief Justice Powell.
—— Mr. Justice Campbell.
—— Mr. Justice Boulton.

Hilary Term 1823.

Present, the same as last Term ; each absent occasionally.

Easter Term 1823.

Present, the same as last Term.

Trinity Term 1823.

Present — The Hon. the Chief Justice.
—— Mr. Justice Boulton.

Michaelmas Term 1823.

Present — The Hon. the Chief Justice.
—— Mr. Justice Campbell.
—— Mr. Justice Boulton.

Hilary Term 1824.

Present — The Hon. the Chief Justice.
—— Mr. Justice Campbell.
—— Mr. Justice Boulton.

The Chief Justice and Mr. Justice Campbell absent occasionally.

Easter Term 1824.

Present, the same Judges as last Term ; each occasionally absent.

Trinity Term 1824.

Present, the same Judges as last Term.

Michaelmas Term 1824.

Present, the same Judges as last Term.

Hilary Term 1825.

Present — The Hon. Mr. Justice Campbell.
—— Mr. Justice Boulton.

The Chief Justice Part of the Term.

Easter

Easter Term 1825.

Present — The Chief Justice.
The Hon. Mr. Justice Campbell.
— Mr. Justice Boulton.

The Chief Justice and Mr. Justice Boulton absent occasionally.

Trinity Term 1825.

Present — The Hon. W. D. Powell, C. J.
— W. Campbell, J.

Michaelmas Term 1825.

Present — The Hon. W. Campbell, C. J.
— Levinus P. Sherwood, J.

Hilary Term 1825-6.

Present, the same as last Term.

Easter Term 1826.

Present, the same as last Term.
Mr. Justice Sherwood absent Twice.

Trinity Term 1826.

Present — The Hon. the Chief Justice.
— Mr. Justice Sherwood.

Michaelmas Term 1826.

Present — The Hon. the Chief Justice.
— Mr. Justice Boulton.
— Mr. Justice Sherwood.

Hilary Term 1827.

Present, the same as last Term.

Easter Term 1827.

Present — The Hon. W. Campbell, C. J.
— Mr. Justice Sherwood.

Trinity Term 1827.

Present, the same as last Term.

Michaelmas Term 1827.

Present — The Hon. W. Campbell, C. J.
— Mr. Justice Sherwood.
— Mr. Justice Willis.

Hilary Term 1828.

Present — The Hon. the Chief Justice.
— Mr. Justice Sherwood.
— Mr. Justice Willis.

The Chief Justice occasionally absent.

Easter Term 1828.

Present — The Hon. Mr. Justice Sherwood.
— Mr. Justice Willis.

A true Statement.

(Signed) JAMES E. SMALL,
Deputy Clerk of the Crown.

Inclosure, No. 12.

Copy of a Letter from the Honourable Mr. Justice Powell to his Excellency Lieutenant Governor Gore, respecting Remuneration for Services performed in the Absence of Mr. Justice Thorpe.

Sir,

York, 10th August 1809.

A SECOND Season being about to close without any Prospect of the Bench being filled, I hope it will not be thought indiscreet on my Part to call your Excellency's Attention to a Subject which, however personal in the View of this Address, does in no small Degree interest the Colony.

The Absence of a single Judge, *though it leaves the Bench competent*, yet throws upon the remaining an unequal Portion of Labour and Responsibility. Had Mr. Thorpe returned to his Duty last Year, or a Successor supplied his Place, there would have been no Room for this Representation; but as it is, I entreat your Excellency to submit to His Majesty's Minister, my humble Pretension to receive, for the Year ending the First July last, Half the Salary of the inefficient Judge.

When your Excellency considers that I have for more than Twenty Years filled my present Station without Reproach, and have supplied the several Vacancies occasioned by Death or Promotion in that Period, I hope my present Application will meet your Support; and, if the Right Honourable Secretary of State will apply the Principle on which a similar Remuneration was granted to me in 1797, and in 1807, on the respective Vacancies of the Chief Justiceship, I shall not doubt a favourable Event.

I have, &c.

(Signed) WILLIAM DUNMER POWELL.

Inclosure, No. 13.

Opinions of the Attorney General and Solicitor General on a Dispatch from Earl Bathurst, respecting the Appointment of an additional or Third Puisné Judge.

Sir,

York, 29th January 1828.

WE have perused the Dispatch of the Right Honourable Earl Bathurst, late His Majesty's Secretary of State for the Colonies, respecting the Appointment of an additional or Third Puisné Judge to His Majesty's Court of King's Bench in this Province, and suggesting that Provision may be made for the convenient Exercise of an equitable Jurisdiction, by committing to the Chief Justice, or One of the Puisné Judges of the Court of King's Bench, the Judicial Office of Chancellor, under the Title of Master of the Rolls or Vice Chancellor; and in obedience to the Commands of his Excellency the Lieutenant Governor, we have considered whether the Measure last referred to, or any Modification of it, can be conveniently adopted in Upper Canada; and also, whether it may be necessary to obtain an Act of the Legislature, or to issue Letters Patent under the Great Seal, in order to render the proposed Increase to the Number of Judges legal and effectual.

And we have now the Honour to report, that in our Opinion it would not be advisable to erect an equitable Jurisdiction by Commission. It is at least doubtful whether, since the passing of the Bill of Rights, it is in the Power of the Crown to constitute any Jurisdiction, with Authority to proceed otherwise than by the Rules and upon the Principles of the Common Law; and as the Erection of an equitable Jurisdiction can only be desired for the common Benefit of His Majesty's Subjects in this Colony, we see no Reason to recommend that it should not be left to rest upon the sure Basis of a Legislative Enactment, rather than upon the Exercise of a doubtful Prerogative, particularly as the former Course would properly include a suitable Provision from the Provincial Revenue for the Maintenance of the Officers constituting the Court. In reference to that Part of his Lordship's Dispatch which relates to the Appoint-

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ment of an additional Judge to the Court of King's Bench, we have the Honour to report, that by the Provincial Statute of 1794, creating the Court of King's Bench, it is provided that a " Chief Justice and Two Puisné Judges " shall preside in that Court." The Legislature must be presumed to have intended something by that Provision; we conceive that the Legislature must have meant, either that the actual Presence of a Chief Justice and Two Puisné Judges upon the Bench shall be necessary to constitute a Court, or merely that the Court shall consist of a Chief Justice and Two Puisné Judges. The first Construction is not the most obvious; and as the Act has never been so understood, to maintain such a Construction now would be to declare invalid a great Proportion of the Proceedings of the Court of King's Bench, which has in fact taken place, and inevitably before the Chief Justice and One Puisné Judge, or before Two Puisné Judges. Assuming that the Legislature rather meant, that the Court should consist of a Chief Justice and Two Puisné Judges, the Question which presents itself is, whether it is competent to the Crown, under the existing Law, to appoint a Third Puisné Judge?

There is no Question in our Minds, that before the Act of 1794 was passed, it was competent to the Crown to have created, by Letters Patent, such a Jurisdiction as was created by that Act, and to have appointed any Number of Judges that might have been thought expedient; but if the Royal Assent has been given to an Act which controuls and limits that Power in any Respect, the Prerogative, in regard to such Matter, cannot be exercised in any Manner repugnant to the Act.

It is a Maxim, that affirmative Words merely do not take away or abridge the King's Prerogative, and therefore it might be maintained with some Reason, that as it is not declared by the Act of 1794 that more than Two Puisné Judges shall not be appointed, and as the Existence of a Chief Justice and Three Puisné Judges is not inconsistent with the Enactment that a Chief Justice and Two Puisné Judges shall preside in the Court, there is no Objection to the Appointment of a Third Puisné Judge by the Crown; but it appears to us so decidedly inexpedient to suffer the Constitution of the Supreme Civil and Criminal Court in the Province to rest on a doubtful Basis, that we do not advise the Appointment of an additional Judge, without first proposing to the Legislature to make an Alteration in the existing Law, so far as it respects the Number of the Judges.

We have, &c.

(Signed) JOHN B. ROBINSON, Attorney General.
H. BOULTON, Solicitor General.

To Major Hillier
Sec. to His Excellency the Lieut. Gov.

Inclosure, No. 14.

Crown Officers' Report.

Sir,

19th June 1828.

Upon the Points submitted to us, by His Excellency's Commands, in your Letter of this Day, we are of Opinion, 1st, That the Power to remove an Officer depends on the Tenure of his Office. In this, as in other Colonies, the Appointment of a Judge is during Pleasure; and we conceive that in Law any Person holding an Office on such a Tenure is removable at Pleasure; that is, at the Pleasure of the Lieutenant Governor, acting in the Name and on Behalf of the King. The Reasons for such Removal are to be rendered to His Majesty by the Lieutenant Governor, who is responsible for their Sufficiency.

We do not think that the Stat. 22 Geo. 3. c. 75. is material in this Question. That Statute being passed, as appears from its Preamble and the whole Tenor of it, to give to the Governor and Council a Power which, without it, they were conceived not to have, namely, the Power of removing Officers appointed by Patent under the Great Seal of England, and without regard to the Tenure of their Offices, whether for Life or otherwise. The legal Power of removing an Officer commissioned in the Colony, and holding only during Pleasure, cannot, we imagine, have been disputed at any Time. The only Question can

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be as to the Sufficiency of the Cause. 2d, We are of Opinion, that a Removal of a Judge of the Court of King's Bench necessarily vacates the Office: and that another Person may be appointed to fill the Vacancy, subject to be confirmed or disallowed by His Majesty. 3d, We think there is this Difference between Removal and Suspension, that the former produces a Vacancy, and the latter does not. It is not submitted to us whether a Judge of the Court of King's Bench can legally be suspended from his Office, and we therefore only intimate our Doubt of the Power to restrain a Judge by Suspension from the Performance of Duties which, while he holds the Office, are exacted from him by positive Enactments.

We have, &c.

(Signed)

JOHN B. ROBINSON, Att. General.

H. BOULTON, Sol. General.

To Major Hillier,
Private Sec. to His Excellency the Lieutenant Governor.
&c. &c. &c.

Inclosure, No. 15.

Copy of a Letter from the President of the Council to Mr. Justice Willis.

Sir,

Executive Council Office, York, 25th June 1828.

His Excellency the Lieutenant Governor having referred to the Executive Council the present State of His Majesty's Court of King's Bench, accompanied, amongst other Documents, with your Letter to his Excellency's Private Secretary of the 17th Instant, in which you state, "that you are and always shall be most desirous to discharge such of the Duties as, under existing Circumstances, you can legally perform;" and the Government having ever been of Opinion that the Court of King's Bench has hitherto been legally held, and the Duties of the Judges well understood;

I am directed by the Council, with reference to the Opinion publicly delivered by you on the 16th Instant, to request, for their Information, any Explanation you may be pleased to offer respecting the Duties you contemplate, as well with regard to the Term and Chamber Business as to the Circuit Courts, including, of course, the Trial of all Records emanating from the King's Bench, whether containing Pleadings of the present or any preceding Term, and whether passed before or since the Departure of the Chief Justice.

I have, &c.

(Signed)

J. BABY,

Presiding Councillor.

The Hon. Mr. Justice Willis.

Inclosure, No. 16.

Copy of a Letter from the Honourable John Walpole Willis to the President of the Executive Council.

Sir,

York, Upper Canada, 25th June 1828.

I HAVE to acknowledge the Receipt of your Letter of this Date; and to inform you, that I shall have much Pleasure in affording the utmost Explanation in my Power on the very important Topics to which you have referred, at as early a Period as the Magnitude of the Enquiry will permit.

I have, &c.

(Signed)

JOHN WALPOLE WILLIS.

To the Honourable
The President of the Executive Council,
&c. &c. &c.

Inclosure, No. 17.

Copy of a Letter from the President of the Council to Mr. Justice Willis.

Executive Council Chamber, York, 26th June 1828.

Sir,
I HAVE to acknowledge the Receipt of your Letter of Yesterday's Date.
With reference to my Communication, I am requested by the Council to state, that their Desire is to receive an explicit Declaration as to which, if any, of the Duties enumerated by me you are prepared to discharge; and to add, the Public Service requires your early Answer.

I have, &c.

(Signed) J. BABY,

Presiding Councillor.

To the Hon. Mr. Justice Willis,
&c. &c. &c.

Inclosure, No. 18.

Letter from Mr. Justice Willis to the President of the Executive Council.

To the President of the Executive Council.

Honourable Sir,

York, Upper Canada, 26th June 1828.

HAVING in Easter Term joined in an Order of the Court of King's Bench, and also delivered my Sentiments in the Causes then argued before Mr. Justice Sherwood and myself, following incautiously, as I admit, the Practice which had previously been adopted, when convinced of the Error of such Proceeding, and in order to rescind, so far as I was concerned, the Order I had joined in, and to declare what I considered to be the Effect of my Judgment, I felt myself legally, judicially, and religiously bound, by virtue of that Oath which was taken by me in your Presence, when I entered upon the Office to which His Majesty has graciously appointed me, to take the earliest Opportunity of declaring, not only my Opinion, but my firm Conviction, (which must continue till over-ruled), that the Court of King's Bench, as established by the Legislature of this Province, cannot legally sit in Bank, unless the Chief Justice, together with Two Puisné Justices, preside in such Court. It is a Court of statutory Creation; and all or every of the several Duties permitted by the Legislative Enactments of this Province (with which the Honourable Executive Council, as Legislators, must be fully acquainted) to be discharged by One Judge, or One in conjunction with the Chief Justice, I shall always be ready to perform. The precise Nature of those Duties (in case there be any Question respecting them) I can only give my Opinion upon judicially, when legally before me. It is not for Want of that Respect which no one feels more than I do for the Honourable Executive Council, that I do not now go more fully into the Question. But the Comments on the extra-judicial Opinion first given in the Case of Ship Money will not be forgotten. In the Opinion of a most eminent English Jurist—an Opinion expressed in a Work of such Celebrity as to be almost tantamount to a Decision, I allude to that of the celebrated legal Antiquarian and Editor of Lord Coke's Comment on Littleton—"However numerous and strong the Precedents may be in favour even of the King's consulting Judges, in Questions in which the Crown is (as I conceive in the present Case) materially interested, it is a Right to be understood with many Exceptions, and such as ought to be exercised with great Reserve, lest the rigid Impartiality so essential to the judicial Capacity should be violated. The Anticipation of judicial Opinions in Cases actually pending (as I think is the Case here) should be particularly guarded against; and therefore a wise and upright Judge will ever be cautious how he answers Questions (extra-judicially) of such a Tendency. So far one may venture to qualify the Right of his being required to do so, because even the House of Lords have declined taking the Opinion of the Judges for Reasons of this Sort; though their Attendance on that Assembly is confessedly for assisting the Lords in

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“ Matter of Law.” (See Fortesc. Rep. 384, 385.) Under these Circumstances, I most respectfully submit, previously to entering further into the Subject, whether I can be legally requested to do so by the Honourable the Executive Council: I must add, my private Wish is to give the fullest Information on the Subject; but Respect must be had to my Oath, and to established and constitutional Law.

I have, &c.

(Signed) JOHN WALPOLE WILLIS.

Inclosure, No. 19.

Opinion of the Honourable Mr. Justice Sherwood, dated 25th June 1828.

On the Ninth Day of July 1794 the Statute of the Provincial Legislature 34 Geo. 3. cap. 2. was passed, to establish a Superior Court of Civil and Criminal Jurisdiction in Upper Canada. As the Common Law of England had been introduced into this Province before the Erection of the Court of King's Bench, and as it was intended the Court should proceed according to the Course of the Common Law so introduced, the King might have established a Court of King's Bench without the Interference of the Provincial Legislature.

This Position must be self-evident to every Professional Man, and I will not stop to cite Authorities in support of it, but proceed directly to examine what the Legislature actually did, and what it clearly left to be done by the King. The First Section of the Statute before alluded to enacts, “ That there be constituted and established, and there is hereby constituted and established, a Court of Law, to be called and known by the Name and Style of His Majesty's Court of King's Bench for the Province of Upper Canada, which shall be a Court of Record of original Jurisdiction, and shall possess all such Powers and Authorities as by the Law of England are incident to a Superior Court of Civil and Criminal Jurisdiction; and may and shall hold Plea in all Manner of Actions, Causes, or Suits, as well Criminal as Civil, Real, Personal, and Mixed, arising, happening, or being within the said Province, and may and shall proceed in such Actions, Causes, or Suits by such Process and Course as shall tend with Justice and Dispatch to determine the same; and may and shall hear and determine all Issues of Law; and shall also hear, and, by and with an Inquest of good and lawful Men, determine all Issues of Fact that may be joined in any such Action, Cause, or Suit as aforesaid, and Judgment thereon give, and Execution thereof award, in as full and ample a Manner as can or may be done in His Majesty's Court of King's Bench, Common Bench, or, in Matters which regard the King's Revenue, by the Court of Exchequer in England; and that His Majesty's Chief Justice of this Province, together with Two Puisné Judges, shall preside in the said Court.”

There was another Act 2d Geo. 4th, passed on the 17th January 1822, which must be considered *in pari materia* with the first Act, and construed with it as One Act; and in order to avoid Confusion, I will constantly refer to them jointly as One Law, under the Denomination of the King's Bench Acts.

The Preamble of the last Act states “ it to be expedient to make certain Amendments in the Practice of His Majesty's Court of King's Bench in this Province.” And by the Fourth Section directs, “ that the original Process for compelling the Appearance of the Defendant shall be a Writ of Capias ad respondendum, tested in the Name of the Chief Justice or Senior Puisné Judge of the said Court for the Time being.”

The same Act further provides, by the Sixth Section, “ that for and notwithstanding any thing in this Act contained, it shall and may be lawful to proceed by Bill in any Case where by reason of any Privilege such Proceeding is practised in the Court of King's Bench in England, and that the like Proceeding shall be had in Actions so commenced as in the said Court.”

By the Fourth Section 34 Geo. 3. before mentioned, it was further enacted, “ That all Writs to be sued out of the said Court shall issue in the King's

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“ Name,

" Name, and be tested by the Chief Justice, or in his Absence by the Senior Judge of the Court."

The foregoing Clauses of the King's Bench Acts I think sufficient for my present Purpose, which is principally to examine the following Question, Can there be a Court of King's Bench in Upper Canada during the Absence of the Chief Justice?

The Chief Justice is undoubtedly One of the Judges of the Court, possessing precisely the same Powers, and no more, than the other Judges individually have, and he is expressly recognized as such Judge in the 16th, 31st, and several other Sections of the last Act relative to the Court of King's Bench; and therefore, when the Court is full to the utmost Number allowed by Law, there must of necessity be Three Judges present in Court. Supposing then, for a Moment, the Three Judges to be personally present in Court, I will repeat a Part of the first Clause of the first Act that applies to them thus assembled, and upon which Foundation has been erected all the Objections that with so much Industry have been recently brought in view. The Legislature by that Clause declared, " that the Chief Justice, together with Two Puisné Judges, shall preside in the said Court." When a Lawyer follows nice Reasoners, he must himself be particular, and I will therefore give the popular and generally accepted Definitions of the Expressions " together with " and " preside." The Words " together with " are both derived from the Saxon, and when joined, as in this Case, mean " in union with;" the Word " preside " was originally derived from the Latin " præsideo," subsequently from the French Word " présider," and signifies " to be set over;" so that the Legislature in other Words directs, " that the Chief Justice, in union with Two Puisné Judges, shall be set over the Court," to direct, govern, and regulate its Proceedings. Supposing these Words, then, to stand in the Act unexplained by any subsequent Words, could they possibly amount to any thing more than the following Proposition? " That the Court shall consist of Three Judges, of whom the Chief Justice shall be the first in Rank and Dignity." The most fastidious Sophistry, I believe, has never gone the Length of intimating that the Chief Justice possesses any greater judicial Power or Authority than either of the other Judges possess, and therefore it is quite unnecessary to say any thing to prove the reverse. As I have already shown, the Legislature directs that the Court shall be a Court of Record, to consist of not more than Three Judges; and as it is well known the Common Law of England is in full Force in this Province, and, as I have already said, I do not yet choose to resort to the other Parts of the King's Bench Acts for the Purpose of explaining the Clause now under Consideration, I purpose to apply the Rules of the Common Law to that End, before I consider the different Clauses of the Statutes. The Common Law Rule is in substance this: " *All Judges derive their Power and Authority, from the Crown, and where there are divers Judges of a Court of Record, the Act of any One of them is effectual, if their Commission do not expressly require more.*" 1 R. Abr. 381. 6 Mod. 83. 2 R. Abr. 675. 677. Co. Lit. 99 a. 144.

The Words of the Statute should be construed, in the present View of the Subject, like the Words of the King's Commission at Common Law; and if the Words of the Statute do not expressly require Commissions to issue, directing all the Judges to join in every Step taken by the Court, the Act of a less Number than Three must be valid. Now, I assert that the Words before stated do not expressly require any such Thing, nor any particular Number of Judges to do any Act in Court, but merely limits the Number of Judges, and shews which One shall be set over or at the Head of the Court. This, in Truth, is nothing more than the Effect which a joint Commission at Common Law to divers Judges of a Court of Record must necessarily have; for the first Judge named in such Commission would be at the Head of the Court, and, if present, would preside. (Haw. book 2d, cap. 20.) But I have already fully proved, that by virtue of such Commission the Act of the other Judge would be as binding and valid in Law as if the whole Number of Judges were present at the doing of such Act. What makes the Doctrine I advance still stronger, on general Principles of Common Law, is, that no joint Commissions are issued to the Judges in this Province, but each Judge

receives

receives a separate Commission under the Great Seal, authorizing and empowering him to hold the Court of King's Bench at such Times and at such Places as the Law prescribes. If the novel Opinion of the Advocates for " Three Judges or no Court " is in reality correct, then the King's Commissions to His Judges in this Province are incorrect, and the King's constitutional Prerogative is destroyed by mere forced Implication, without any express and clear Enactment of the Legislature to warrant it. This is a Position so clearly unconstitutional, that it can never be advocated with any reasonable Prospect of Success.

To suppose the Legislature would give the Court of King's Bench, in Matters of Law, the united Powers and Authorities of the Courts of King's Bench, Common Pleas, and Exchequer in England, which it has certainly done, and at the same Time really intend that the Judges here should not individually have the Rights, Powers, and Authorities which the Judges of the lowest of those Courts individually possess in England, seems to me so contrary to common Reason and the Nature of Things, that I most candidly confess I cannot entertain the Idea for a Moment. If the Presence of all the Judges be indispensably requisite to hold the Court of King's Bench, notwithstanding their Commissions authorize any one of them to do so, then the following Anomalies and legal Absurdities must inevitably follow :

1st. The Judges of the Court of King's Bench can neither sne or be sued in this Province, like other Subjects.

2d. If any one of the Judges should die in Vacation, all Proceedings instituted after the last Day of the preceding Term would be irregular, for in Contemplation of Law the Writ issues and bears Teste during the Sitting of the Court.

3d. If any such Casualty should occur during the Sitting of the Court in Term, similar Consequences must follow, because in Contemplation of Law the Term is considered but One Day.

4th. No Part of the Business of the Court could legally be done by any Judge at Chambers, unless especially directed by Statute, although such Business is constantly done by the Judges in England and in other Colonies.

5th. The Judges of the Court of King's Bench in this Province would collectively possess all the Powers in Matters of Law of the Courts of King's Bench, Common Pleas, and Exchequer in England, but would individually possess less Powers than the Judges of the District Courts in Upper Canada, because any one of these Judges can hold the District Court.

I have already shewn that the Principles of natural Justice embraced by the Common Law do not allow of such Effects in Society ; and I will now endeavour to show that the Wisdom of the Legislature has likewise guarded against them. I have stated that the King's Bench Acts do not direct in what Manner, or by whom, the Judges shall be appointed ; that the King by His Prerogative has the Power of appointing them ; that he has done so, and by his Commission has authorized each Judge to hold the Court.

If the King's Bench Acts do not clearly make such Commissions void, they are valid and effectual ; and I will attempt to show that they do not. In order, as far as possible, to elucidate the Subject, I will take a few long established and well known Rules of Law, originating in the Experience and sanctioned by the Wisdom of our English Ancestors.

1st. Whenever any Words of a Statute are doubtful, the Intention of the Legislature is to be resorted to, in order to discover the Meaning of such Words. *Plow. 57.*

2d. The most natural and general Way of construing a Statute is to construe one Part by another of the Statute, for Words and Meaning of one Part of a Statute frequently lead to the Sense of another. *1st Inst. 381. Plow. 365. 11 Mod. 161.*

3d. Acts of Parliament shall be construed according to the End and Intent for which they were passed. *Plow. Com. 465. a.*

4th. Great Regard ought, in the construing of a Statute, to be paid to the Construction which the Sages of Law who lived about the Time, or soon after it was made, put upon it, because they were best able to judge of the Intention of the Makers. *2 Inst. 11. 136. 181.*

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Every candid Person, in perusing the King's Bench Acts, must at once be convinced, that the Legislature most certainly intended to invest the Court of King's Bench in this Province, in Matters of Law, with the full and ample Powers possessed by the Courts of King's Bench, Common Pleas, and Exchequer in England; and particularly intended to assimilate the Practice of the Court here to that of the Court of King's Bench in England, as far as local Circumstances would permit. I wish to place the present Question in such a plain and familiar Point of View that the Conclusions which I endeavour to arrive at may be manifest to every Reader, whether he belong to the Profession of the Law, or occupy any other Place in the Community; and that he may be able to determine for himself whether such Conclusions be just or unjust. It appears to me, that if I can establish either of the following Propositions, my Object will be decidedly gained; and therefore I will confine myself to these, as it is desirable not to embarrass the Subject with any unnecessary Matter. 1st. The Chief Justice may legally sue or be sued in the Court where he presides. 2d. There may be a legal Court in the Absence of One of the Judges.

As to the first Proposition,—“The Chief Justice may legally sue or be sued in the Court where he presides.” No Man can be a Judge in his own Cause, and therefore, if the Chief Justice can sue or be sued, he must necessarily be absent from the Court during the Proceedings in his own Suit. The Chief Justice, the other Judges, and all the Officers of the Court of King's Bench and Common Pleas in England, have the undoubted Privilege of suing and being sued in the Courts where they discharge their Public Duties, 3 Leon. 13. 91., Salk. 398.; and our Legislature, anxious to confirm all English Privileges, and to make the Practice of the Court in this Province similar to that of the King's Bench in England, as respects all Matters of Controversy relative to Property and Civil Rights, have made a specific Enactment on the Subject.

The Sixth Section of the Statute 2 Geo. 4. c. 1., being the last King's Bench Act, is in the following Words:—“That for and notwithstanding any thing in this Act contained, it shall and may be lawful to proceed by Bill in any Case where by reason of any Privilege such Proceeding is practised in the Court of King's Bench in England, and that the like Proceeding shall be had in Actions so commenced as in the said Court, unless otherwise altered by the Rules of His Majesty's Court of King's Bench in this Province.

In case the Chief Justice of England wishes to sue in the King's Bench, there he may sue by Bill; and by the Section of the Statute just mentioned, in case the Chief Justice of Upper Canada wishes to sue in the Court of King's Bench here by Bill, in order to provide against the Absence or Death of any one of the Judges, the Legislature has enacted, by the Fourth Section of the same Act, and which I have also stated at Length, that the original “Process of the Court shall issue tested in the Name of the Chief Justice or Senior Puisné Judge of the said Court for the Time being.” I have ventured plainly to state the Intentions of the Legislature in making that Part of the Law last mentioned; for I cannot imagine any other Intention they could possibly have had, within the Scope and Reason of the Law which they were then making, and within the Scope and Reason of the Amendment and Alteration from the Words of the First Statute on the same Subject, which were, “that all Writs to be sued out of the said Court shall issue in the King's Name, tested by the Chief Justice, or in his Absence, by the Senior Judge of the Court.” Under which Enactment they probably supposed that Writs could not legally issue in the Name of a Judge, in the Event of the Death of one Chief Justice, and before the Appointment of another, or in the Event of the Absence of the Senior Judge, and therefore they made the latter Clause more general than the former, in order to embrace both Contingencies. To suppose the Alteration was accidentally made by the Legislature, without any Design or Object in view, would be a Contempt of that august Body, and would be doing great Injustice to the Individuals of whom it was composed. Again, to suppose the Legislature intended that Writs might issue in the Name of the Senior Judge, in exclusion of the Chief Justice, without any good Reason or Cause whatever for such a Deviation from the immemorial Usage of Eng-
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land, and the settled Practice of this Country, would he to suppose the Legislature intended to commit a Breach of Constitutional Propriety and Decorum, and to break down the established Distinctions in Official Dignity and Rank in this Colony. Indeed I am inclined to think, that a Writ sued in the Name of the Senior Judge without any good Reason would decidedly be irregular, and would be set aside upon Application to the Court for that Purpose. I therefore conclude that one good Reason for suing out a Writ in the Name of the Senior Judge, in the Absence of the Chief Justice; and that the Legislature intended by allowing a Writ to be so sued out, that the usual Proceedings should be had on it, whether the Chief Justice continued absent, or returned before the Suit ended.

When a legal Proceeding is allowed to be commenced, which forms the First of a Series of subsequent legal Proceedings, it must necessarily be implied, that the Legislature intended to sanction such subsequent Proceedings, when they are indispensably requisite to the Attainment of the Object for which the first Proceeding was permitted, otherwise such Permission would be altogether futile and useless.

As to the Second Position,—“ There may be a legal Court in the Absence of One of the Judges.”

It appears to me that I have already proved a Legislative Recognition of the Doctrine contained in this Proposition, by stating the established Rule of Law, as I have done, “ that no Man can be a Judge in his own Cause;” and by further shewing, that the Chief Justice may sue or be sued in the Court of King’s Bench in this Province. Actions of this Kind have already been instituted, and carried on to final Judgment in the Court without Objection. I will proceed, however, to shew the Truth of the Second Proposition by other Arguments. Immediately after the passing of the First King’s Bench Act, and in the same or in the next Year, and subsequently, the Court was held by One Judge at different Times for the Performance of the common and ordinary Business of the Court, and which could be attended with no Doubt or Difficulty. This has uniformly been the Practice in this Province for a Period of between Thirty and Forty Years; and has been the Practice in England Time out of Mind. During about Ten Years subsequently to the making of the First King’s Bench Act, there was but One Puisné Judge in this Province, and the uniform Practice evinces that all the Judges were of Opinion the Court could be legally held by Two Judges. The First King’s Bench Act was drawn by a celebrated Chief Justice of this Province; and the Practice already stated was commenced by himself while he presided, and has ever since been approved of and followed by all his Successors in Office, and by the other Judges.

Here there is irrefragable Proof that the Learned in the Law at the Time of passing the Act, and immediately after the Period, put the same Construction on it, with respect to the present Question, that I now believe is the true and legal Construction; and if we carefully examine the different Parts of the King’s Bench Acts, and attentively compare them with each other, we cannot help admitting that it is impossible to carry many of the most important Clauses into effect without such a Construction. How can the Court be held without this Construction, in case one of the Judges is a Suitor? This the Legislature, however, expressly allows him to be by the 6th Clause of the last Act, and points out the Course he may pursue. How can the Court be held without this Construction in the Absence of the Chief Justice? By the 4th Section of the First and Second King’s Bench Acts, however, his possible Absence is anticipated and provided for; and the Legislature in those Sections recognizes, in my Opinion, the Legality of holding the Court by other Judges. I am convinced of the Truth of the Maxim adopted by Lord Coke in 2 Inst. “ *Contemporanea expositio est fortissima in lege*,” that a contemporary Construction of a Statute is considered in Law the most honest; and I think an Adherence to this Rule is peculiarly appropriate at the present Juncture, when great Exertions are made to contravene what I consider the true Intentions of the Legislature. A contrary Construction must introduce Inconvenience and Injustice, materially affect the King’s Commission, put it in the Power of bad Men to take undue Advantages

of their unsuspecting Neighbours, and render nugatory the deliberate Acts of the Court, sanctioned by the Lapse of so many Years, and the concurrent Opinion of so many Judges. I think no one will deny that the King's Bench Acts must have been intended by the Legislature for the real Advantage and general Good of the Public; and that they are highly remedial Laws, designed in their very Origin to remove the objectional Mode of legal Proceedings introduced into this Country by the French Laws of Lower Canada, and to substitute in its Place the Mode prescribed by the Laws of England. Such Statutes should be, therefore, construed with uniform Liberality of Sentiment; and subtle Objections ought never to be allowed against Reason and the Public Weal. I will shew one more Absurdity, which I think a Rigidity of Construction would necessarily create, and then I am done with Examples of this Kind. Suppose, for a Moment, that the King's Bench Acts clearly and expressly require all Three of the Judges to be present at one and the same Point of Time, in order to constitute the Court, and upon proceeding to Business they should not agree in Opinion, how can they decide? It will of course be answered, that the Acts of the Majority must necessarily bind the Whole. To this Assertion I freely assent; but, at the same Time, I assert the express Words of the King's Bench Acts warrant no such Conclusion. The Common Law Rule which I have before stated, that where there are divers Judges of a Court of Record, the Act of One is effectual, is the true Foundation of this Conclusion; for if the Act of One be effectual, the Act of the Majority, which consists of Two, must of course be equally effectual. If a Statute is not couched in direct negative Terms, or if the Matter of it is not so clearly repugnant as necessarily to imply a Negative, it does not repeal the Common Law, 11 Rep. 63. "The best Construction of a Statute is to construe it as near to the Rule and Reason of the Common Law as may be, and by the Course which that observes in other Cases." Plow. 365. 2 Inst. 148. 301. 1 Saund. 245. "Affirmative Words in an Act of Parliament do not take away the Common Law." Plow. Com. 112, 13. The Legislature have affirmatively enacted, that "the Chief Justice, together with Two Puisné Judges, shall preside in the said Court;" but they have not negatively enacted, that the Two Judges shall not themselves preside in the said Court when the Chief Justice does not happen to come there; therefore, the Common Law not being repealed by affirmative Words or clear Implication, the Two Puisné Judges may and ought to preside, for the Purpose of doing their Duty in pursuance of their Commission and the Law of the Land. The Practice of doing Business at Chambers by One Judge, which has been allowed for Time immemorial in England, and has existed in this Province ever since the Erection of a Court, and has in some Instances been expressly sanctioned by the Legislature, and in all other Instances approved of by all the Judges of the Province, is another strong Proof that One Judge can hold the Court; for the Business done at Chambers is undoubtedly a Part of the Business of the Court, and the Judge transacts it as a Judge of the Court, by virtue of his Commission and by Authority of Law.

It has been alleged by some, who entertain the Opinion that the Court of King's Bench cannot be held in this Province without the Chief Justice, that the 31 Edw. 3. stat. 1. cap. 12., so far as relates to the Formation of the Exchequer Chamber for hearing Appeals from the Law Side of the Exchequer Chamber in England, is analogous to the First King's Bench Act in this Province. The Words of that Statute which relate to the present Question are as follows:—"In all Cases touching the King, or other Persons, where a Man complains of Error made in Process in the Exchequer, the Chancellor and Treasurer shall cause to come before them, in any Chamber of Council nigh the Exchequer, the Record of the Process out of the Exchequer, taking to them the Justices and other sage Persons, such as to them seemeth to be taken," &c. Afterwards, in consequence of there being no Treasurer, the Chancellor alone was allowed by Statute to do such Acts as himself and the Treasurer might before do. It has been said, the Chancellor alone is Judge of the Court of Exchequer Chambers. This I perfectly assent to. It is further said, he must himself be personally present in Court when a Cause is heard, and that he must call to him all the Justices of the Court of King's Bench

Jench and Common Pleas ; and if he be not personally present in Court, or if he do not call to him all the Justices of both the other Courts, the Proceedings before him are void. From the Two last Propositions, and the alleged Consequences for not complying with them, I wholly dissent, and assert, without Hesitation, that I believe such Opinion is erroneous. It is not usual for the Chancellor to be present in the Court of Exchequer Chamber when any Cause is argued, although he is the sole Judge of the Court. A Perusal of the Case of Salton v. Johnson, in 1 T. R. 493. 510. and 784, and a Reference to the Note made by Christian, in 3 Black. Com. 412, on this Subject, will afford abundant Authority for making the following Assertion:—That it is the Practice in England, under the Statute 31 Edw. 3. before stated, for the Chief Justice of the King's Bench and the Chief Justice of the Common Pleas only, without the Chancellor, or any of the other Judges, to sit and hear the Appeal, and then report their Opinion to the Chancellor, who gives Judgment as he thinks right. It has also been stated, that, to obviate the Objection of an equal Number of Judges in all the Superior Courts in England, a Cause may be moved into the Exchequer Chamber for Decision on any Question where the Judges of the Court of King's Bench are equally divided in Opinion. If it be meant by this, that the Judges, when they think proper, may do so, the Assertion is correct ; but if it be intended to convey the Idea that the Parties to the Suit have that Right to insist on the Removal of the Cause, it is altogether incorrect ; for it is never done at the Request of any Party. It has likewise been advanced, that our Provincial Legislature must have intended that not less than Three Judges should constitute the Court of King's Bench here, because an odd Number of Judges is decidedly preferable to an even Number. This, like all other unfounded Positions, may easily be disproved. The well-known Usage of England, the Parent of a similar Usage in her Colonies generally, and the Opinions of the most celebrated Writers on Jurisprudence, and others, are all against it ; Mr. Paley, well known as a Writer on Moral as well as Political Philosophy, while treating on this very Subject, not long ago, made the following Remarks :
 " I should prefer an even to an odd Number of Judges, and Four to almost any other Number ; for in this Number, besides that it sufficiently consults the Idea of separate Responsibility, nothing can be decided but by a Majority of Three to One ; and when we consider that every Decision establishes a perpetual Precedent, we shall allow that it ought to proceed from an Authority not less than this. If the Court be equally divided, nothing is done ; Things remain as they were, with some Inconvenience, indeed, to the Parties, but without the Danger to the Public of a hasty Precedent."

When the Court of King's Bench in England is equally divided on any Question of Law arising from Matter on the Face of the Record, the Judges do sometimes remove the Cause into the Exchequer Chamber for Decision. If it be extrinsic Matter, not appearing on the Face of the Record, such as a Motion for a new Trial, the Cause is never removed before the Judges in the Exchequer Chamber, even if the Court are equally divided in their Opinion ; but Things remain as they were, and so they ought, because the Opinion of the Judges and Jury at Nisi Prius is in favour of the successful Party, in addition to the Opinion of One Half of the Number of the Judges in Bank. The Balance in the Scale of Justice is, therefore, on the Side of the Verdict, and it stands. The Legislature, in my Opinion, would never have limited the Number of Judges in this Country to Three, if the Funds of the Province in its infant State had allowed them the free Choice of a greater Number ; and to doubt this is, in my Opinion, tantamount to a Doubt of the good Feeling and Wisdom of the Lawgivers, who should always be supposed to have been acquainted with and attached to the Usage in England and its Colonies. As no other Authority worthy of Consideration, of which I am aware, has been relied on in opposition to the Opinions I have attempted to support, I shall briefly proceed to give another very clear Recognition by the Legislature of the Doctrine which I advocate, "that the Court of King's Bench in this Province can legally be held in the Absence of the Chief Justice."

It seems somewhat fortunate, under existing Circumstances, that the Legislature, at the Distance of Nine Years after the Establishment of the Court of

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King's Bench, when the Practice of holding the Court by Two Judges had become perfectly familiar and generally known, passed a Statute on another Subject, which Law seems to me to be an unqualified Recognition of the Practice before stated, and of the Construction I now put upon the King's Bench Acts. I allude to the Provincial Statute 43 Geo. 3. c. 5., intituled " An Act to enable Married Women having Real Estates more conveniently " to alien and convey the same." I will state the very Words of the Act relative to this Subject. The Second Section enacts, that the Deed of no Married Woman shall be valid " unless such Married Woman shall appear in " open Court in the Court of King's Bench, &c. and shall freely and volun- " tarily give her Consent before such Court, &c." The Third Section further enacts, " that in case it shall appear to the said Court, &c. it shall and may be " lawful for such Court, &c. and they are, &c. hereby required to cause a " Certificate thereof to be indorsed on the Deed, &c. which Certificate shall " state the Day on which such Examination was taken, and shall be signed " by the Chief Justice, or, in his Absence, by the Senior Puisné Judge of the " said Court."

With this legislative Recognition, in addition to the others before stated, to prove that the Court can be held, and can exercise its Functions, in the Absence of the Chief Justice, I shall leave the Subject. My Opinion is, and uniformly has been, that the Court of King's Bench in this Province can be legally held in the Absence of the Chief Justice; and I believe this Opinion is confirmed by all the judicial Proceedings of the Court, and by the Acts of the Provincial Legislature. As the King's Bench Acts are not penal, but remedial Laws, and of vital Importance to the Good of the whole Community, in improving its judicial System, there could have been no more Reason, at the Time of the passing these Acts, for the Legislature to make such a Change in the established Principles of English Jurisprudence as has lately been contended for, than would be at this Day; and I imagine no enlightened Legislature now would ever think of making a Law of the Description which the novel Construction of the Statute lately advanced would inevitably prove the King's Bench Acts to be.

Whether any advantageous Alteration could be made in the Jurisdiction of the Court of Appeal in this Province, is an important Question, upon which I give no Opinion; but I think it a Subject most worthy of serious Consideration.

(Signed) LEVIUS P. SHERWOOD, J.

No. 4.

Separate. — CIVIL SERVANTS.

COPY of a Dispatch marked "Separate," from Major General Sir PEREGRINE MITLAND to Mr. Secretary HUSKISSON, dated 6th July 1828. — Six Enclosures.

Sir,

York, Upper Canada, 6 July 1828.

THE very extraordinary Course which Mr. Willis has pursued, and of which I was left to gain the first Intimation by perusing at his Request his Letters to yourself and to Mr. Stephen, has compelled me to Measures which I would willingly have avoided, if any Alternative had been left to me; but, since I have been driven to them, it is necessary that I should state the Case explicitly, in order that you may clearly understand how indispensable it is to the Peace of this Province, and to the Character of the Government, that an absolute Stop should be put to a System of Proceeding discreditable to the Administration of Justice, and most pernicious in its Influence upon Public Feeling. Now that Matters have been brought to this Issue, I cannot avoid declaring to you, that the Conduct of Mr. Willis, almost since his Arrival in this Colony, has been such as to make it Matter of deep Regret that his Want of that

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Discretion and those Principles which are necessary in every Public Officer, but above all in a Judge, should have escaped the Notice of those personal Friends who recommended him for a judicial Appointment in this Province. He came out with the Expectation that in addition to the Situation of a Judge in the King's Bench, which had been conferred upon him, he should also be appointed a Judge in Equity. The latter Arrangement took me rather by Surprise; because, though I had communicated with Lord Bathurst on the Expediency of creating an equitable Jurisdiction here, there had, in Truth, been no Court of Equity yet created; and Mr. Willis was therefore left exposed to a Disappointment against which the Government could not ensure him. To a Person of correct Disposition, the Apprehension of a Failure in such an Expectation must have created some Uneasiness; but with Mr. Willis the Suspense has had an Effect of a much more injurious Kind as regards himself, and produced no little Mischief in other Respects.

The Report which the Attorney General made to me after the Session of the Legislature, will fully explain the Progress of the Measure here, and I therefore send a Copy of it with this Dispatch. Mr. Willis was not called upon by his Situation to meddle with the local Politics of the Colony; and it was not expected of him. It was his Duty, on the contrary, to abstain. I was, therefore, not well pleased to hear him for some Time after his Arrival boasting of his Attachment to the Government in a Strain of Levity and Indiscretion not becoming his judicial Character; but I believed that he was in some Measure sincere in the Principles which he so ostentatiously avowed.

His becoming a Subscriber to Two or Three notoriously scurrilous Newspapers, whose contemptible Editors, (Men in the lowest Walk of Life,) were constantly occupied in slandering the Government, was no very favourable Symptom. He ought not to have suffered it to be said, that a Judge of the Court of King's Bench was the only respectable Member of Society who contributed to the Support of Newspapers teeming with Libels upon every honest and independent Public Servant in the Colony — upon his Brother Judges, and upon most of those with whom he was associating. He professed, nevertheless, great Abhorrence of the Licentiousness of these Papers, and yet declared that he sent them to the Colonial Office in order to shew the Department the Kind of Country to which they had sent him. I fear he was rather tempted by the Wish of calling Attention to the fulsome Compliments which, for obvious Ends, the worthless Publishers of these Papers lavished upon him, and with which he ought to have been disgusted. It was, at all Events, giving too much Importance to what he ought to have treated with Contempt. Mr. Willis, from his Arrival in August to the Time the Legislature met, was treated with Kindness and Attention by the Government, and I have no Doubt equally so by his Brother Judges and the Crown Officers, and indeed by every one, so long as it was possible to preserve friendly Relations with him. He had been long expecting a Commission from England as Master of the Rolls, though it was generally thought here that a Court must first be created by Parliament or by the Provincial Legislature.

In January, about the Time the Legislature met, your Dispatch of the 25th of November brought the Information that, in the Opinion of the Crown Officers, such a legislative Provision was not necessary, and that the Commission could not therefore issue, as was intended. This Disappointment Mr. Willis, with a characteristic Levity, and I dare say without the slightest Justice, ascribed freely in Conversation to a personal Resentment on the Part of Sir James Scarlett, the Attorney General, whom he said he had once challenged, and compelled to apologize, for some Rudeness on the Circuit.

Soon after the Legislature met, Mr. Willis adopted a very strange and unwarrantable Line of Conduct, of which the Object is now perfectly evident. He associated himself intimately with Three Persons in the Assembly most conspicuous for an indecent and unprincipled Opposition to the Government; and, as if it were an unavoidable Consequence of this Connection, he abstained from forming any Acquaintance with those Gentlemen most respectable in Character and Station, and ceased to associate with those who had but recently been his most intimate Friends. Considering his Station as a Judge,

this Line of Conduct was most unworthy; because his new Associates were in reality only known by their intemperate Language and Proceedings in the Assembly, and were not of such a Standing in Society as to make an Intimacy of that kind with Mr. Willis in any respect proper.

Thinking that his Object was merely to ingratiate himself with those Persons whose Support of the desired Measure he thought most doubtful, I merely regarded his Proceeding as evincing a total Want of Dignity and generous Feeling, and lamented that he was not superior to the Temptation which Circumstances had unfortunately thrown in his Way; but it was soon very evident that Mr. Willis's Views were directed to another Object. He was in the daily Habit of frequenting the House of Assembly, from whose Debates the Judges in this Colony have ever felt it discreet to abstain; and it was universally spoken of as a great Indecency that he was seen in a Dress and Manner but little according with his Situation, hanging about the Lobbies and Committee Rooms of the House, in close and familiar Conversation with Persons whom he heard daily haranguing against the Government, while to every other Gentleman in the Legislature he seemed to be utterly unknown. When the Attorney General's Motion respecting the proposed Court was called up, he took his Seat, as usual, on the Floor of the Assembly, and was content to remain there during the Discussion, notwithstanding his personal Connection with the Measure, and the Observations which it unavoidably induced. He seemed now, and perfectly of his own Accord, to have placed himself so entirely in opposition to the Government, and to those who supported its Measures in the House, that he was evidently in strict Concert with the most factious popular Declainers during the Progress of the Measure I speak of, and so much so, that Questions which must have been, and which are known to have been, prompted by him, were put in Debate to the Attorney General by the Persons I allude to — Questions indicating a Want of Confidence in the good Faith of the Government, and which, it is evident, if Information was his Object, he ought to have himself addressed to the Government. I know that his whole Manner of Proceeding excited (and it could not do otherwise) in the Mind of the Attorney General, who was going plainly forward in submitting to the Legislature the Proposition of the Government, the strongest Disgust at a Course at once unjust and insulting. Mr. Willis's Conduct in the Matter throughout was in my Opinion highly indecent and unprovoked, utterly subversive of all Respect for his Character, and very injurious to Public Feeling. It did, indeed, place him in that Light with all respectable Men, that had he committed none of the Extravagancies which since have marked his short Career of Public Duty, I must always have regretted that he had been appointed to a Seat on the Bench of Justice. The Result of the Discussion in the House of Assembly, coupled with Mr. Willis's subsequent Proceedings, have discovered very plainly that he had other Objects than I supposed, or were contemplated by the King's Government in sending him to this Country. All those Members of the Assembly with whom he was in constant Communication opposed the Establishment of a Court of Equity, and it was evident that he was neither surprised nor disappointed that they did so. There was so clearly some View beyond, in the Connection he had formed, that Members of the Assembly, with whom he had not the slightest Acquaintance, did not hesitate to declare that it was his Wish to defeat the Measure, in order to establish, from its Failure, a Claim to another Situation which he preferred, and which would place him in the Way of co-operating more effectually with his political Associates. He had been heard, I am told, frequently to state, that Lord Goderich had promised him he should be Chief Justice if the other failed, and spoke much of the Interest he could make for the Situation, and of the Certainty that the Attorney General would not succeed if he (Mr. Willis) chose to apply. His subsequent Request to me to forward his Application for that Office shews that he had those Views, and I must say it is almost incredible that any Man should have adopted such Means as he has resorted to for attaining such a Situation as that to which he aspired.

In the Assizes which succeeded the last Session of the Legislature, he made an Attack upon the Attorney General, so unfeeling, and so unjust, and so uncalled for, as to excite Suspicion and Disapprobation in every honest Mind; and

and the extraordinary Measures he countenanced were so evidently calculated to give Countenance and Support to the wretched Libellers who had been disgracing him by their Praises, and to disturb the Peace and good Order of Society, that from that Moment the Character and Designs of Mr. Willis could no longer be questioned. Some Weeks ago I forwarded to you a Report, by the Attorney General, of these novel Proceedings; and, as they were made the Occasion of attempting to depress the Character and Services of that Officer, I trust an Opinion will be expressed of them.

In April last, the Chief Justice obtained my Leave to go to England. He had been nearly Seventeen Years on the Bench, without having been a single Term absent from this Province. His Health has suffered much from an acute Disease, from which he hoped to obtain Relief by surgical Aid. For that Purpose he had long desired to go to England, but had never asked Leave, until after Mr. Willis's Arrival, when the Court contained Two Puisné Judges, effective from their Time of Life, and much better able in that Respect to discharge the Duties of the Court than the Judges who had frequently been left to do so in the Absence of the Chief Justice. Mr. Campbell, with another Judge, had frequently been left to constitute the Court; and I did not think I could justly refuse him an Indulgence which he solicited for the First Time after so long a Service. It is true a Member of the Bar addressed to me a written Remonstrance against acceding to the Chief Justice's Request of Leave, setting forth the possible Inconvenience which might arise from his Absence; but as no particular Ground was pointed out which would not equally have applied in all other Cases of a Judge being necessarily absent for a Time, and as the general Objections urged against it would have applied in like Manner to prevent the Chief Justice from leaving the Colony at any future Time, I did not think I could justly do more than place this Remonstrance before the Chief Justice, and urge his remaining beyond the approaching Term, if his Health would permit. In his Reply, he stated, that his Arrangements were made for embarking at New York on the 1st of May, and that it was of consequence to him to take Advantage of this Season; that he would still defer his Journey if he could be at all assured that the State of his Health would permit his attending on the Bench at Easter Term, but that was by no means certain; and indeed his occasional Absences from the Court in preceding Terms, from sudden Attacks of Illness, gave but little Hopes of it. Under these Circumstances I did not feel myself called upon to revoke the Leave which I had granted. In Easter Term, Mr. Sherwood, the Senior Puisné Judge, and Mr. Willis sat and transacted the Business of the Court throughout the whole Term, as usual; except that Mr. Willis found it necessary, it seems, to differ from Mr. Sherwood in most of the Judgments pronounced, though I have heard no one speak in stronger Terms of the legal Knowledge and sound Judgment of Mr. Sherwood than Mr. Willis was in the habit of doing a few Months before.

In the Interval between Easter and Trinity Term, Mr. Willis, it seems, either made the Discovery, or adopted the Opinion of some other Person, that without the Chief Justice no Court could sit; that what had been done in the last Term, and in very many preceding Terms, was wholly invalid; and that there could be no legal Court in Trinity Term, which, as it immediately precedes the Assizes, is the most important in the Year.

This Opinion, and his Resolution to act upon it, under the Certainty that it must produce much Public Excitement, he did not otherwise apprise me of than by sending, under Cover to my Secretary, Two unsealed Letters to yourself and Mr. Stephen, without even expressing a Wish that they should be opened, and without conveying the slightest Intimation of their Contents. My Dispatch, No. 27, of the 6th of July, has acquainted you with what followed. I confess I did not think that Mr. Willis would have persevered, and still less that he would, in order to increase the Excitement, have resorted to other Measures still more indefensible. Nevertheless, when the Court opened on Monday the 16th June, the Two Judges had no sooner taken their Seats, all the Printers being in Court with their Note Books, as if fully apprised of what was to take place, before any Motion was made, Mr. Willis, the Junior Judge, stood up, and addressing the Bar, read to them the Paper, No. 8, with a
good

good deal of Agitation. When he had finished, he was about to leave the Court, when Mr. Sherwood remarked, that as his Construction of the Provincial Statute creating the Court was the same as it had ever been, he would continue, as all other Judges had done who had preceded him, to discharge his Duty on the Bench, notwithstanding the occasional Absence of any other Member of the Court; that as the withdrawing of Mr. Willis would leave him without the Assistance of any other Judge, he would confine himself as much as possible to the ordinary Business of the Court; doing only what was necessary to prevent a Denial of Justice, and postponing Cases that would admit of Delay for a fuller Bench. That he considered his Appearance there sufficiently declared his Conviction that it was his Right and his Duty to sit there; and as no Exception had been taken, and as no Question was before them for Judgment, he did not see the Propriety or Necessity of entering into any more particular Discussion on the Subject. He then directed the Clerk to adjourn the Court until the next Day. Mr. Willis, who had partly descended from the Bench, now returned, and standing up and addressing Mr. Sherwood, said, warmly, "You cannot adjourn—I protest against your adjourning—there is no Court in existence." Mr. Sherwood replied, "That is your Opinion; but I presume I may have an Opinion here too, and I think differently." And he repeated his Direction to adjourn. Mr. Willis again protested, and asked, "By what Authority, Sir, do you adjourn the Court?" To which Mr. Sherwood replied, he did not feel it necessary to give Authority; and after this Altercation the Court was adjourned.

On the next Day Mr. Sherwood sat alone, as he did during the Remainder of the Term. Two or Three Members of the Bar, in Concert with whom Mr. Willis had been acting, and with whom his Name stands connected in very exceptional Proceedings since, addressed the Court on the Subject of the recent Occurrence, and requested Mr. Sherwood to state his Reasons for differing from Mr. Willis in Opinion. On the next Day Mr. Sherwood gave the Answer which I inclose; and the Messrs. Baldwin and Mr. Rolph, Barristers, took off their Gowns in the Presence of the Court, and declared that they concurred in Mr. Willis's Opinion, and could not continue to transact Business in a Court which they thought illegal.

Their Example was not followed by any other Member of the Bar, and Mr. Sherwood continued to proceed in the Term. A Court composed of a single Judge, is, however, not a Tribunal adequate for Purposes of Justice, for Reasons which are given in some of the Documents inclosed. The annual Circuits are approaching, and in the Term which is to succeed, the Objection of the Chief Justice's Absence must apply with the more Force in point of Law than in the last, and be attended with much greater practical Inconvenience. Upon receiving the Report of Mr. Justice Sherwood, therefore, I referred it to the Consideration of the Executive Council; and I called also upon the Attorney and Solicitor General for their Opinions, which were laid before the Council. The Result of these References is transmitted with my Dispatch, No. 27.

Though I do not pretend to form a legal Opinion upon the proper Construction of the Act, my Judgment certainly very strongly condemns the Course pursued by Mr. Willis; and I could not hesitate to adopt the Measure recommended by the Council, of removing him, in order to make Way for another Appointment, since I could by no means suffer those Inconveniences to accrue which Mr. Willis proclaimed from the Bench must follow the Course he was pursuing. To leave the Inhabitants of this Province for many Months without the Means of administering Justice, in deference to the Opinion of the Junior Judge of the Court, when that Opinion stood opposed, not only to his own previous Proceedings, but to the Opinions of all the preceding Judges, and to the declared Intention of the Legislature, would have been incurring a Responsibility which I could not assume.

The Crown Officers had, many Months before this Difficulty occurred, (as will be seen by their Opinion transmitted with Dispatch, No. 27,) expressed a Doubt whether a Third Puisné Judge could be appointed without an Alteration of the Statute of 1794; and the Council therefore recommended, as a Measure of Necessity, that Mr. Willis should be removed, and another Appointment

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made, until His Majesty's Pleasure be signified. I have accordingly removed Mr. Willis, and have appointed Christopher Alexander Hagerman, Esq., a Barrister of long Standing at the Provincial Bar, to supply the Vacancy.

But although Mr. Willis's Removal has grown out of a Necessity of his own creating, which Necessity may not continue after he is convinced that the Construction given by him to the Statute creating the Court is erroneous, I must beg it to be distinctly understood, that my Objections to his Conduct in this Colony go far beyond any Imputation of Error in Judgment. It is worthy of Remark, that although he did not feel the Propriety of addressing any Communication of his Intentions to me, as Head of the Government, those Intentions were perfectly well known, as it afterwards appeared, to many Individuals, from whom, if it was his sincere Desire to avoid creating Public Excitement, he would most certainly have withheld the Information.

He seemed to hold perfectly at nought the Propriety of endeavouring to inform himself of the Grounds on which his Predecessors and his Associates had acted, and of acquiring, by Reference to the Government or its Officers, Information which might have saved him from the Error into which I must think he has fallen. That his Object was in fact to create Excitement, and that of the most mischievous Kind, I have no Doubt: his whole Method of Proceeding proved it.

If he thought the Court could not legally sit in the last Term, he might surely have communicated to the Government fully and in Time the Reasons which must prevent his attending. Instead of that, he went to the Court for the mere Purpose of telling the Public, that neither he nor the other Judge had any Right to be there, and that, "however awful the Fact," there was no Protection for all that is most valuable in Society. This Speech, or whatever it may be called, was given to the Printers of the most vile and inflammatory Papers, and published verbatim as it was delivered. Again, if Mr. Willis was really sincere in deploring the Excitement which he anticipated, he would not only have been content with delivering his own Opinion, but he would have been happy to find that Mr. Sherwood was prepared to adhere to and act upon the former Construction, and thus assume the Responsibility of preventing a total Obstruction of Public Justice. He would have withdrawn himself, well satisfied that Mr. Sherwood could conscientiously pursue another Course, and hoping that that Course would either be determined to be sustainable, or that the Legislature would interpose to make it so.

On the contrary, he shewed an impatient and even passionate Anxiety to drive Mr. Sherwood from his Purpose, as if determined that the Government should incur the Reproach of leaving the Country without a Court to administer Justice. Again, the Announcement from the Bench that the Chief Justice and several other principal Officers of the Colony had forfeited their Offices, was surely a most mischievous and unwarrantable Proceeding. If Mr. Willis conscientiously thought that he could not sit in Court for any judicial Purpose, surely he ought to have thought it much less justifiable to repair thither for the Purpose of proclaiming, quite extra-judicially, that the Chief Justice of the same Court with himself, and other Officers unconnected with the Court, had forfeited their Offices. It is impossible that he could have thought himself fulfilling any Act of Duty in addressing this Information to the Public from the Bench. It could answer no other End than that which it did accomplish, and for which it seemed intended,—the giving to the discontented and clamorous a new Topic of Abuse against the Government and its Officers,—Abuse utterly unfounded and unjust.

Mr. Willis was removed on the 26th of June. Writs had just issued for the General Election of Members of a new Assembly, the Term of Service of the former having expired. The Election for York was appointed for the 9th Instant; and in the Interim every Exertion was used by the Two or Three Gentlemen of the Bar to whom Mr. Willis has attached himself, to make his unavoidable Removal from Office the Occasion of creating a popular Ferment, which might prejudice the Elections. To that End a popular Meeting was called in York by the Handbill inclosed. Mr. Baldwin, whose political Character can be readily learned from Mr. Gore, many Years Lieutenant

Governor of this Colony, is Mr. Willis's constant Associate, and must have known, unless Mr. Willis grossly deceived him, that this Removal was not an Act of Cruelty, but was expressly placed on the Footing of Necessity by the Letter written to him, of which a Copy is transmitted.

Failing to attract much Attention by the Meeting, which was discounted by every Gentleman, and almost by every respectable Mechanic of the Place, Accounts were circulated full of the most shameful Falsehoods; but these, I trust, will in like Manner fail. The Populace were harangued by Mr. Baldwin in inflammatory Language, charging Mr. Huskisson with intending to trample upon the Constitution in his proposed Amendments of the 31 Geo. 3., and every Effort was used to excite a Hatred to this Government, as acting arbitrarily and tyrannically against Mr. Willis.

The Farce of an Address was got up, in which Mr. Galt and Mr. Baldwin, with their Wives, were appointed a Committee to take care of Lady Mary Willis; and I understand a Petition is busily circulated, including the Removal of Mr. Willis among a List of Grievances. The utmost Efforts of the Faction with which Mr. Willis has chosen to identify himself, failed to exclude the Attorney General from the Assembly. He was returned on the 11th, after a Contest of Two Days, and Mr. Willis departed the same Day for England. Had they succeeded in this Instance, the utmost Use would have been made of their Success to influence the other Elections against the Government. The Attempt was at least exceedingly mischievous. At the Election for York, the Candidate opposed to the Attorney General read from the Hustings a literal Transcript of the Writ discharging Mr. Willis from his Office, in the Hope of exciting a Feeling of Irritation among the Multitude. This Document was handed from the Crowd, to the Candidate who read it, by Mr. Collins, the Editor of a scandalous Newspaper here. It must have been furnished by Mr. Willis, and is stated to have been in the Handwriting of his Clerk.

The Proceedings I have detailed have given rise to very flagitious Libels upon the Administration of Justice, and upon the Government, for which the Authors of them shall be prosecuted in the ordinary Manner. The same Journals, very much to the Discredit of Mr. Willis, are filled with Commendations of his Character and Conduct; but these Productions, and the Authors of them, are so utterly contemptible that I would not notice them, if it were not that Mr. Willis seems to attach a strange Importance to their Support. If I could fancy Statements or Opinions, drawn from such a Source, could have Influence any where, I should take the Trouble of transmitting some Numbers of these Papers, that it might be seen in what Terms they hold up each other to Public Reprobation as unprincipled and worthless Misereants wholly destitute of Truth.

Regretting the Injuries which Mr. Willis's Misconduct has entailed upon his Family, as well as its mischievous Effect in the Colony, I have no Desire to interfere with his Interests more than my Duty here renders absolutely necessary. I do not, therefore, wish this Statement should stand publicly recorded against him unless you deem it necessary.

I have marked it "separate," in compliance with your Circular of the 3d September last, and have transmitted the Documents with a short official Letter, (No. 27.) that you may exercise your Discretion on that Head; begging you, however, to understand, that I have no Objection to any Use being made of this Statement that you may desire.

I cannot conclude without stating, in explicit Terms, that Mr. Willis's Conduct has been so marked with a Want of Dignity and good Sense, so disrespectful towards the Government and its Officers, so unjust, in my Opinion, towards those who are associated with him in Public Duty, and so prejudicial in its whole Bearing to the Tranquillity and good Order of the Province, that I cannot and do not contemplate his Return to a Seat on the Bench as in the slightest Degree probable. I would, indeed, think it necessary to express myself on this Point in stronger Terms, if I did not feel perfectly assured that His Majesty's Government could not fail to come to this Conclusion.

If the Seat of Justice is to be used for the Furtherance of private and personal Views, or the Promotion of Party Politics, all Stability of Government and

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and all Confidence in the Laws is at an End; and to suffer such a State of Things to continue is to leave those whom the Government is bound to protect, subject to a Tyranny beyond Endurance.

Right Hon. W. Huskisson, M. P.
&c. &c.

I have, &c.
(Signed) P. MAUTLAND.

Address to Judge Willis.

To the Honourable John Walpole Willis.

WE, the undersigned, Inhabitants of Upper Canada, with Joy heard of your Arrival from the English Bar, commissioned by our most gracious Sovereign to administer Justice amongst us.

The Persecutions you have suffered, the Jealousies which have prevailed against you, and the Consummation of your Wrongs by your arbitrary Removal, have awakened our painful Attention, and disappointed our fondly cherished Expectation of better Things.

The ignominious Treatment to which you have been exposed, however base in its Motive and unjust in its Causes, cannot but be wounding to your pure and honourable Mind; and therefore, in addition to those Consolations which you cannot fail to derive from your Consciousness of Integrity, we beg leave, with all Sincerity, to offer to you the Sympathies of the People among whom you have cast your Fortunes, and administered so impartially the Justice committed to you by our King.

It is most grateful to our Feelings, as a Pledge for your Return, that upon proceeding to England to seek at the Foot of the Throne the Redress of your Wrongs, which Wrongs we feel to be seriously our own, you intend to leave your amiable and accomplished Lady and your infant Child to the Care of Heaven and the grateful Superintendance of a generous Public.

Seeing that you are abandoned by the Provincial Administration and their Dependants, we have, independent of any Arrangements which your limited Knowledge of this Country may enable you to provide, appointed, for our Public Satisfaction, a Committee to watch over the Interests and insure the Protection of Lady Mary and Family, that her Ladyship may, during your Absence, the less feel the Remoteness of her native Country and of her noble Friends. This Committee consists of John Galt Esquire and Lady, and Docter Warren Baldwin and Lady; to which Committee is added Robert Baldwin Esquire, as her Ladyship's Solicitor.

Inclosure, No. 1.

York, 12th May 1828.

Sir,

I TAKE Advantage of the first Moment of Leisure after the Session of the Legislature, and of the Courts of Justice, which immediately succeeded, to report, for his Excellency's Information, the Progress and Result of the Measure proposed to the Legislature for establishing an equitable Jurisdiction in this Province.

Since Circumstances, not of a very agreeable Nature, induce me, in Justice to myself, to be more particular in the Relation than would otherwise be necessary; for if I am to give Credit to but a small Portion of what I hear, it is only prudent that I should place in his Excellency's Hands the Means of guarding against the Effect, in other Quarters, of Misrepresentations which could do me no Injury here.

His Excellency will remember that the Propriety of establishing a Court of Equity in this Country has not unfrequently engaged his Attention for many Years past. I forget whether, when I went to England in 1822, that Subject was among those which I was instructed to bring before the Government, or whether any Dispatch respecting it was conveyed by me to Lord Bathurst. I recollect that in 1825, that was one of the Matters to which I was requested, in a Memorandum which you gave me by his Excellency's Desire, to call the Attention of the Government, if an Opportunity should offer.

I did

I did accordingly advert to it Once or Twice in Conversations which I had the Honour to have with Lord Bathurst; and I think I also spoke on the Subject to Mr. Wilnot Horton. Nothing was decided, however; and indeed, as it was evident that the preliminary Measures were more properly to be taken in the Colony, nothing more was expected to be done than to obtain the Opinion of the King's Government as to the Footing upon which the Court might best be established. It occurred to me that it might be useful and satisfactory to ascertain, while I was in England, what Income it would be necessary for the Province to provide, in order to induce a practising Barrister in the Court of Chancery, of respectable Character, and who had had considerable Practice in that Court, to come to Upper Canada and organize a Court of Equity, and to preside in it, if not for Life, at least for a certain Number of Years; and in my Wish to arrive at some specific Information, I asked Mr. Stephen, Counsel to the Colonial Department, who had practised in the Court of Chancery, whether he thought a Person of undoubted Qualification as to Character and Experience would be induced to come out, if the Legislature could be induced to provide a Salary of £2,000 a Year, and a Retirement after Ten Years' Residence. He was good enough to make Enquiries for me, and to write to me a Note, which I have still by me, communicating the Result of his Enquiries, which was rather encouraging. The whole Thing was hypothetical. My Meaning was merely to ascertain how the Office might be filled, supposing it were to be created, and supposing an adequate Provision to be made for it; and I cannot have a Shadow of Doubt that it was clearly so understood by Mr. Stephen. I think I brought out no Communication whatever from the Colonial Department to his Excellency on the Subject; nor did I ever hear more of it until the Arrival of the Intelligence, in July last, that Mr. Willis had been appointed a Judge of the Court of King's Bench in Upper Canada, upon a supposed Vacancy, and with the Understanding, that if any Court of Equity should be established in the Province, he was to preside in it either as Master of the Rolls or Vice-Chancellor. I imagined at the Time, and I have now Reason to think it most probable, that this conditional Appointment took its Rise in a great Measure from the Conversations I have had with Mr. Stephen, which were precisely of the Kind and for the Purpose I have mentioned.

His Excellency will call to Mind, that in the Session of 1826 he had in general Terms called the Attention of the Legislature to the Expediency of providing an equitable Jurisdiction; and that, although the Legislature pledged themselves that it should engage their Attention, the Suggestion was not acted upon, probably from an Impression that the State of the Revenue did not conveniently admit of a suitable Provision being made for the Court.

Mr. Willis arrived in August or September last, when I was absent on the Circuit. On my Return I saw him, and it was on all Accounts as much my Desire as I considered it my Duty, to pay him every Attention, as a Member of the same Profession and a Public Officer in the same Colony; and because my Situation here, both under the Government and in the Assembly, seemed to place me in, more than others, the Way of forwarding one of the Objects for which Mr. Willis had come out, I quite felt it incumbent upon me to do all in my Power towards the Fulfilment of the Expectations he had been allowed to entertain.

I had consequently frequent Conversations and Appointments with him on the Subject of the proposed equitable Jurisdiction; and being myself wholly inexperienced in Chancery Proceedings, it was my Wish to acquire such Information as might enable me to submit a Proposition to the Assembly in a specific Shape, if it should become necessary. That it would be found necessary was decidedly my own Impression, and always had been; but Mr. Willis had been led to think otherwise, and had come out under the Persuasion that the Constitution of the Court would be an Act wholly emanating from the Crown. He stated, indeed, that not finding it convenient to incur longer Delay in waiting for his Commission, he had left England with the positive Assurance that it would soon follow him; and appeared to be so fully persuaded that the Court would be created by Commission under the Great Seal of Great Britain, and the Details left to himself to arrange, in conjunction with the Govern-

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ment, that his Object in consulting me seemed merely that he might be better prepared for settling the Details, when the Arrival of his Commission should enable him to do so.

I had always thought that an Act of the Legislature, or of the Imperial Parliament, would be proper, if not indispensable, for creating the proposed Court of Equity; and I expressed my Surprise to Mr. Willis that it had not appeared so in England; but I was assured by him that it was otherwise understood and settled, and he, no doubt, thought so. As Mr. Willis was in daily Expectation of his Commission from England when the Legislature met in January last, it would neither have been proper nor considerate in me to have introduced any Measure into the Legislature for creating the proposed Court; because, had such a Proposition not been more favourably received than in the preceding Year, no other End would have been answered by it than the throwing Doubts upon the Sufficiency of the Commission he was expecting, by an Attempt to procure an Act of the Legislature. Some Days after the Session met, however, his Excellency received the Dispatch from Mr. Huskisson, dated 25th November 1827, in which it is stated, that the Law Officers of the Crown in England had given it as their Opinion, that there was "considerable Doubt whether His Majesty lawfully could, by Letters Patent under the Great Seal, without the Intervention of Parliament or of the Local Legislature, create any new Judge in Equity in Upper Canada." This Dispatch required that the Opinions of the Judges and the Crown Officers here, upon several Modes which were suggested in it, of creating the desired equitable Jurisdiction, should be called for and submitted to the Legislature. This was done; and the several Reports were printed for the House of Assembly. I transmit a printed Copy of them with this Report. You know at what Time they were transmitted by his Excellency to the Legislature, and the Message with which they were accompanied. I was desirous of obtaining as soon as possible the Sense of the House of Assembly upon the Measure generally; and, with that View, I moved for a Committee of the whole House upon the Message, and named the Monday after its Transmission. When that Day came, the House declined entering upon the Question, because the Papers had not yet been printed. As soon as they were printed I moved the Committee again; but a further Delay was insisted upon, in order that Time might be given for examining and considering the Reports; and two or three other Motions for an early Consideration of the Subject were alike ineffectual. It was evident that the House had no particular Desire to enter this Session into the Question; and, in the next place, I need scarcely remark, how difficult it was, and in many Cases impossible, to force into Discussion and to a Decision, during the last Session, or indeed any Session of the last Parliament, the most ordinary and necessary Measures. At length, on the 11th of March I think, I succeeded in getting it into Committee, when I explained at some Length the several Occasions which had arisen for the Exercise of an equitable Jurisdiction, and declaring that, without any Reference to the Opinions which had been expressed by others, or even by myself as Attorney General, my Desire was to obtain from the House, in the first place, an Expression of their Opinion as to the Expediency of providing, during the present Session, for the Erection of an equitable Jurisdiction, and, in the next place, upon what Footing they considered it most expedient to establish such a Jurisdiction. I further stated, that I had proceeded some Length in preparing a Bill, in which I had endeavoured to provide for the Court in the Manner which seemed to have been originally contemplated by the Secretary of State; and that I thought it right, and but just, as it concerned the Gentleman who had come to this Country with the Expectation that a Court would be so established, to submit the Measure fairly to the House upon that Footing. The only Measure, therefore, which I had prepared was one of that Description, and consistent with Lord Goderich's Dispatch, which Mr. Willis had brought out; but as it was doubtful which of the Alternatives suggested from England in Mr. Huskisson's Dispatch of the 25th November, and directed by the Secretary of State to be submitted to the Judges and Crown Officers here, would be preferred by the House, I should not submit any

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Measure in detail, until a Vote had been first taken upon the following Resolutions, which I then proposed; viz.

1st. Resolved, That it is the Opinion of the Committee, that it is expedient to make Provision, during the present Session of the Legislature, for the convenient Exercise of an equitable Jurisdiction within this Province.

2d. Resolved, That it is the Opinion of this Committee, that an equitable Jurisdiction may be best provided for by the Constitution of an independent Tribunal, unconnected with the Courts of Common Law, in which a Vice Chancellor shall preside, under the Lieutenant Governor as Chancellor, with Power to administer Equity and afford equitable Relief upon the same Principles as the High Court of Chancery in England.

I was asked whether I could not lay before the Committee a Bill providing for the proposed Details. I had prepared the principal Clauses of a Bill, and had no other Objection to submit them to the Committee than that, as there was evidently a very general Disinclination to the Subject altogether, I feared that a Disagreement and Cavil as to some of the minor Details, which I could have no Objection to modify when they should come properly before the House, might be unfairly made the Pretext for dissenting from the whole Measure, and that its Chance of Success might be truly prejudiced. It was my Wish, on that Account, rather to obtain a Vote upon the first general Resolution, which expressed merely a Determination to provide for an equitable Jurisdiction in some Manner during the present Session. The desiring to see a Bill placed before the Committee, while even this Question was undecided, was evidently unreasonable; and seeing from what Quarter it came, and the Manner of urging it, I had no Difficulty in understanding the Motives with which it was pressed. As too much Reason, however, was afforded, not only to myself, but to all who observed Mr. Willis's Course of Conduct during his almost daily Attendance within the House of Assembly, to be convinced that this Call was not made without the Knowledge and Concurrence of Mr. Willis himself, I chose not to leave room for the Assertion hereafter, that the Measure had miscarried because I was not prepared to exhibit any thing specific. As I happen to be the only Organ of the Government in the House of Assembly, I thought it proper, though Mr. Willis had no direct personal Claim upon me, not to leave Ground for any Imputation against the Colonial Government, of a Want of Readiness to place fairly before the Legislature the Measure in which he was interested.

I therefore gave into the Hands of Mr. Rolph, the Member who made the Request, the Draft which I had prepared, and of which I inclose a Copy; but I expressed it to be for his own Information, and declared myself ready to answer any Enquiry, as to my own Views of the necessary Details, which he or any other Member might desire to make. I said I was not inclined to have the Details of the Bill brought prematurely into Discussion, for the Reason I have given, and therefore pressed, in the first place, the general Resolutions; declaring my Readiness, in case of these or any other Resolutions being carried, to submit, with the least possible Delay, a Bill to meet them. The Bill was nevertheless immediately brought into Discussion by Mr. Rolph, and its Clauses read, and remarked upon. It was objected that the Governor ought not to be Chancellor; that he should have nothing to do in the Appointment of any Officers of the Court; that the Vice Chancellor's Commission should be under the Great Seal of England; that he should not be removable by the Crown, &c. It was of little Moment, however, to discuss these Objections, for the Question being put on the first Resolution, it was wholly unsupported, and the House declined altogether entering into Consideration of the Measure during that Session. As it was the last Session of the existing Legislature, I was not surprised that they did refuse to entertain it. Some Members were impressed with Apprehensions of the Delay and Abuses which, in their Minds, seemed inseparable from a Court of Chancery; others were unwilling, or thought we were unable, to provide for the Expence. It seemed a prevailing Sentiment that a Court of Chancery was not a very popular Matter to meddle with, and that Idea had, no doubt, its Weight on the Eve of a new Election; but these Considerations, it is very certain, would not of themselves have

have led the whole House to refuse, as they did, to entertain a Measure which had in a former Session, as well as in this, been pressed upon them by the Government, and which they now seemed the more called upon to enter into, from the Circumstance, that a Gentleman had already come out from England under an Expectation, in some Measure authorized, that a Court would be created, and that he would be selected to preside in it.

The Reason of the total Failure of Support, and especially from those Persons with whom Mr. Willis had chosen to place himself in the most confidential Communication, is too evident to require that I should say any thing upon it. I have, therefore, only to add, that as Mr. Willis came out to organize a Court of Equity in a Country where no Experience whatever had been had of such a Jurisdiction, I might reasonably have expected that a complete, well-digested, and well-connected System would have been prepared by him and placed in my Hands; and that my Part in this Measure, among the numerous Occupations which you are well aware press daily for my Attention, would have been confined to the conducting the Bill through the Legislature, and acquiring a previous Knowledge of its Details, in order that I might be able to explain them. Mr. Willis gave me a very short Memorandum of the proposed Officers of the Court, and the Arrangement of the mechanical Part of it, which I thought advisable so far as it went. The inclosed Draft of a Bill in his Hand-writing was the only other Material with which he furnished me. It did not afford me any Aid in my Preparation of the Measure so far as I proceeded in it; nor would it have been of any particular Use to me if, from the Legislature entertaining the Proposition favourably, I had had Occasion to attempt a more perfect Scheme.

I have the Honour to be,

Sir, &c.

Major Hillier, &c.

(Signed) JOHN B. ROBINSON.

Inclosure, No. 2.

Copy of a Message from his Excellency the Lieutenant Governor to the House of Assembly, and Documents accompanying the same, relative to the Establishment of an equitable Jurisdiction in Upper Canada. (Ordered by the House of Assembly to be printed, February 1828.)

P. MAITLAND.

THE Lieutenant Governor transmits, for the Information of the House of Assembly, Copies of Three Dispatches which he has received from His Majesty's Secretary of State for the Colonies, dated the 9th April, the 19th July, and the 25th November last, respecting the Provision for an equitable Jurisdiction in this Province. To these are annexed, conformably to His Majesty's Instructions, the Reports of the Judges and Crown Officers on the Subject. The manifest Importance of the Object to which they refer induces the Lieutenant Governor to recommend these Documents to the early and attentive Consideration of the House.

Government House, 19th February 1828.

Extract of a Dispatch from Lord Bathurst to Major General Sir Peregrine Maitland, K.C.B.; dated Downing Street, 9th April 1827.

THE rapid Growth of the Population, and the consequent Increase in the Number of commercial and other Transactions in the Province, must be met, not only by a proportionate Increase in the Number of the Judges, but, perhaps, also by an Enlargement of their Jurisdiction. I understand that at present there is no Tribunal in the Country discharging the Functions of a Court of Equity, and that there is consequently a Failure of Justice in those numerous and most important Cases which belong exclusively to Courts of that Nature. In the probable Advance of the Province, the Want of a Tribunal competent

to execute Trusts, and to protect the Property of Infants, must be felt as an extreme Inconvenience. It has therefore occurred to me, as a Subject highly deserving Attention, whether the judicial Office of Chancellor, under the Title of Master of the Rolls or Vice Chancellor, might not advantageously be committed for the present either to the Chief Justice or to One of the Inferior Judges of the Court of King's Bench. An Arrangement of this Nature might, if necessary, form the Basis of some more systematic Arrangement in future Times.

Your Excellency is aware that a similar Measure has been adopted in Nova Scotia; and that under a recent Act of Parliament a System very similar has been introduced into the Court of Exchequer in England. You will consider and report to me whether this Measure, or any Modification of it, could be conveniently adopted in Upper Canada.

Sir,

Downing Street, 19th July 1827.

This Letter will be delivered to you by John Walpole Willis, Esq., Barrister at Law, whom His Majesty has been pleased to appoint One of the Judges of the Court of King's Bench of Upper Canada.

His Majesty's Intention to make this Appointment, in compliance with the Memorial of the Judges of that Court, was specified to you in Lord Bathurst's Dispatch of the 9th April last; in the same Dispatch the necessary Arrangements were made respecting the Salaries to be allowed to the Judges of the Court.

It has been in contemplation to make Provision for the Administration in Upper Canada of that Part of the Law of England which in this Country is administered by the Court of Chancery; and it is intended to commit that Jurisdiction to Mr. Willis, who has practised for several Years in the Courts of Equity.

Sir P. Maitland, K. C. B. &c. &c. &c.

Sir,

Downing Street, 25 November 1827.

THE Question of the Erection of a Court in the Province of Upper Canada, for the Administration of that Part of the Law of England which in this Country is administered in the Court of Chancery, having been brought under the Consideration of the Law Officers of the Crown, they have reported it as their Opinion, that there is considerable Doubt whether His Majesty lawfully could, by Letters Patent under the Great Seal, without the Intervention of Parliament or of the Local Legislature, create any new Judge in Equity in Upper Canada.

They recommend that if a Judge in Equity be appointed, he should bear the Title, not of Master of the Rolls, but of Vice Chancellor to the Governor, observing that the Title of Master of the Rolls might lead to Misconceptions, in consequence of misfounded Analogies which might be drawn between the Office to be created in Upper Canada and the ancient Office of Master of the Rolls in England. The Law Officers of the Crown have further suggested, whether, instead of erecting a distinct and independent Tribunal, it might not be expedient to invest the existing Common Law Court with so much of an equitable Jurisdiction as upon due Consideration may be thought useful or necessary to the Province; and they observe, that this Jurisdiction might be exercised, as in the Court of Exchequer in England, in the same Tribunal and by the same Judges who administer the Common Law.

In consequence of this Report it has been deemed inexpedient to proceed with the proposed Letters Patent for erecting the Office of Master of the Rolls in Upper Canada. As, however, the Establishment of a Court, competent to execute Trusts and to protect the Property of Minors, appears indispensable to the due Administration of Justice in the Province, you will avail yourself of the earliest Opportunity for recommending the Subject to the Attention of the Legislative Council and House of Assembly; and you will inform them, that His Majesty will be ready to concur in the Enactment of any Law which may be properly framed for the Establishment of an equitable Jurisdiction. For the Information and Assistance of the Legislature, it will be proper to call upon

upon the Attorney and Solicitor General, and the Judges of Upper Canada, for a Report of their Opinion as to the most convenient Method of carrying this Object into Execution. But whether a new Tribunal be erected, or new Powers be imparted to the existing Tribunal, the Act ought so to be framed as to require the Intervention of the Royal Authority to accomplish the Purposes of the Legislature; for the Principle, that all Courts are Courts of the King, and that Justice is to be dispensed only by Officers commissioned by the King for that Purpose, cannot be too fully recognized or too strictly enforced.

As it appears that Mr. Willis, at present one of the Judges of the Province, quitted this Country upon an Understanding that, in the Event of the Erection of a new Court of Equity, he was to preside in it, that Intention will of course be carried into Execution if the Provincial Legislature should ultimately decide upon constituting a separate Court of Equity. In that Event you will consider and report to me what additional Remuneration ought to be allowed for the Discharge of these additional Duties, and out of what Fund and in what Manner that Remuneration would be most properly made.

I have the Honour to be, &c.

(Signed) W. HUSKISSON.

Letter from Mr. Chief Justice Campbell to Major Hillier.

Dear Sir,

York, 12th February 1828.

I HAVE the Honour to inclose herewith the Dispatch of His Majesty's Secretary of State, relative to the Erection of a Court of Equitable Jurisdiction in this Province, and upon which his Excellency the Lieutenant Governor has requested the Opinion of the Judges as to the most eligible Mode of carrying such Intention into Effect in the present State of the Province.

Mr. Justice Willis having, under peculiar Circumstances, given his Sentiments separately, I have now the Honour of sending herewith the Sentiments of Mr. Justice Sherwood and myself on the Subject, for the Information of his Excellency.

I am, my dear Sir,

Yours faithfully,

(Signed) WILLIAM CAMPBELL.

George Hillier, Esq., Secretary.

Report of the Chief Justice and Mr. Justice Sherwood on the Method of carrying the above Object into Execution.

His Majesty's Secretary of State having suggested to his Excellency the Lieutenant Governor Two different Modes of erecting an equitable Jurisdiction in this Province, we have been requested to express an Opinion as to the most convenient Method of carrying the proposed Object into Effect. The Extent of the Population and Resources of the Province obviously lead to this Alternative, either to constitute an independent Tribunal, or to give the Superior Court of Law equitable Powers for the same End, and we shall therefore confine our Remarks to this View of the Subject.

The extensive Benefits derived from the Existence of a Court of Chancery in England are universally acknowledged; and it is also well known that much Public Advantage results from the Exercise of equitable Powers imparted to some of the Courts of Law in that Country. The only Difference between these Two Kinds of equitable Jurisdiction consists, perhaps, rather in the Quantity of Business done in each Court, than in the Mode of Practice or in the Correctness of Decision.

The Court of Chancery possesses a general Jurisdiction; and its entire Attention, when sitting as a Court of Equity, is devoted to equitable Causes. The Court of Exchequer has also a general Jurisdiction in both Law and Equity, but the greater Part of its Time is occupied in deciding Questions of Law. The equitable Proceedings of both Courts are subject to the ultimate Revision and Amendment of the House of Lords; and we have no particular Reason to believe that the judicial History of the Mother Country exhibits any great Difference between the Number of erroneous Decisions on the

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Equity Side of the Court of Exchequer, and the like Decisions made in other Courts which have more exclusively an equitable Jurisdiction.

The Courts of Wales, of the City of London, and of the Cinque Ports, have all their peculiar equitable Jurisdictions; most of these Tribunals have existed for Centuries, which Fact alone affords sufficient Grounds to believe that there is no general Inclination in England for a total Separation of the Courts of Law and Equity. As long Usage in England allows not only distinct Courts of Equity, but also sanctions the Exercise of legal and equitable Powers by the same Judges, no conclusive Argument can be drawn from such Usage to settle the present Question; we shall therefore resort to the Consideration of Public Convenience in this Province, as the only proper Criterion by which we should be governed in forming our Opinion.

If a separate Tribunal be erected for the Administration of Equity in this Province, it clearly appears to be the Pleasure of the King's Government that One of the Judges of the Superior Court of Law in this Country must preside in the new Jurisdiction. Such an Arrangement, we think, would be productive of Public Detriment, because there is no Superabundance of Judges in the Superior Court. The proposed Abstraction of One of its Members would necessarily lessen the existing Efficiency of the Court, and the Civil and Criminal Jurisprudence of the Country would not receive the requisite Attention.

An independent Tribunal, possessing an equitable Jurisdiction over this extensive Province, would require all the Time and Energies of any One Individual, and leave him no Leisure to attend to the Considerations and Determinations of Suits at Law.

The Situation of One of the Judges of the Superior Court of Law in this Province would in that Event become a perfect Sinecure; and even the Addition of another Judge to the Court would in fact produce no accumulated Advantages to the Public.

If all the Judges of the Superior Court of Law were made Judges in Equity, with competent Authority to any One or more of them to hold a Court of Equity, with defined Powers and for particular Purposes, at certain Periods, distinct from the existing Law Terms, we incline to think the whole Public Business would be accomplished with greater Facility.

The Judges might make such Arrangements as to afford mutual Assistance to each other in both Descriptions of Courts. There can be no conclusive Objection to such a Measure: Law and Equity are not founded in discordant or incompatible Principles; nor is it indispensably necessary for Knowledge of either, to separate and contrast the Two.

The general Definition of Equity is the Soul and Spirit of all Laws. Both Rules of Action have their Origin in the immutable Principles of natural Justice. Equity essentially assists in the Interpretation and Application of Law, and occasionally supplies the Defects of its general Regulations. The Administration of both Law and Equity have been intrusted to the same Tribunal under all the various Forms of Government which have so long been known in Europe; and it is undoubtedly true, that Ignorance of the Common Law is nearly allied to Incompetency for the true Application of Equity. Men who have spent their Lives in the continual Study and Practice of the Jurisprudence of their Country are the most fit Persons to compose any Tribunal to which the Constitution attaches the Power of deciding Disputes between the Members of the Community. At the same Time it must be admitted, that constant Practice and intimate Knowledge of any particular Part of the general Law of the Land greatly facilitates the Performance of the peculiar Duties of that Department, where such Part of the Law forms the Rules of Adjudication. The Judge in Equity, who takes no Share in Proceedings at Common Law, would undoubtedly be capable of performing more Business in any given Period than the Judge whose Attention is alternately divided between Common Law and Equity. We incline, therefore, to think, that if a distinct Court of Equity, possessing a general Jurisdiction, were erected in this Colony, and a separate Judge appointed to preside, without lessening the Number of Judges for that Purpose in the Superior Court of Law, greater Advantages would accrue to the Public than can be reasonably expected from any other equitable Establishment.

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On the other hand, if One of the Judges of the Superior Court of Law must of necessity be selected for a Judge of an independent and general Jurisdiction in Matters of Equity, we incline to think that the more eligible Method at the present Juncture would be to invest all the Judges of the Superior Court of Law with equitable Powers, limited to specific Objects; they should possess sufficient Authority for any One or more of them to hold a Court of Equity, at fixed Periods, independent of the existing Terms of the Court of Law, and where equitable Causes only should be heard and adjudged.

This circumscribed Jurisdiction could be wholly abrogated whenever the Exigencies of the Province call for a more extended Administration of Equity, and the Legislature might substitute such other System as in their Wisdom should be deemed more eligible. Should the Common Law Judges find, on Experiment, that the additional Duties now proposed would be too burthensome, they might express a Dissent to their Continuance; and the Justice of the Legislature would of course recognize their Right to be relieved, by some other Appointment.

(Signed) WILLIAM CAMPBELL, C. J.
LEWIS P. SHERWOOD, J.

York, 10th February 1828.

Letter from Mr. Justice Willis to Major Hillier, with Report on the same Subject.

Sir,

York, Upper Canada, 5th Feb. 1828.

PERMIT me to acknowledge your Letter of Yesterday, accompanying a Copy of a Dispatch from Mr. Secretary Huskisson, for which I have to request you will make my most respectful Acknowledgments to his Excellency the Lieutenant Governor. Under the peculiar Circumstances in which I am placed, I have ventured to inclose a separate Report on the Subject of the Dispatch, for the Information of his Excellency. A Copy of this Report shall be transmitted to the other Judges when I am called upon by them for my Opinion; and I presume to hope that his Excellency will release me (if it can be done with Propriety) from any further Expression of my Sentiments in this Matter. Perhaps I may be excused for adding, that when the Office of Vice Chancellor of England was first created, the Salary attached to it (£5,000 per Annum) was, I believe, *at least equal* to that of the Chief Justice of the Court of King's Bench.

I have the Honour to remain,

Your very obedient Servant,

(Signed) JOHN WALPOLE WILLIS.

Major Hillier, &c.

BEING in some Degree interested in the Subject on which my Opinion, together with that of the other Judges and the Attorney and Solicitor General of this Province, is now called for, I hope I may be excused from joining in any general Report, and permitted merely to express my *entire Accordance* with the Sentiments publicly delivered by the present Lord Chancellor when Attorney General, and repeated by him when Master of the Rolls, in the British House of Commons, in the recent Discussions respecting the Court of Chancery of England.

In his Speech of the 19th May 1826 he said, " If you unite the Two Systems, Common Law and Equity, and compel the same Judge to administer Law one Day and Equity the next, is it probable that he will possess the same Knowledge and Information as those Judges who are exclusively confined to the Administration of the Laws in the Law Courts, or as those who now preside solely in Courts of Equity? It is well known that the Exchequer Court has both a Jurisdiction in Law and in Equity. It is as well known, that any Suitor who is desirous of having a Question of Law decided will never go to the Court of Exchequer - he will prefer the Court of King's Bench. In a similar Manner, every body who has an Equity Case to be decided will go to the Court of Chancery in preference to the Court of Exchequer. The Inconvenience of uniting these Two Systems in the Court of Exchequer was so palpable and so great, that some Time ago a Bill was brought in to separate the Two Jurisdictions. In consequence of that Bill the Equity Jurisdiction of the Court of Exchequer is now distinct from the

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“ Law Jurisdiction; the Equity Cases being decided by the Lord Chief Baron, while the Common Law Jurisdiction is dispensed by the other Judges in the Court below him. I have made these few Observations, and have appealed to these well-known Facts, in order to shew that the Equity Jurisdiction of the Country must *not only* exist, but that it *must exist* in separate Courts, and that we shall derive no Advantage from attempting any Change in it.” On the 28th February 1827 Sir John Copley (then promoted to the Office of Master of the Rolls) spoke on the same Subject as follows: “ I have never found any one Individual, on whose Judgment I could place the least Reliance, who attempted to find Fault with that System of Jurisprudence which distinguishes the Court of Chancery from the other Courts of Civil and Criminal Law, and which is with us called Equity. I never recollect any one who ventured to assert that the Jurisdiction of that Court could be dispensed with; *that what is called Equity could ever be administered by the Courts of Law*; or that it could be afforded by any other Means than by a *distinct and different Tribunal*, limited to a peculiar Object. I yield to no Man in my Admiration of the Simplicity of the Proceedings of the Courts of Law. I have been brought up in early Prejudices in favour of that Simplicity; but it is in consequence of the Separation of the Business of the Courts of Law from that which should be conducted in Courts of Equity, that the Simplicity of the former has been preserved.” I shall only observe, that these Statements are in strict Conformity with the Opinion of the Commissioners, (Lord Eldon, Lord Gifford, Sir John Leach, then Vice Chancellor and now Master of the Rolls, Sir Charles Wetherell, Master Cox, Sir Anthony Hart, the present Chancellor of Ireland, Doctor Lushington, M. P., Master Courtenay, M. P., Mr. Smyth, M. P., Mr. Merival, Sir N. C. Tindal, the present Solicitor General, and Mr. Beames,) of whom it was said by Lord Lyndhurst, “ That Persons better qualified for the Task entrusted to them (namely, to enquire what Improvement could be made in the Practice of the Court of Chancery, and what Part of the Business could be withdrawn from that Court and committed to the Jurisdiction of any other,) could not be found in the Country.” On their Report, the Discussions I have alluded to took place in the House of Commons; and the Statements I have quoted were made by Lord Lyndhurst, then Sir John Copley, without their being attempted to be refuted or contradicted.

(Signed) JOHN WALPOLE WILLIS, J.

York, Upper Canada, 5th February 1828.

Attorney General's Report on the same Subject,

Sir,

York, 16th February 1828.

In obedience to the Commands of his Excellency the Lieutenant Governor, I have considered the Dispatch of the Right Honourable the Secretary of State for the Colonies, on the Subject of creating an equitable Jurisdiction in this Province; and I have the Honour to report that, in my View of the Question, the Choice of the Alternatives suggested in the Dispatch depends very much upon the Powers which it may be thought expedient to confer on the proposed Court.

If it were decided that a Court of Equity should be erected in this Province, possessing all those Powers of superintending, disposing, and controlling, which are exercised by the Lord Chancellor in England, and which can scarcely be said to be defined or limited, I should certainly not think that the safe or convenient Exercise of such Powers could be adequately provided for in any other Manner than by committing them (under the Lieutenant Governor as Chancellor) to a Judge in Equity, whose previous Studies and Experience should have qualified him for the Discharge of Duties at once comprehensive and peculiar; and who, unembarrassed by the Necessity of attending in the Common Law Courts, might afford that almost constant Attention to the Administration of Equity which the very Nature of the specific Relief required in many Cases renders indispensable.

I do not imagine that any System could be devised under which the Court of King's Bench could, consistently with their other Duties, exercise Powers

so various and extensive, and in many Cases so minute in their Application, as belong to the Court of Chancery in England.

That they might be enabled in most, if not in all Cases actually depending before them, to apply the Principles of Equity in their Administration of the Law, I can easily conceive; because in most Countries Tribunals exist where Justice is administered according to such a System.

If the proposed Court of Equity is to be in Upper Canada what the Court of Chancery is in England, I am of Opinion that the nearest Approach we can make to an English Lord Chancellor in all Respects the better.

I do not perceive clearly, on reading the Dispatch, whether the giving equitable Powers to the Court of King's Bench is suggested as preferable to the simple Proposition of having a Court of Equity wholly distinct, with a Judge in Equity altogether unconnected with the Common Law Court; or whether it is rather recommended as a System more proper (as I think it is on several Accounts) than the committing an independent equitable Jurisdiction to One of the Judges of the Common Law Court.

If it is to be understood in the former Sense, the Opinion of the Crown Officers in England may be taken to have been expressed upon the principal Point; namely, whether it would be more expedient to introduce into this Province a Court of Chancery, with all its ordinary and extraordinary Powers, or to give to the Court of King's Bench, in certain defined Cases, the Powers of a Court of Equity, with the general Power of administering Law with Equity, by admitting all Objections of Fraud, Accident, unconscionable Bargains, &c., as fully as a Court of Equity could do in Cases litigated before them. I am inclined to concur in the Opinion intimated in the Dispatch, and to think the latter the more prudent Experiment.

The Common Law Jurisdiction of the Chancellor might very naturally and readily be vested in the Court of King's Bench; and as this would include the Power to cancel Letters Patent, when adjudged void upon a Proceeding of Scire facias to repeal them, a Remedy would be given which is as much wanted in this Colony as any, perhaps, which a Court of Chancery would open to us.

Provision might be made for foreclosing and redeeming Mortgages, for the Recovery of Legacies, the Recovery of Dower, the compelling Partners, Executors, and Trustees to account, and for various other Matters which are of absolute Necessity, and for Want of proper Remedies in which Cases our present System of Jurisprudence is palpably defective. A distinct Office and distinct Officers might be assigned to the Court of King's Bench for some of these Purposes.

I anticipate some Difficulty in forming a satisfactory Opinion as to the Propriety of giving Powers in certain Cases, which shall take Effect upon Transactions passed and Contracts entered into at a Time when the Resort to such Powers could not have been contemplated by the Parties.

I would instance the Case of Mortgages, but forbear to enter into the Considerations on this Head, which have presented themselves to my Mind, because, without more Explanation than I have now Leisure to offer, I should perhaps fail to make myself clearly understood. Upon the System last spoken of, much of the Power of the Chancellor, which he is considered to exercise in his ordinary legal Court, might, I think, conveniently be allowed to remain with the Lieutenant Governour, in whom it is now vested, with the Custody of the Great Seal; and Provision might be made to render its Exercise more easy and effectual. I allude to the Cases of Infants, Lunatics, and others of that Description, and to the issuing of certain necessary Writs under the Great Seal.

Whether the various Ends which the Court of Chancery attains by compulsory Process, such as Discoveries by Oath, enforcing the Execution of Trusts, the Conveyance and Re-conveyance of Property, the Performance of natural and moral Obligation, the specific Execution of Contracts, and the immediate Interposition by Injunctions, should, with or without Restriction, be provided for, and how, is, perhaps, the Point most difficult to determine.

It is in connexion with this last Class of Cases that the Court of Chancery in England has principally to encounter the Objections raised to it as a Tribunal imposing harassing Delays; sometimes apparently acting upon no known or

certain Rules, and assuming a Power of Disposition over the Property and even the Persons of Men, directed only by the Conscience and Discretion of the Judge.

If we attribute as much of the Dissatisfaction which has been expressed on this Subject as can fairly be attributed to Want of sound Consideration and to unreasonable Prejudice, still it is necessary to give their due Weight to Facts which are admitted on all Hands; and, I confess, I should fear to see introduced here, *uno flatu*, all those Powers which the Court of Chancery has in a Series of Ages acquired, of which some, at least, took their Rise in Circumstances having little or no Application here, and are now continued in England principally from a Necessity which the very Exercise of such Powers has itself contributed to create.

Our Transactions are more simple in their Nature, particularly as respects the Disposition of Estates, than in England; and it would not seem prudent to adopt in this new Colony, and in the early Period of our Society, the whole Machinery of a System which has been thought to be unfortunately more complicated than is necessary for England in its present advanced State.

I think it a safer Experiment to endeavour to define and to confer Jurisdiction than to attempt to set Boundaries after establishing, in the first Instance, a general equitable Jurisdiction, depending only on a Comparison with the English Court of Chancery. While following the former Course, every additional Power, clearly defined and expressly given, would be an Improvement. By adopting the latter, much Confusion may be created, and some Injustice done, before the Course of Proceedings can be confined within Limits suited to the Country and to the Interests of its Inhabitants.

Having ventured to express this Opinion in favour of an Attempt to introduce the Jurisdiction and Powers of a Court of Equity by specific Enactments, rather than to leave the whole to be assumed from Analogy, I will add, that in either Case, if equitable Powers are to be conferred to any considerable Extent and for many Purposes, and particularly if they shall embrace the Controul of Trusts, I am of Opinion that a Judge in Equity, presiding in a distinct Court, and connected only with that Court, will be found to afford the most convenient Jurisdiction. Whenever such a Court shall be established, I submit, that adequate Provision should at the same Time be made for the Support of the Judge and Officers; such a Provision as shall ensure its being respectable and effective. Unless this be done, I am of Opinion that the System suggested by the Crown Officers of England, of vesting an equitable Jurisdiction, in certain Cases, in the Court of King's Bench, may be very beneficially adopted; and I am inclined to think, that, with much Labour and Attention, such a System might be so contrived as to leave less Ground to apprehend Inconvenience from its Defects than there would be to anticipate Evil from an Adoption in gross of all the Powers and Jurisdiction of the Court of Chancery.

I have the Honour to be, Sir,

Your most obedient humble Servant,

(Signed) JOHN B. ROBINSON.

Major Hillier, &c. &c. &c.

Report by the Solicitor General.

Report to his Excellency the Lieutenant Governor, relative to the proposed Establishment of a Court of Equity in Upper Canada, as recommended in the Dispatch of the Right Honourable William Huskisson, His Majesty's Principal Secretary of State for the Colonies; dated 25th November 1827.

I APPREHEND that there can be no Difference of Opinion, in this Province, as to the Usefulness and even Necessity which exists of establishing a Tribunal for the Administration of some Portions, at least, of such Parts of the Law of England as are there exclusively dispensed in Courts of Equity, and without which the Law of England, as a "Rule of Decision in Matters of Controversy relative to Property and Civil Rights," must necessarily be incomplete, the Means of applying being almost a Concomitant of the Rule itself. And moreover, the Common Law, however venerable for its Antiquity, or admirable

for the Justice and Purity of its Principles as a general Rule of Decision, like all other general Rules of Action, must necessarily embrace Cases which, if the Nature of human Institutions were capable of so much Foresight, would have been excepted and otherwise provided for; and therefore I believe I am correct in saying, that wherever the English Common Law has been the Basis of any System of Jurisprudence, some Mode of administering Equity, as its Handmaid, has generally been provided.

Should it be thought advisable to establish a Court of Equity in Upper Canada, possessing the same Jurisdiction as that which is exercised by the High Court of Chancery in England, I am clearly of Opinion that that Object will best be attained by organizing a distinct Court of Chancery, totally separate and apart from the Courts of Common Law already subsisting in the Province, wherein a Vice Chancellor might preside, upon whom should rest the whole Responsibility of the Proceedings in the Court, and in whose Name they should be conducted; the Office of Chancellor, of course, being filled by the Governor, Lieutenant Governor, or Person administering the Government for the Time being, who, with the Assistance of such Persons as he might think fit to call to his Aid, might exercise a Jurisdiction, either Appellate or in the Nature of a Re-hearing.

But should the present State of the Colony not seem to call for the Exercise of a Jurisdiction so general in its Superintendence, I am fully persuaded that the Court of King's Bench might be invested with specific equitable Powers, with much more Advantage to the Public than by assigning such Authority to any one of its Members in particular.

Taking this View of the Subject, I would suggest that Two Equity Terms be added to those already established for the Sitting of that Court, in which all Causes on the Equity Side of the Court should be heard and determined.

In whatever Manner an equitable Jurisdiction shall be introduced, separate Officers, I think, should be appointed for conducting the subordinate Part of its Business. In a Court of Chancery this would, of course, be essential; and in the Mode last suggested it would be found of vast Importance in keeping the Business of the Two Jurisdictions, though exercised by the same Person, separate and distinct.

This Advantage would be peculiarly felt, should the Legislature at any future Period deem it expedient to erect a distinct Tribunal for dispensing Equity; when, instead of having to contend with those Obstacles which are invariably found to present themselves upon every Attempt to change old and established Systems, in which individual Interests may be concerned, and Principles originally distinct become so interwoven as to be almost incapable of Separation, the mere Change of the Style of the Court would be sufficient to bring into Operation the extended Jurisdiction.

The vested Interests of subordinate Officers has been an insuperable Objection to the bringing about many Changes in the Court of Chancery in England, which have been thought desirable, and which would probably have been effected had these Interests not been set in array against them.

The only Officers which I should deem necessary at present would be a Master and Registrar; the former fulfilling the same Duties as those which are discharged by the Masters in Chancery in England, to which might be added, that of Examiner, and the Superintendence of the Accounts of Suitors, which might be kept with the Bank of Upper Canada, to avoid the Expence and Necessity of an Accountant General. The Registrar should issue all Process, draw up all Rules, Orders, and Decrees, and file all Bills, Answers, Pleadings, and other Proceedings in the Cause, not belonging to the Master's Office.

It is my Opinion, though I give it with much Diffidence, that the Witnesses should be examined *viva voce* by the Counsel for the respective Parties, either in open Court or before the Master in Town, or Masters Extraordinary in the distant Parts of the Country. And I also think that the Solicitors on either Side should serve a Copy of all Bills, Answers, and other Pleadings or Papers to be filed in Court, at or before the Time of filing them, in accordance with the Practice in the Courts of Common Law. This would save Expence, and materially accelerate the Proceedings.

The

The Subjects particularly calling for the Interference of an equitable Tribunal are, in my Opinion, Trusts, fraudulent Conveyances, specific Performances, Wills, Mortgages, and Partnerships, and the Guardianship of the Property and the Protection of the Persons of Infants, Idiots, Lunatics, and Married Women.

All which is respectfully submitted,
(Signed) H. J. BOULTON,
Solicitor General.

Inclosure, No. 3.

Draft of an Act to confirm and establish an efficient Court of Equity in the Province of Upper Canada. — By Mr. Willis.

WHEREAS by the First Act of the First Parliament of this Province it is, among other Things, enacted, that thenceforth, in Matters of Controversy relative to Property and Civil Rights, Resort should be had to the Laws of England as a Rule for the Decision of the same: And whereas such Laws cannot be resorted to in this Province with full and complete Effect, without the efficient Operation of a Court of Equity; be it therefore enacted, &c., That there be henceforth confirmed, constituted, and established, and there is hereby, &c. an efficient and operative Court of Equity in and for this Province, to be called and known by the Style and Name of His Majesty's High Court of Chancery (or *Supreme Court of Equity*) for the Province of Upper Canada, which said Court it is hereby declared is and shall be a Court of substantive and original Jurisdiction, and shall and may possess and be armed with all such Powers and Authorities in this Province, (except with regard to the Bankrupt Law,) and may and shall entertain Jurisdiction and hold Plea, compel Discovery, and afford Relief in all such Cases of Accident, Mistake in all such Mortgage Transactions, and all other Matters of Account, and in all such Cases of Fraud, Contracts, Trusts, Guardianship of the Persons and Property of Infants, and of *Persons of insane Mind* or who are incompetent to conduct their own Affairs, and in all other and the like Cases, (except those relative to Bankrupts,) as the said High Court of Chancery, Court of Exchequer, as a Court of Equity, or any other Court of Equity whatsoever: in England, under and by virtue of the Prerogative of the Crown, or of any Usage or Custom, or of any British Statute or Statutes now in force in England, can, may, or do now entertain, hold, and exercise Jurisdiction, and with all such and the like Powers as are or may be now used and exercised in all or any of such Courts of Equity in England for enforcing the Process and giving Effect to the Orders, Judgments, and Decrees thereof; and that the Governor, Lieutenant Governor, or such Person or Persons for the Time being to whom the Great Seal now or hereafter to be used for this Province shall, by or by the Order and Direction or under the Authority of His Majesty, be from Time to Time delivered or entrusted for safe Custody and the Public Purposes of this Province, shall and may have and enjoy all such and the like Powers, Prerogatives, Privileges, and Advantages as are now attached or incident to, or in any wise appertain and belong to the Custody of the Great Seal of the United Kingdom of Great Britain and Ireland, or now are or may be used, exercised, or enjoyed by the Lord High Chancellor of Great Britain, or the Person or Persons entrusted with the Custody thereof. And for the more active and efficient Operation and Dispatch of Business of the said Court hereby established, *be it further enacted*, That it shall and may be lawful for His present Majesty, His Heirs and Successors, to nominate, constitute, and appoint, or by Warrant under His Hand to order and direct, that a proper Person, being an English Barrister at Law of not less than Ten Years standing at the least, shall be nominated, constituted, and appointed an additional Judge of the said Court hereby established, by the Name and Style and Title of Master of the Rolls of Upper Canada, with the same Powers, &c. in this Province as belong to the Master of the Rolls in England,

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England, in consequence of his Office, by Prescript, Statute, Custom, or &c. : And further, that it shall and may be lawful for the Person or Persons holding the Great Seal from Time to Time to delegate and transmit, for the more effectual and speedy Discharge of the Business of the said Court, all such Powers, &c. as belong or are incident to the Custody of the Great Seal, and are not possessed by the said Master of the Rolls.

Section 2. Precedence of the Master of the Rolls.

Section 3. Officers, as in Statement, to be appointed by the Chancellor, with the Exception of the Secretary and the Usher of the Court.

Section 4. Salary for the Master of the Rolls, and Officers, &c. Court and Offices.

Section 5. Investment of Suits.' Money on Government Security.

Section 6. Practice and Fees to be settled by the Judges.

Section 7. Admission of Solicitors.

Inclosure, No. 1.

Upper Canada.

Auswer of Mr. Justice Sherwood to a Question proposed to him by Three Members of the Bar, on the Constitution of the Court of King's Bench. — June 1828.

You are desirous I should express an Opinion on the Bench on the present State of this Court, but it appears to me any Opinion of that Kind would be extra-judicial. No one but His Majesty's Representative has any Right to ask for the Opinion of a Judge where no Cause or regular Motion, according to the Practice of the Court, is pending before him; and he has the Right only so far as a Judge is a constitutional Adviser of the Crown.

Being a Judge of this Court I consider it my Duty to repair to the usual Place of holding the Court of King's Bench during the Terms prescribed by the Laws of the Country. If my Brother Judges are not there I have no Authority to enquire whether their Reasons for being absent are legal or illegal. As I stated to the Bar on Monday, I think it incumbent on me to preside in Court, and attend to such Business as the Law of the Land, the King's Commission, and the established Practice of both the Courts of King's Bench in England and this Province render it the Duty of a Judge to perform. As professional Men, you cannot expect me to assign any Reason for sitting in this Court during the present Term more than any other Term. The Act of holding this Court I imagine sufficiently indicates the decided Belief of the Judge that he is doing his Duty, and no superior Tribunal has ever declared the Course now pursued to be erroneous. Should any Decision occur, I will adhere with the greatest Respect to any Rule laid down by a superior Tribunal for the Guidance of the Court. Any thing short of this can never have the legal Effect of controlling the Decisions or settled Practice of a Superior Court of Record.

Inclosure, No. 5.

As submitted by the Attorney General.

WHEREAS by an Act passed in the Parliament of this Province in the 32d Year of the Reign of His late Majesty King George the Third, intituled " An Act to repeal certain Parts of an Act passed in the 14th Year of His Majesty's Reign, intituled ' An Act for making more effectual Provision for the Government of the Province of Quebec in North America,' and to introduce the English Law as the Rule of Decision in all Matters of Controversy relative to Property and Civil Rights;" it is enacted, that from and after the passing of the said 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 : And whereas, for the more perfect and effectual Administration of the Laws of England thus introduced and established in this Province, it is expedient to provide for the convenient Exercise of an equitable Jurisdiction, and of such other Jurisdiction and Powers as by the Laws of England are annexed to the Custody of the Great Seal ; be it therefore declared and enacted, &c. &c., That there is and shall be within this Province a Court of Chancery, to be stiled and called the High Court of Chancery of Upper Canada, of which Court the Governor, Lieutenant Governor, or Person administering the Government of this Province, is and shall be Chancellor.

And be it further enacted, &c., That the said Court shall be holden at the Seat of the Civil Government in the said Province ; and that the Time appointed by Law for the Sitting of the Court of King's Bench in this Province shall be in like Manner the Terms of the said Court of Chancery.

And be it further enacted, &c., That the said Court of Chancery shall be open as well in Vacation as in Term ; and that the Chancellor for the Time being shall have Power to appoint and regulate the Returns of the said Terms, and to appoint on what Days therein and in what Order the Business of the said Court shall be heard and proceeded in ; and shall also make Order for the hearing and proceeding in the Business of the said Court in Vacation.

And be it further enacted, &c., That the said Court shall have all such Powers and Jurisdictions as now are incident to the High Court of Chancery in England, except in such Cases as are otherwise provided for by any Statute of this Province ; and when any Jurisdiction, which by the Law of England is vested in the High Court of Chancery, hath by any Statute of this Province been conferred upon any Court or Jurisdiction heretofore recited, the said Court of Chancery in this Province shall in all such Matters have and enjoy a concurrent Jurisdiction.

And be it further enacted, &c., That the Chancellor of this Province for the Time being shall have Power from Time to Time to make Rules and Orders for regulating the Practice thereof, and to assign to the Officers of the said Court respectively the several Duties to be by him or them performed, and also to regulate and limit the Allowance of Costs for all Business done in the said Court : Provided always nevertheless, that until the Practice of the said Court shall be so regulated as aforesaid, as well as in all Cases to which no Order or Rule made by the said Court for governing the Practice thereof shall extend, the Practice of the said Court shall conform, as nearly as the Circumstances of this Province will permit, to the Practice of the High Court of Chancery in England.

And be it further enacted, &c. by the Authority aforesaid, That it shall and may be lawful for the Chancellor of this Province for the Time being to appoint from Time to Time, by Letters Patent under the Great Seal, such and so many Officers and Clerks for conducting the Business of the said Court as may to him appear necessary.

Accountant General, prescribe his Duties, and exact Security as in 12 Geo. 1.

And be it further enacted, &c., That for the better and more convenient Administration of Justice in the said Court it shall and may be lawful for His Majesty, His Heirs and Successors, to nominate and appoint from Time to Time, by Letters Patent under the Great Seal of the said Province, a fit Person, being a Barrister at Law of England or of the said Province, to be Judge Assistant to the Chancellor for the Time being in the Discharge of the judicial Functions of his Office, and to be called Vice Chancellor of Upper Canada ; to hold such Office, &c.

And be it further enacted, &c. by the Authority aforesaid, That such Vice Chancellor shall have full Power to hear and determine all Causes, Matters, and Things which shall be at any Time depending in the Court of Chancery of Upper Canada, either as a Court of Law or as a Court of Equity, or incident to any ministerial Office of the said Court, as the Chancellor for the Time being shall from Time to Time direct ; and all Decrees, Orders, and Acts of such Vice Chancellor so made or done shall be deemed and taken to be respectively, as the Nature of the Case shall require, Decrees, Orders, and Acts of the said Court of Chancery, or of such incident Jurisdiction as aforesaid,

said, and shall have Force and Validity and be executed accordingly (subject nevertheless in every Case to be reversed, discharged, or altered by the Chancellor for the Time being); and no such Decree or Order shall be enrolled until the same shall be signed by the Chancellor for the Time being.

Provided always, that such Vice Chancellor shall have no Power or Authority to discharge, reverse, or alter any Decree, Order, Act, Matter, or Thing made or done by any Chancellor, unless authorized by the Chancellor for the Time being so to do.

Oath of Office.

Provision of Salary for Vice Chancellor.

No Fees to be received by him.

Chancellor not to reverse any Decree of Vice Chancellor, but may order a Re-hearing before himself and Two or more Judges of the King's Bench.

Appeal from Decisions of the Court of Chancery to the Governor and Council.

Thence to the King in Council.

Inclosure, No. 6.

Sir,

Government House, York, 27th June 1828.

I AM commanded by the Lieutenant Governor to acquaint you, that the Executive Council having had under Consideration the present State of the Court of King's Bench, with a view to the Inconveniences and Obstruction with which Public Justice is threatened, as well with reference to the present Term as to the approaching Circuits, have reported to his Excellency, that they have called upon you to explain what Duties of a Judge you contemplated in your Letter to me of the 17th Instant as those which you would consent to discharge, and that your Answer is not satisfactory upon a Point on which it was absolutely necessary to have from you an explicit Understanding. That having been therefore left to interpret for themselves the Effect of the Opinion delivered by you on the 16th Instant, and being unable to comprehend any Duties, compatible with the Principles therein avowed and the Steps taken by you, which you can legally perform as a Judge of the Court of King's Bench legally commissioned to hold the said Court at such Times and Places as the Law requires, the Executive Council anxiously looked for some Remedy to prevent a Failure of Justice in the Country, that might have enabled the Government to dispense with the Necessity of any present Interference with your Appointment, in order that the whole Course of your Proceedings might be referred to the Decision of His Majesty's Government; but that being advised that the Bench of Justice cannot be increased in Numbers without giving rise to a Question as to the Legality of such Increase, and viewing with anxious Concern the Evils resulting from your Conduct, which threaten to increase, to the great Obstruction of Justice, and Injury and Inconvenience of the Public; sensible also of the absolute Necessity of the Circuit Courts being regularly held, the Public having a Right to expect the Trials to proceed as usual, yet wanting Time to communicate with the Parent Government; fully believing that your abstaining from the full Discharge of your Public Duties was unauthorized; strongly disapproving also in other Respects of the Course you have taken throughout; the Executive Council report that they, with Pain, feel it an incumbent Duty, due to the King's Government and to the Country, to recommend your Removal from Office until His Majesty's Pleasure be known, in order to enable the Lieutenant Governor to supply an efficient Court, that there may be no Impediment to the Administration of Public Justice.

I am to acquaint you, that the Lieutenant Governor laments exceedingly the Necessity of this Step, but he reflects with Satisfaction that it is open to you to appeal to the King in Council as to the Sufficiency of the Cause; and his

Excellency

Excellency commands me to assure you that it would not, however justifiable, have taken place without a previous Reference to His Majesty, if the Circumstances in which the Superior Court of the Province is placed by these new and unlooked-for Proceedings had rendered the Delay possible.

I have the Honour to be,

Sir,

Your most obedient humble Servant,
(Signed) , GEORGE HILLIER.

The Hon. J. W. Willis, Esq.
&c. &c. &c.



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PART II.

No. 30.

CIVIL SERVANTS.

LETTER from SIR PEREGRINE MAITLAND to the Right Honourable WILLIAM HUSKISSON, M. P. &c. &c. &c.

Sir,

York, Upper Canada, 21st July 1828.

I PARTICULARLY regret, that after the Report which I have been constrained to make to you of the Conduct of Mr. Willis, late a Puisné Judge in this Province, and the voluminous Documents to which it was necessary I should on that Oecasion request your Attention, I should be still further obliged to trouble you with the annexed Correspondence, which relates to Subjects purely personal, and of little or no Public Importance; but as Mr. Willis made an official Request that I would lay before you this Correspondence, and afterwards transmitted to me, as you will perceive, an imperfect Copy for that Purpose, I have deemed it right, for Reasons which will appear obvious, to send an exact Copy of the whole, which has been prepared with all the Dispatch that a due Attention to Matters of more Importance would admit of.

I beg leave to add, that I do not feel it necessary to trouble you with any further Explanations of the Matters complained of by Mr. Willis, than those which have been rendered to me by the Persons to whom his several Allegations have reference, and which appear to me to shew clearly enough the Nature and Motives of Mr. Willis's Proceedings.

I have the Honour to be, &c.

The Right Hon. W. Huskisson, M. P.
&c. &c. &c.

(Signed) P. MAITLAND.

Sir,

York, Upper Canada, 12th April 1828.

As Judge of Assize Yesterday, I stated that the Law Officers of the Crown (who have hitherto always conducted, and who alone are paid by the Public for all Criminal Proceedings in this Province,) were, in my Opinion, bound to prosecute for all Crimes which they know have been committed, of their own Accord; but the Attorney General (and certainly not in so courteous a Manner as the Bench is usually addressed in England,) disclaimed that Duty, admitting, however, that he and the Solicitor General were the *Public Prosecutors*. I then said, the Question must be decided by the Government; and as nothing can be more necessary for the due Administration of Justice, than that the Source from which all Public Prosecutions must originate should be distinctly understood, I do not think I should honestly discharge the Duties of my Office, did I not respectfully submit this Matter to your Excellency's Notice.

I have the Honour to be,

To the Lieut. Gov. of Upper Canada,
&c. &c. &c.

Sir,

Your most obedient and very humble Servant,
(Signed) JOHN WALPOLE WILLIS.

Sir,

The Cottage (Queenstown), 14th April 1828.

I AM commanded by the Lieutenant Governor to acknowledge the Receipt of your Communication of the 12th Instant, addressed to his Excellency, and to acquaint you, that he has directed the same to be referred to the Attorney General for the necessary Explanation.

I have the Honour to be,

The Hon. Mr. Justice Willis, &c. &c. &c.

Sir,

Your most obedient humble Servant,
(Signed) G. HILLIER.

Q q

York, Upper Canada, 14th April 1828.

Sir,
 I AM sorry to have Occasion again to appeal for a Decision respecting the Duties of the Attorney General of this Province, who *now* repudiates (as I understand him) what he stated on Friday last, namely, that Criminal Prosecutions in this Province are, as in England, open to the Bar; and he has this Day in open Court further asserted, that as His Majesty's Attorney General for this Province, he is answerable for his Conduct in his legal Capacity, not to any of His Majesty's Judges of this Colony, but only to the King's Government. If this be so, the Question is, whether the Attorney General (who is not only a Barrister, but also a PRACTISING ATTORNEY and Officer of the Court,) or the Judge who presides, is the *Superior*? I had Occasion to notice the greater Mildness of the Criminal Law of England, and the Administration of it as it now stands, to that which is admitted into this Province, (which is what it was in England in 1792,) and I now call on your Excellency to observe the Improvements since that Period, and particularly those made recently by the Right Honourable the present Secretary of State for the Home Department.

A Sense of the Duty attached to the Dignity of my Office compels me, however reluctantly, to add, that the Language of the Attorney General was such that I could only tolerate from his being an Officer of Government, and from my Desire, on that Account, not to obstruct the Public Business. In this Controversy I certainly disclaim all personal Feeling. I do not, nor can I ever, condescend to entertain it *in any Public Measure*; but the Crisis has now arrived at which it must be determined how Criminal Prosecutions *here* are to be conducted, and how far the Law Officers of the Crown are answerable to the Judges of this Province.

I have the Honour to be, &c.

(Signed) JOHN WALPOLE WILLIS.

To the Lieut. Governor of Upper Canada,
&c. &c. &c.

Government House, 17th April 1828.

Sir,
 I AM commanded by the Lieutenant Governor to acknowledge the Receipt of your Letter of the 14th Instant, and to acquaint you that it has been referred to the Attorney General for Explanation.

I have the Honour to be, &c.

(Signed) G. HILLIER.

The Hon. Mr. Justice Willis,
&c. &c. &c.

York, Upper Canada, 22d May 1828.

Sir,
 I BEG most respectfully to call your Excellency's particular Attention to the inclosed Paper, which appears to have been published by Captain and Adjutant Gurnet of the Gore Militia.

I have the Honour to remain, &c.

(Signed) JOHN WALPOLE WILLIS.

To Major Gen. Sir P. Maitland, K.C.B.
&c. &c. &c.
Stamford Cottage, Queenstown.

Government House, 29th May 1828.

Sir,
 I AM commanded by the Lieutenant Governor to acknowledge the Receipt of your Letter to his Excellency of the 22d Instant, with a Newspaper inclosed, which I am commanded to return, and to state, that if you regard the Contents of that Paper as libellous, and desire that the Printer should be prosecuted, it is only necessary you should communicate your Wish, and furnish the necessary Information, to His Majesty's Attorney General, who will adopt whatever Measures his Duty requires. If, in soliciting his Excellency's Attention to this Paper, you had any other Object, I am desired to request that it may be stated.

I have the Honour to be, &c.

(Signed) G. HILLIER.

The Hon. Mr. Justice Willis,
&c. &c. &c.

Sir,

York, Upper Canada, 30th May 1828.

IN Answer to your Letter of the 29th Instant, I can only state, it has been so long established that a Judge cannot deliver an extra-judicial Opinion on any Subject like the present with Propriety, that it is impossible, in my Situation, to consult the Attorney General on the Affair in question.

My Object was merely to draw the Attention of the Lieutenant Governor to the singular Circumstance of an Officer under the Control of Government being the Medium of derogatory Comment on One of the King's Judges in the solemn Discharge of his Duty. It is for the Executive Government to say, whether any and what Proceedings should be instituted in a Case so contrary to Decorum, and so repugnant to the Spirit and Subordination of British Government.

I remain, Sir, &c.

(Signed) JOHN WALPOLE WILLIS.

To Major Hillier, &c. &c.

Sir,

Government House, York, 4th June.

WITH reference to your Letter of the 31st Ultimo, I am desired by his Excellency the Lieutenant Governor to observe to you, that he is not aware why you were desired to consult the Attorney General, as my Letter expressed nothing of the kind, and still less required any Opinion from you. I am to observe, that it cannot have escaped your Attention, that here, as well as in England, the Newspapers not infrequently contain Articles derogatory to the Judge and other Public Officers, not excepting the Head of the Government. Criminal Proceedings are not on those Occasions directed by the Government to be undertaken, unless the Individual whose Name and Conduct must necessarily be made the principal Subject of Discussion, signifies his Assent to it; because it is thought, that the same Discretion of despising such Attacks should be left to the Individual as is exercised in the other Case by the Government. All that was desired was, that you should apprise the proper Officer of your Wish, and if you had a Paper which could be legally proved, to place it in his Hands. This Course you will still adopt if you think proper. As to the Person whose Name appears to the Paper as Editor being an Adjutant in the Militia, his Excellency infers it to be your Impression that he ought to be deprived of his Commission, either before or after a Criminal Prosecution for Libel; and unless you otherwise explain it, your Letter will be considered in that Light. Except for the Purpose of this Explanation, his Excellency cannot see the Occasion for further Correspondence.

I have the Honour to be, &c.

(Signed) G. HILLIER.

The Hon. Mr. Justice Willis,
&c. &c. &c.

Sir,

York, Upper Canada, 5th June 1828.

WITH respect to the Publication in the Gore Gazette, I beg to refer you to your Letter of the 29th May 1828, from Fort George, to my Answer of the 30th of the same Month, as the Reply to your Communication dated Yesterday; and to state, that my View of this Subject remains unaltered.

I have the Honour to be, &c.

(Signed) JOHN WALPOLE WILLIS.

To Major Hillier, P. S. &c. &c.

Sir,

York, Upper Canada, 18th June 1828.

I REALLY regret extremely to be so very troublesome; but I cannot, as one of His Majesty's Judges, and in *Term*, submit to be publicly insulted in the open Street, without claiming the Interference of the Government. Mr. Henry Sherwood came up to me a few Minutes since, and said, "I understand, Sir, from my Father, that you said Yesterday you would not take me with you on the Circuit on any Account?" I answered that it was so. He then said, that he would not descend to go with me, and asked why I objected to him. I stated, on account of his Conduct, having seen him in the Streets in a State of Intoxication. This he denied, and said he might find a *Time and Place*

where

where he would demand Satisfaction. I asked him if such was proper Language to one of His Majesty's Judges, and left him, on the first Impulse, in quest of a Constable or Magistrate; I soon afterwards met with Mr. Widmer, but after stating the Circumstances to him, I deemed, on Reflection, the proper Course for me to take was to claim the Protection of the Government. I have frequently been informed of the very reprehensible Conduct of this young Man. Scanlan, a Publican, with whom Knowlan lodged (the Man recently shot in the Streets), came to me, on the 2d of June, to complain of some young Men, and among them Mr. Henry Sherwood, having on the Friday previously broken the Window; and I desired Scanlan to go to his Solicitor or the Magistrates. Mr. Henry Sherwood is one of those recently convicted before me for the Type Riot.

I must request you will lay this Matter before the Lieutenant Governor with as little Delay as possible, as it cannot be endured that I should longer continue subject to the Insults which have lately been heaped upon me.

I have the Honour to be, your very obedient Servant,

To Major Hillier, &c. &c. (Signed) JOHN WALPOLE WILLIS.

Sir,

Government House, 19th June 1828.

I LOST no Time in laying before the Lieutenant Governor your Letter of Yesterday Afternoon; and immediately, by his Excellency's Commands, placed the same in the Hands of the Attorney General.

I have the Honour to be, Sir, your most obedient humble Servant,

The Hon. Mr. Justice Willis. (Signed) G. HILLIER.

Sir,

York, Upper Canada, 21st June 1828.

I MUST again trouble the Government of this Service respecting the very extraordinary Conduct of Mr. Henry Sherwood. I have just received Information, which I have every Reason to believe correct, that on Tuesday last he made use of, and applied to me, in Allusion to the Opinion I delivered on Monday last, the Terms "Ruffian," "Blackguard," "Damned Rascal," &c. &c. &c.; and said, "*I was setting up the Standard of Rebellion, and haranguing the People against his Excellency*;" and made other Observations to the like Effect, even in the Front of the Court House. I am certain this Conduct can never be sanctioned; though I am sorry to find, that even after what I have already complained of, he should be continued in the Service of one of the principal Officers of Government. If this Matter be not taken up here, I must intreat that it may be referred to His Majesty's Government. I do not think that in such a State of Things *my Life is free from Danger*; and I am determined to use every Effort to eradicate the infamous Conspiracy that I now find has long been in existence against me. I beg this may be laid before his Excellency, who will, I am sure, as well as yourself, excuse me if I appear to have written, as *I really feel*, MOST WARMLY on the Subject of these very disgraceful Proceedings.

I have the Honour to remain, &c.

Major Hillier, &c. &c. (Signed) JOHN WALPOLE WILLIS.

Sir,

York, 23d June 1828.

I AM directed to acknowledge the Receipt of your Letter of this Date, and to observe to you the Connection of his Excellency's Name with Conversations imputed to Mr. Claudius Foster, enables his Excellency to judge of the Degree of Attention which is due to the multiplied Communications which you have addressed to the Lieutenant Governor, and to add, that his Excellency is not in the habit of listening to Remarks of the Nature you allude to.

You cannot but be aware that it does not depend on the Government, nor on the Lieutenant Governor, to secure to you the Respect which it is most desirable should attend Persons filling the Situation to which you have been appointed. The Courts, and the Judges of the Courts, have, it must be presumed,

presumed, full Power to protect themselves under the Law of the Land, and his Excellency has never been appealed to on any such Occasion as the present.

I am desired further to add, that in reply to any similar Communications that you may have to address to the Lieutenant Governor, his Excellency can only refer you to the Crown Officers and the Magistracy of the Country.

I have the Honour to be, &c.

Mr. Justice Willis,

(Signed) G. HILLIER.

Sir,

York, Upper Canada, 23d June 1828.

For the Security of my *personal* Safety, and in order to ensure that Respect which I am fully sensible should always attend Persons filling the Situation to which I have had the Honour of being appointed by *His Majesty*, may I most respectfully enquire if his Excellency the Lieutenant Governor will have any Objection to transmit the Whole of my multiplied Communications to the Principal Secretary of State for the Colonies; and in the meantime to permit me to give the full Publicity to the Whole of the Correspondence.

I have the Honour to be, Sir,

Your obedient Servant,

To Major Hillier, &c. &c.

(Signed) J. W. WILLIS, J.

Sir,

York, 24th June 1828.

I HAVE received your Letter of last Evening, and am directed by the Lieutenant Governor to acquaint you that Copies of your Correspondence will be transmitted to the Secretary of State; and in reference to the concluding Part of your Letter, I am directed to add, that with respect to the Publication of the Correspondence you must be guided by your own Discretion, for the Exercise of which you of course will be responsible to His Majesty's Government.

I have the Honour to be, &c.

Mr. Justice Willis,

(Signed) G. HILLIER.

My dear Sir,

York, 20th June 1828.

THE inclosed has been put into my Hands this Moment, and I must request an immediate Explanation upon it. You will consider that it has been referred to you for that Purpose. Considering the Situation that Mr. Willis holds, I shall regret exceedingly if you have given Occasion for the Statement he has made.

Yours, very sincerely,

Henry Sherwood, Esq.

(Signed) J. B. ROBINSON.

Sir,

York, 20th June 1828.

I AM extremely happy in having it in my Power to state that the Complaint made by Mr. Justice Willis, of my insulting Conduct towards him, is entirely incorrect.

Some Time last Fall I asked Mr. James Givins, who, Mr. Willis had informed me, was to act as his Clerk of Assize upon the Eastern Circuit, whether he would not prefer accompanying my Father upon the Western Circuit, being aware that he had Business to transact in the London District; and I wished to effect a Change, if possible, as my Father was desirous that I should be present at a Trial of an Ejectment Cause in the District of Bathurst, in which he was interested. I informed Mr. Givins, that I knew the Eastern Circuit to be the more lucrative of the Two, and that I would give him the Difference, to which Arrangement he assented. I then spoke to Mr. Willis, who seemed highly delighted with the Change, and expressed his Satisfaction to one or two Gentlemen, whose Names I can mention, if necessary. I took it for granted that I was to accompany Mr. Willis; indeed he himself mentioned to my Father

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that

that such was the Case. When this Arrangement was made, Mr. Willis was perfectly conversant with all the Circumstances connected with the Ejectment Cause before mentioned; but during the Sitting of the Legislature last Winter, for Reasons unexplained, he wrote to my Father, to say that he could not take me for his Clerk, as my Father was interested in a Cause which would come before him to be tried, and that he did not wish the Purity of his Motives to be at all suspected; insinuating, no Doubt, that I, as Clerk of Assize, might sway his *better Judgment*. However, before the Receipt of this Letter, my Father had determined, for certain good Reasons, not to allow me to act in that Situation for him. It appears that this became the Subject of a Conversation between Mr. Willis and my Father a Day or two ago; when I was informed by my Father that he, Mr. Willis, had stated to him, that he would not take me on the Circuit with him *on any Account*; evidently insinuating that he knew something to the Prejudice of my Character. I instantly determined, for my own Satisfaction, (and that I might convince my Father that there was really no Ground for such an Objection,) upon asking Mr. Willis to give me his Reasons for what he had said. I also intended to take the Precaution of having a Third Person present when I spoke to him, for fear that he might afterwards make some improper Statement, as he has most certainly done; but observing him standing upon the Bank of the Bay alone, I unfortunately addressed him, without carrying my Precaution into Effect. I asked him his Reasons for what he had stated to my Father. He said his Reason was, that my Conduct had been so particularly bad; that he had seen me in the Streets in a State far from being sober. I told him that it was not the Case, and also that I would not descend to act as his Clerk; and further, that I might, at some future Day, have it in my Power to demand Satisfaction from him, as a Gentleman, for the foul Aspersions and vile Insinuations which he had thrown out against my Character. He told me to be cautious; that he might be under the Necessity of taking Steps against me that I might regret. I told him that he was at full Liberty to do what he pleased. He then asked me to walk with him to the Police Office, which I declined, saying that he might go and make his Complaint, and that I would be ready to answer it at any Time. At that Moment Lady Mary Willis came up to us; he directed her to send immediately for a Constable; that there was a *Man* here who talked about Satisfaction. I said, Sir, you know perfectly well the Satisfaction I mean; it is that which one Gentleman has a Right to ask from another who has injured him, as you have me; but your Standing in Society precludes me from claiming that Right. The above I positively declare to be a true Relation of all that occurred at the Time.

With regard to his seeing me in the Street in a State of Intoxication, I can only say it is *untrue*.

I will not pretend to say that Scanlan did not make the Complaint Mr. Willis states. It is most probable that he did, as Mr. Willis is too ready to lend an attentive Ear to every idle Tale that may tend to the Prejudice of his Neighbour; but the Statement is false, which I can prove, and which Mr. Willis well knows from good Information, and has already expressed his Conviction of its Falsity, though he thinks a Repetition of it may strengthen his Cause. I must confess I am a little astonished at the Reference Mr. Willis makes to my being one of those recently convicted of the *Type* Riot before himself. A few Months after Mr. Willis's Arrival at this Place, he formed an Acquaintance with me, which was quite unsolicited on my Part, and while we were living in the strictest Intimacy, he frequently conversed with me upon the Subject of this Trespass, and stated, in Terms that could not be misunderstood, that he regretted the bad Example, but did not blame me at all, as he himself would enter into the very Feelings which prompted me and the others concerned on that Occasion. And at this very Time, when he was in full Possession of all that occurred, which he had learn'd from the Public Prints, and from those to whom he had pretended Friendship, he kindly offered me his Assistance in my Studies, and that he would use his best Exertions to get me on in Life, and frequently spoke of me to my Friends in Terms of the most gross Adulation. As a Proof of his vindictive and fickle Mind, I have heard him reviling in a most disgraceful Manner good and respectable Persons

who

who are much above him in Rank, and lavishing extravagant Praises upon others against whom he is now most inveterate. The Public are well aware of all that took place upon the Trial of the Criminal Prosecution that took place against us, to which Mr. Willis alludes, and can judge of his Abhorrence of our Conduct from the trifling Fine of Five Shillings which he imposed upon each of us.

I do not conceive it to be at all improper for a Gentleman to ask one of His Majesty's Judges of the King's Bench his Reasons for traducing his Character; nor do I conceive my Conduct to be in the slightest Degree reprehensible in this Instance from its happening in Term, as Mr. Willis has publicly declared that there is no Court of King's Bench in existence, and consequently he cannot be acting now more as a Judge than in Vacation.

Mr. Willis has stated Matter quite irrelevant to the Subject of his Complaint, solely for the Purpose of creating unfavourable Impressions against me in the Mind of his Excellency; and has unnecessarily introduced the Name of the unfortunate Man who was very lately shot, that his Excellency may infer *more* than Mr. Willis dare publicly assert.

I have it in my Power to state many Things that I have heard against Mr. Willis, supported by much better Authority, and much more injurious to his Character, than what he has maliciously stated against me; but I shall refrain from doing so, as it cannot in the least tend to an Elucidation of the present Question.

J. B. Robinson, Esq.
Attorney General.

I have the Honour to be, &c. &c. &c.
(Signed) HENRY SHERWOOD.

Sir,

York, Upper Canada, 23d June 1828.

I ENCLOSE a Letter which I have just received from Mr. Henry Sherwood, and which I have to request may, together with this Letter, be immediately laid before his Excellency the Lieutenant Governor. My Impression as to the Conduct of this young Man, *and the Danger of my Life*, not only still exists, but from the Communication I made to you on Saturday last (and to which I must again intreat *immediate Attention*), is CONSIDERABLY STRENGTHENED.

Lady Mary Willis was too much agitated about our Infant, who was with me, to pay any Attention to what fell from Mr. Sherwood's, further than hearing him, as she states, in a very menacing Tone and Attitude, utter the Term "Satisfaction," and that "I had insinuated Things against his Character." My Family are now in a State of great Alarm and Uneasiness; nor can they, or can I, feel easy or satisfied, (particularly considering the Situation I hold,) until these Matters, which now rest with the Government, meet with that Decision which they demand. I am also obliged to add, that Mr. Claudius Foster, on Friday last, grossly insulted my Mother and Lady Mary Willis, (as I learn from them and the Servant who drove them,) when returning in their Carriage from Government House; and that Mr. Foster asserts, that he has often conversed with General Maitland respecting my Politics, as if they were opposed to the Local Government. I must therefore most respectfully solicit General Maitland to do me common Justice, and to cause me to be informed what Mr. Foster has said to him respecting me on this Subject, convinced that the Lieutenant Governor will not have listened to an *Accusation*, or even a Hint, of this Sort, without affording me an Opportunity of refuting it; particularly when he recollects the Publication in the Gore Gazette, and that I am now accused in the open Streets, by the Son of my Brother Judge and the Clerk of the Attorney General, of wishing to raise "the STANDARD OF 'REBELLION;'" for I feel it due to myself, as one of the King's Judges and as a private Individual, to spurn and to repudiate, in the *most public Manner*, both here and in England, the base, the foul, the cruelly and totally unfounded Aspersions with which I have been so wantonly assailed.

Major Hillier, &c. &c. &c.

I have the Honour to be, &c. &c. &c.
(Signed) JOHN WALPOLE WILLIS, J.

Sir,

York, 23d June 1828.

FROM a Communication which the Attorney General has had with me upon the Subject of a Conversation which took place between yourself and me on the 18th June instant, I find you have made such a Statement as conveys the Impression that I had demanded Satisfaction of you for an Injury to my Character, in a Manner that might imply a Threat of improper Proceedings on my Part. I beg to assure you, that you have placed a wrong Construction upon my Words, which I was very particular to guard against *expressly*. I never could, by any Possibility, so far forget myself as to threaten a Judge of His Majesty's Court of King's Bench, or to call upon him for Satisfaction in the ordinary Sense of the Term. Had I done so, I should equally have forgotten my own Situation and yours, and should have acted in a Manner which I freely confess would have been most improper.

I acknowledge having said, under the Influence of what I considered great Provocation, that you might, at some future Day, be placed in a Situation when I could claim Satisfaction from you as a Gentleman — that your present Standing in Society precluded me from doing so at this Time.

The above Explanation I gave you in the Presence and Hearing of Lady Mary Willis, who came up to us at the Close of the Conversation.

I am, Sir,

Your obedient Servant,

(Signed) HENRY SHERWOOD.

Mr. Justice Willis, &c. &c. &c.

Sir,

York, 25th June 1828.

SOME Letters, recently addressed by you to the Lieutenant Governor, have been sent to me as Crown Officer. As these contain Allegations of Apprehension of personal Violence on your Part, and Complaints of insulting Language used to you by Two Persons, One of whom, Mr. Henry Sherwood, is a Clerk in my Office, I have referred to Mr. Sherwood, who declares the Statements made to you by some Informant, not named, of Expressions used by him on Tuesday last are without ground, and have originated in Malice or Mistake. I have also spoken to him on the Subject of your Representation of him, dated the 18th June, and have received his written Explanation. It is hardly necessary for me to say, that I entirely disapprove of any Conduct proceeding from Mr. Henry Sherwood which could have given the slightest Colour for the Construction placed upon it by you. I have expressed myself fully to him upon this Point, and I learn that he has, in consequence, written to you. If his Letter is not satisfactory, or you desire to institute any further Enquiry, or to take any legal Measures, you will find me at my Office at any Hour out of Court that you may appoint, or, if you prefer it, I will place your Letters in the Hands of the Police Magistrate, who will refer to you upon them if he finds it necessary.

I am, Sir, &c. &c. &c.

(Signed) J. B. ROBINSON,

Attorney General.

Mr. Justice Willis.

Sir,

York, Upper Canada, 25th June 1828.

HAVING represented your Conduct to me during the last Assizes, and the Publication in the Gore Gazette, and the Conduct of Mr. Henry Sherwood, to the Local Government, and being assured that his Excellency the Lieutenant Governor will be graciously pleased to transmit the Correspondence on these Matters to His Majesty's Principal Secretary of State for the Colonies, all I can now do is, to state that my Impression, with regard to Mr. Henry Sherwood's Conduct to me personally, will, at any Time, be repeated under the Sanction of an Oath. There are also Members of my Family who will give important Information on this Subject. Mr. Henry Sherwood's Letter to me was duly transmitted to the Lieutenant Governor. I was informed of the calumnious Expressions to which I have particularly referred by Nathaniel P. Buckley, the Bearer of this Letter, now a Clerk in the Crown Office; and

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his Statement was corroborated in my Presence by one Timothy M'Pherson, and Bird the Crier of the Court, who were brought to me by Buckley, Bridgland, too, it is said, can give important Information on this Subject. I shall have further to complain to the Government of the opprobrious Language made use of respecting me, while on the Bench during the late Assize in the Crown Office, by a Person, who, I am informed, is also a Clerk of yours, whose Name is Stewart. I am generally to be found at Home at any Time before Three o'Clock.

Your obedient Servant,
(Signed) JOHN WALPOLE WILLIS, J.

J. B. Robinson, Esq.
&c. &c. &c.

York, Upper Canada, 25th June 1828.

Sir,

It is with extreme Regret that, individually, though in the official Capacity of one of His Majesty's Judges, I am now compelled to address you.

I consider myself to have been insulted, when on the Bench as Judge of Assize, by the Attorney General of this Province. I only forbore to punish him from the Fear of obstructing the Public Business.

One of his Clerks also, a Mr. Stewart, spoke of my Conduct in the Execution of my Duty on that Occasion, in the Public Law Office, in the most opprobrious Manner.

I was then libelled as a Judge in a Newspaper, which I transmitted to the highest Quarter; but I am not aware of any Effort having been made to discover and bring the Authors to Punishment.

I have recently been openly insulted in *the Presence* of my Wife (Lady Mary Willis), in the public Street, by a Mr. Henry Sherwood, another Clerk of the Attorney General's and the Son of my fellow Puisné Judge; and from Circumstances which have recently transpired in consequence of a horrible Assassination, I believe MY LIFE now to be in jeopardy.

But what is worse than all is, that I have been accused of *Disloyalty and Faction*, of wishing to raise the *Standard of Rebellion* against the Lieutenant Governor of this Province, although his Excellency the Lieutenant Governor declared to Lady Mary Willis that he considered I had never been wanting in personal Respect towards him; yet, as you will perceive by the Conclusion of the Correspondence, he *declines stating* whether he has any Grounds of Complaint against my public or official Conduct, *according to my Request*, which I made with a View of obviating unfounded Calumnies, and in future avoiding Error, if any should inadvertently have been committed. Under these Circumstances I have requested the Government here, to whom I fully stated these Matters, and claimed its Protection, will be pleased to transmit you the Correspondence on this Subject, and I now respectfully solicit the *fullest Investigation*.

I have the Honour to be, &c. &c.

(Signed) J. W. WILLIS, J.

The Secretary of State,
Colonial Department.

York, 26th June 1828.

My dear Sir,

I HAVE taken much Pains to ascertain whether there be any Grounds for the Accusations made against my Son, in the numerous Letters lately written by Mr. Willis to his Excellency, and I am perfectly convinced they are wholly unfounded; and Justice to my Son compels me to say, I sincerely believe Mr. Willis well knows they were false when he made them. I cannot approve of my Son's Allusion, in his Reneounter with Mr. Willis, to what is generally called Gentlemanly Satisfaction; but the malicious Aspersions of my Son's Character were the true Causes of his impetuous Behaviour, which, at all Events, was both natural and honest, although imprudent. Mr. Willis cannot injure the Character of my Son in this Country, where they are both well known, and where his vindictive Attempts have justly excited an honest Indignation against the unjustifiable Author. He wishes to injure him in England, but I hope his Malice will again be defeated. It appears to me Mr. Willis has wrong Notions of almost every thing. He endeavours to persuade

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suade the People that, as a Judge of the King's Bench, he can do wrong at Pleasure, and is privileged in doing so; but I trust this Hypothesis will be found quite as absurd as many others proceeding from the same Source.

I beg his Excellency to excuse my troubling him on this Subject, as I fear he has already been too much harassed by a Matter from which his high Station should have been a Protection.

My dear Sir,

Truly yours,

(Signed) LEVIUS P. SHERWOOD.

Major Hillier, &c. &c. &c., York.

Sir,

York, 28th June 1828.

I HAVE no Difficulty in answering the groundless Accusations which Mr. Justice Willis has had the Injustice to make to his Excellency the Lieutenant Governor and to yourself respecting me. In his Letter of the 21st June instant, he has made a Representation of my Conduct to his Excellency the Lieutenant Governor; and in a subsequent Letter to yourself, dated 25th June instant, he states, that he was informed of the Expressions therein mentioned by Nathaniel P. Buckley, and that Buckley's Statement was corroborated in his Presence by one Timothy M'Pherson, and Bird the Crier of the Court, who were brought to him by Buckley. He also states in the same Letter, that Bridgland can give important Information on the Subject. Now, to shew how untrue Mr. Willis's Statement is, and that he must have been conscious at the Time he acquainted his Excellency with my Conduct that he was giving Publicity to an Untruth I beg to refer you to the inclosed Affidavit of Bird, with Mr. Small's Certificate thereon, and also the Affidavit of Bridgland, with a similar Certificate thereon; and when I add, that Bird and Bridgland are Persons whom I have never scarcely had Occasion to speak to on any Subject, and that Mr. Small is well known to be upon perfectly friendly Terms with Mr. Willis, I am convinced these Documents will appear satisfactory.

I am, &c.

(Signed) HENRY SHERWOOD.

J. B. Robinson, &c. &c. &c.

Upper Canada, } John Bird, of the Town of York in the said District, Yeoman,
Home District. } maketh Oath and saith, That he never heard Henry Sherwood say, either in front of the Court House or any where else, that Mr. Justice Willis was raising the Standard of Rebellion in the Province, or saying any thing at all in the slightest Degree prejudicial to Mr. Willis; that a Man by the Name of Timothy M'Pherson, as this Deponent is informed, told him that he had heard Henry Sherwood say, in front of the Court House, in the Presence of James E. Small, Esq. that Mr. Willis was raising the Standard of Rebellion in the Province, or Words to that Effect; that the said Timothy M'Pherson has several Times attempted to persuade him, this Deponent, that he, this Deponent, heard the said Henry Sherwood make use of such Expressions; that a Man of the Name of Nathaniel P. Buckley, a Clerk in the Crown Office, as this Deponent is informed, requested him, this Deponent, to go with the said Buckley before Mr. Justice Willis, which this Deponent did, where he found the aforesaid Timothy M'Pherson, and in presence of the said M'Pherson and Buckley, this Deponent informed Judge Willis, that he never heard Henry Sherwood say any thing against him at all: And this Deponent further saith, that the said Nathaniel Buckley also wished to persuade this Deponent that he had heard the said Expressions, as mentioned by him to M'Pherson, and wished him, this Deponent, to make Affidavit to that Effect, which this Deponent declined doing, as he had never heard any thing at all, and could not do so with Truth.

(Signed) JOHN BIRD.

Sworn before me, at York aforesaid, 27th June 1828.

(Signed) G. Powell, J. P.

The Expressions said to have been made use of by Mr. Henry Sherwood in my Presence, in the above Affidavit, are entirely incorrect. Nothing to my Recollection fell from Mr. Henry Sherwood but what was strictly respectful to Mr. Justice Willis.

York, 27th June 1828.

(Signed) JAS. E. SMALL.

Upper Canada, } James Bridgland, of the Town of York in the said District,
 Home District. } Yeoman, maketh Oath and saith, That he never heard Henry
 Sherwood say, either in front of the Court House or any where else, that Judge
 Willis was raising the Standard of Rebellion in the Province, or make use of
 any Expressions at all to the Prejudice of Mr. Justice Willis; that a Man by
 the Name of Timothy M'Pherson, as this Deponent is informed, told him that
 he had heard Henry Sherwood say, in front of the Court House, in the Presence
 of James E. Small, Esq. that " Mr. Willis was raising the Standard of Rebellion
 " in the Province," or Words to this Effect : And this Deponent further saith,
 that he informed the said Timothy M'Pherson and Nathaniel P. Buckley that
 he had never heard any Conversation of the Kind.

(Signed) J. BRIDGLAND.

Sworn before me, at York aforesaid, this 27th Day of June 1828.

(Signed) G. Powell, J. P.

The Expressions said to have been made use of by Mr. Henry Sherwood in my Presence, in the within Affidavit, are entirely incorrect. Nothing to my Recollection fell from Mr. Henry Sherwood but what was strictly respectful to Mr. Justice Willis.

York, 27th June 1828.

(Signed) JAS. E. SMALL.

Sir,

York, 26th June 1828.

I AM instructed to make known to you, officially, that I am commanded by his Excellency the Lieutenant Governor to receive from you every Information which you may be enabled to furnish relative to the Proof of Publication of a Number of a Newspaper, which you have made the Subject of a Communication to the Government, in order that I may take the necessary legal Steps against the Editor of the Gore Gazette, in which Paper the Article complained of appeared. I am further directed to give you to understand, that as in a Criminal Prosecution your Name must necessarily be brought into Public Discussion, it will only be undertaken, in this Instance, with your Concurrence.

I am, Sir,

Your very obedient Servant,

(Signed) JOHN B. ROBINSON,
Attorney General.

To the Hon. J. W. Willis,
&c. &c. &c.

Sir,

York, Upper Canada, 27th June 1828.

IN answer to your Letter of Yesterday, I beg leave to say, that towards the End of the last Month I endeavoured to draw the Attention of his Excellency the Lieutenant Governor to the singular Circumstance of an Officer under the Controul of Government being the Medium of derogatory Comment on me, as one of the King's Judges, in the solemn Discharge of what I conceived to be my Duty. I of course considered that my Name, as such Judge, would be used in any Proceeding the Executive Government might determine to institute for the Punishment, not only of the Printer, but more particularly of the AUTHOR. I have only to state, that I received at the Post Office of this Town a Paper addressed to me, containing the Publication in question, and that Paper I have since disposed of. I think it was sent to Major Hillier.

I remain, Sir, &c.

(Signed) JOHN WALPOLE WILLIS, J.

To J. B. Robinson, Esq.
&c. &c. &c.

Sir,

York, 10th July 1828.

IN the Reply given by you to my Letter, respecting a Publication in the Gore Gazette, you state that it was the AUTHOR and not the Printer of the Publication that you desired to prosecute; but you have not informed me who the Author is, or what Evidence can be adduced. You can, perhaps, supply this Information?

I am, Sir, &c.

(Signed) J. B. ROBINSON,
Attorney General.

To the Hon. J. W. Willis,
&c. &c. &c.

Sir,
York, Upper Canada, 10th July 1828.
WITH reference to the Publication in the Gore Gazette, I said, " I of course considered my Name as a Judge would be used in any Proceeding the Executive Government might determine to institute for the Punishment, nor ONLY of the Printer, but more particularly of the Author," including NOTH. You probably are quite as well acquainted with the Author as I am. I can furnish no Evidence on the Subject. I am very much astonished at a Doubt even occurring where the Language is so obvious.

I remain, Sir,
Your obedient Servant,
(Signed) JOHN WALPOLE WILLIS.
To J. B. Robinson, Esq.
&c. &c. &c.

Sir,
York, 10th July 1828.
I HAVE this Moment received your Note in answer to mine of this Morning, to which I need only reply, that it is quite consistent with your other Communications.

I am, Sir, &c.
JOHN B. ROBINSON.
To the Hon. Mr. Willis,
&c. &c. &c.

Sir,
York, Upper Canada, 3d July 1828.
I MUST again request an Answer to my Letter of the 28th Ultimo. I now inclose an Affidavit, which has just been handed to me, respecting the Conduct of a Mr. Stewart, one of Mr. J. B. Robinson's Clerks.

I have the Honour to be, Sir, &c. &c. &c.
(Signed) JOHN WALPOLE WILLIS.
Major Hillier, &c. &c.

Home District, } Nathaniel Prestidge Buckley, Assistant Clerk in His Majesty's
York, to wit. } Crown Office, York, maketh Oath and saith, That he, this Deponent, on the 12th Day of April last past, was in the Crown Office when John Stewart (a Student at Law in the Office of John Beverly Robinson, Attorney General, and Relative to Henry John Boulton, Solicitor General, and to the Honourable Mr. Justice Sherwood, as this Deponent is informed, and residing in the House with the Solicitor General), came into the Office between the Hours of Two and Three o'Clock of said Day, as near as this Deponent now recollects, and declared and said to James Martin Cawdell, Head Clerk in said Office, " Do you know what? — By G—d, I never knew so great a Black-guard in all my Life, nor so damned a Rascal, as that Judge Willis is! — Do you know what he has done? He has let Collins come into the Court to " blackguard the Attorney General;" and made use of other Words which this Deponent could not distinctly hear. This Deponent saith, that the said James Martin Cawdell said, in reply to the said John Stewart, " I will not allow you " to speak that Way of my Friend," or Words to that Effect. This Deponent saith, on the following Morning, Simon Washburn, Esq. Barrister at Law, came to the Crown Office on Business, to whom this Deponent related what the said John Stewart had said the Day before; and this Deponent saith, that shortly after, James Edward Small, Esq. Deputy Clerk of the Crown, came into the Office, to whom Mr. Washburn spoke of the Circumstance, when this Deponent related to the Deputy Clerk of the Crown as above stated, to which Mr. Small replied, " that he was astonished that Stewart could say the like;" but added, " I would not have wondered if young Sherwood had said it."

(Signed) NATHANIEL PRESTIDGE BUCKLEY.

Sworn before me, this 3d Day of July 1828.

(Signed) Simon Washburn,
A Commissioner in the King's Bench, Upper Canada,
for taking Affidavits.

Sheriff's Office, York, 30th June 1828.

My dear Sir,

IN reply to your Letter of the 27th Instant I beg leave to state, that upon receiving Mr. Justice Willis in the Robing Room on the Morning of the 11th April last, being the first Day of his Attendance at the Assizes as Judge, he informed me that a Matter of the most unpleasant and serious Nature was likely to come before the Court, and he would take that Opportunity of making the Circumstance known to me, in order that I might take the necessary Steps to prevent the Parties about to be complained of from making their Escape. His Lordship alluded in specific Terms to the Duel which took place in 1817 between Samuel P. Jarvis, Esq. and the late Mr. John Ridout; and expressed his Regret that after so long a Period of Time the Matter should again be brought before the Public. He also expressed his Regret that Mr. Jarvis had noticed the infamous Observations of the Editor of the Colonial Advocate, in allusion to the Duel; as the unpleasant Circumstances about to be brought forward arose, in his Opinion, from Mr. Jarvis's not treating that Paper with the Contempt it deserved. He said that since the Matter was to be brought forward, a full Investigation would take place, and the Parties should not be allowed the Opportunity of escaping; and concluded by saying, "If he were in their Place, he would get into a Boat and paddle off." I observed, that whatever might take place, I should not act without full Authority, and certainly should not arrest the Parties on my own Responsibility.

My Impression then was, and that Impression was confirmed by the very extraordinary Proceedings which took place, that Mr. Willis was aware of the Line of Conduct which Mr. Collins, a Defendant under Recognizance for Libel, intended to pursue; and so clearly did it appear in this Light to my Mind, that I did not hesitate to acquaint the Solicitor General, one of the Parties complained of, with the Conversation which took place between Mr. Willis and myself in the Robing Room.

I subsequently mentioned the Circumstance to several other Persons, and, amongst the Number, the Chief Justice, on the Day of his Departure for England.

With respect to your Enquiry, whether I considered the Communication made by Mr. Justice Willis as confidential, I beg leave to state, that his Lordship and I were not then upon such Terms as would warrant confidential Communications, and that only on Matters relating to the Duties of our respective Situations had there been for some Time previous any Interchange between us.

I beg you to believe me, my dear Sir,

Your most obedient Servant,

(Signed) W. B. JARVIS,
Sheriff, Home District.

Major Hillier, &c. &c.

York, 15th July 1828.

Sir,

I HAVE received the Letter from Mr. Willis to the Secretary of State, inclosed in your Letter to me of the 29th June; and, in returning it, must express my Regret that such a Production should have proceeded from any Person in Mr. Willis's Situation. A few Months ago I should have thought it impossible.

The first Statement in Mr. Willis's Letter respects myself. Of the Occurrence to which it alludes I have already given a very full Detail in my Letter to his Excellency, being anxious to receive the Opinion of the Government upon it. The Accusation of Mr. Willis is known by my Brethren of the Bar to be as unfounded as the Attack he thought proper to make upon me was, in my Opinion, unfeeling and unjust. I will only add, I am too indifferent to Mr. Willis's Statements and Proceedings, evidently intended as they are to answer unwarrantable Libels, to think it necessary to vindicate myself more particularly from them, unless the Government is pleased to express a Desire that I should.

2d. When his Excellency placed in my Hands the Newspaper containing a Publication of which Mr. Willis complains, I wrote him the Letter marked A., and received the Answer B.

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It was neither an explicit nor courteous Answer to my Letter, but I was not surprised. Some Days after, hearing that Mr. Willis was about setting out for England, it occurred to me that I ought not to omit enquiring of him before he went who the Author was to whom he alluded in his Note, and what Proof he could enable me to adduce. Not having his Letter before me, and some Days having elapsed since I read it, the Recollection I retained of the Number of Scores under the Word Author impressed me with the Idea that it was the Author and not the Printer, or the Author rather than the Printer, that he wished punished. Under this Apprehension I wrote the Note C., and received an Answer D., to which I could only reply that it was quite consistent with Mr. Willis's other Communications. I will not trust myself to comment upon the Insinuation evidently intended to be conveyed by Mr. Willis's Note, or the Style of his Replies to a purely official Correspondence, which my Duty rendered necessary. It appeared at last that he could not tell me who the Author was; but nevertheless, if I had omitted to ask the Question, I have no doubt I should at some future Day have had it imputed to me, that I waived proceeding against the Author, though Mr. Willis tendered the Proof. For the rest I will only say, that if Mr. Willis intended to insinuate that I had any Connection with the Paper alluded to, or knew any thing of it 'till I saw it in Print, he might, with as little Violation of Truth and Justice, have expressed his Suspicions of the Attorney General of England. He thought such an Insinuation would answer some Purpose, and therefore made it.

3d. Mr. Sherwood is my articled Clerk, as Mr. Willis is careful to state; that is, he attends in my Office within certain Hours. He resides under his Father's Roof however, and I therefore felt it right to make his Father aware of the Charge which had been brought against him; and I also, both verbally and in Writing, expressed my earnest Hope to the young Man, that he had not given Occasion for Mr. Willis's Statement, as nothing could be clearer than the great Impropriety of addressing any Judge in the Manner complained of.

Another Complaint of Mr. Willis's against Mr. Sherwood and a Mr. Foster being placed in my Hands very soon after, I wrote him the Letter H., and received the Answer I., the first Sentence of which might, I think, have very well excused me from having any further Communication with Mr. Willis.

I cannot conceive that it can be expected of any Public Officer that he is to continue a Correspondence merely to subject himself to rude and flippant Replies; and if it were not that I can and do look upon any thing Mr. Willis can say as of the least possible Consequence, I certainly could not have submitted to write to him again on any Subject.

With the Gossip about Mr. Foster I have nothing to do. With respect to Mr. Sherwood and Mr. Stewart, if they have committed any Offence against Mr. Willis, he must adopt the proper Means of proceeding against them, and they must have the same Opportunity as other Persons of defending the Charge; except, however, that an Observation of Mr. Sherwood's is stated as if it were a Challenge or a Provocation to fight.

The Words charged against the other young Gentlemen are not such as subject them to Punishment in a Court of Justice.

The Words implying a Challenge are affirmed by Mr. Willis and denied by Mr. Sherwood. It is not for me to decide who is to be believed. It is in the Power of Mr. Willis to have it determined in the only just Manner.

I called upon Mr. Sherwood and Mr. Stewart for Explanations; and I inclose them as they gave them, K. and L.

The Second Charge made against Mr. Sherwood I have no doubt, from the Documents produced, was groundless and malicious.

I regret to have had Occasion to trouble myself with Matters so much out of the Course of official Duty. Mr. Foster and Mr. Sherwood are well known. I have heard no Person speak of them in Terms of such extravagant Approbation, and particularly of Mr. Sherwood, as Mr. Willis usually did during a long Period of more familiar Intercourse than ever existed between myself and them, though our Acquaintance has been of a much longer Standing. To asperse them now seems to be Part of a System which Mr. Willis has entered upon, for Reasons very evident, from the Mention constantly made of their Fathers, Relations, and Friends; and I have learned from Experience that

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he is not likely to suffer Scruples to stand in his Way when Character is to be injured and a Public Ferment to be produced.

Mr. Stewart I have known from his Childhood; he is a particularly steady and unoffending young Man.

I am, Sir, &c.
Major Hillier, &c. (Signed) JOHN B. ROBINSON, Attorney General.

York, 28th June 1828.

HAVING heard, from a Source that I could not doubt, of the unwarrantable Attack made by Mr. Justice Willis upon the Attorney General, and of his permitting the Editor of a notoriously scurrilous Paper to come into Court without any other Reason than to gratify his own Malice, and to heap Abuse on the Attorney and Solicitor General, I did say in the Crown Office, in Conversation with a Clerk there, to the Effect of what Mr. Buckley has stated, not supposing that a Public Officer of the Respectability of the Clerk of the Crown would employ in his Office a Person who, for malicious Purposes, would be the Bearer of Conversations that occurred there. This Buckley came out as a Servant to Mr. Willis, who it is supposed got him the Situation which he now holds; and, whether from Motives of Gratitude or not, he makes a Practice of going about collecting and repeating to Mr. Willis every idle Word which he may hear to his Prejudice; and he has been proved to have stated, in some Instances, what never did occur. I did say, I most candidly confess, what Mr. Willis has represented, but not with any Expectation of its being repeated, nor for the Purpose of injuring him; and I have heard Hundreds of Persons, Strangers as well as others, express themselves to the same Effect.

(Signed) JOHN STEWART.

Mrs. Willis to the Lieutenant Governor.

MRS. WILLIS, with her most respectful Compliments to the Lieut. Governor, takes leave to request he will honour her with a few Minutes' Conversation upon Business of the highest Importance both to herself and Family. She has also another Favour to ask — that his Excellency will be so good to direct Mr. Claudius Foster to attend at the *same Time* he is pleased to appoint for seeing Mrs. Willis at Stamford Cottage, and hopes it will be convenient to the Lieutenant Governor to name an early Day for the Interview.

York, 21st June 1828.

His Excellency's Answer.

SIR PEREGRINE MAITLAND presents his Compliments to Mrs. Willis, and, in acknowledging the Honour of her Note of Saturday last, he must express his Regret that Mrs. Willis should have had the Trouble of calling at the Government House (after his Departure) on Friday last; as any Business of Importance to Mrs. Willis and her Family, with which the Lieutenant Governor could be justified in interfering, would with Propriety be made the Subject of a Communication by Mr. Justice Willis through the established Channel.

Government House, Monday Morning.

Mrs. Willis to the Lieutenant Governor.

MRS. WILLIS presents her most respectful Compliments to General Maitland, and, in acknowledging the Honour of his Note of this Morning, she must express her Regret that General Maitland declines to comply with her Request; more particularly so, as it is the first and *only Time* she ever was denied an Audience, however *high* the Situation might be; and she sincerely hopes she will not long have to say that General Maitland, whose Politeness and good Breeding she has had Proof of, should refuse to see her, as she wished, in the Presence of Mr. C. Foster, as, in her humble Opinion, nothing that could be termed *official* was mentioned in her Note of Saturday. Mr. Foster having told

told Mrs. Willis that he had often conversed with General Maitland about Mr. Willis's *Politics*, Mrs. Willis must confess, as Mr. Foster was permitted by General Maitland to do so, she did not anticipate a Refusal from General Maitland of an Interview, that being the only Means she can at *present* find to obtain the *Truth* of many of Mr. Foster's Statements. Had General Maitland honoured Mrs. Willis with a few Minutes of his valuable Time, she would have let him see a Letter which speaks *more* for the Person who calls himself a Friend of General Maitland's Family, than any thing Mrs. Willis could possibly say of Mr. Claudius Foster.

Monday, 23d June 1928.

His Excellency's Answer.

THE Lieutenant Governor presents his Compliments to Mrs. Willis, and requests her to believe that nothing was further from his Intention than to reply uncourteously to the Note he had the Honour to receive from Mrs. Willis; and he regrets exceedingly that Mrs. Willis should have looked upon his Answer in that Light.

The Lieutenant Governor has no Hesitation in assuring her that he has not the slightest Recollection that Mr. Foster ever spoke in his Presence upon the Subject of Mr. Willis's *Politics*, nor does he think it in the least Degree probable that he did.

Lady Mary Willis to the Lieutenant Governor.

LADY MARY WILLIS presents her Respects to General Maitland, and requests he will do her the Favour to state if there be any thing in the public or private Conduct of her Husband which has ever given any Cause for the Disapprobation of his Excellency. Lady Mary Willis understood from the Conversation of Yesterday, that General Maitland *had no Ground* whatever for any such Feeling, and she now only repeats the Question to prevent the Possibility of Mistake, and to obviate the Necessity of an immediate Journey to England.

York, 25th June.

His Excellency's Reply.

SIR PEREGRINE MAITLAND presents his Compliments to Lady Mary Willis, and regrets to be under the Necessity of assuring Lady Mary that his Conversation of Yesterday has been much misapprehended by her Ladyship.

Sir Peregrine Maitland had no Intention of entering into the Subject of Mr. Willis's Public Conduct with Lady Mary; he would not have considered it proper to do so.

Lady Mary Willis to the Lieutenant Governor.

As Lady Mary Willis's Impression is decidedly different from that of General Maitland, respecting the Conversation of Yesterday, and he now seems to intimate that there *is* Ground of *Public Complaint* against her Husband, she will feel greatly obliged to be honoured with those Charges, so as to enable her to take the necessary Measures in England respecting them. If this Request ought to be made in any other Way, will General Maitland direct Lady Mary Willis how to proceed, as she should be sorry to obtrude further upon his Excellency's Time.

York, 25th June.

His Excellency's Reply.

SIR PEREGRINE MAITLAND presents his Compliments to Lady Mary Willis, and he begs leave to remind Lady Mary, that, previous to the Visit he was honoured with by her Ladyship, he had taken the Liberty of pointing out to Mrs. Willis the proper Channel of Communication on any Matter belonging to
Mr.

Mr. Willis or his Family, with which it could be proper for the Lieutenant Governor to interfere; and he is sure Lady Mary will pardon him for intimating that he is still of the same Opinion, and that he cannot feel himself justified in being a Party to any further Deviation from the natural and established Course.

Mr. Willis to Major Hillier.

Sir,

York, Upper Canada, 25th June 1828.

I HAVE to solicit, in the most respectful Manner, that I may be immediately informed if his Excellency the Lieutenant Governor has any and what Complaint to make respecting my public or official Conduct.

I have the Honour to be, Sir, your very obedient Servant,

(Signed) JOHN WALPOLE WILLIS.

Major Hillier's Reply.

Sir,

I HAVE submitted your Letter to the Lieutenant Governor, and am directed to observe to you, that whenever his Excellency may deem it necessary to animadvert on the Conduct of any Officer in this Colony, he will, of course, choose his own Time and use the proper Channel for that Purpose.

You were fully informed of the natural established Course for communicating with the Head of the Government; and on your Demand, obviously originating from a very different Course of Proceeding, his Excellency purposely forbears to comment.

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PART III.

No. 1.

COPY of a Letter from Mr. WILLIS to the Secretary of State for the Colonial Department.

York, Upper Canada, 21st April 1828.

Sir,

WHEN I left England last July, Mr. Wilmot Horton, then Under Secretary for the Colonial Department, assured me, that notwithstanding the Objections of the *then* Attorney General, Sir James Scarlett, to the Jointment of a Master of the Rolls or Vice Chancellor of Upper Canada, under the Great Seal of England, (in the same Manner as a similar Appointment has taken place more than Six Years ago in Nova Scotia, and has been attended, as I am informed, with very beneficial Effects,) without any Legislative Enactments, my Pay, as Equity Judge, should commence from that Period, and my Patent be sent after me to this Colony; I was therefore content to leave England merely with the Commission of an inferior Judge of the Court of King's Bench, in the Expectation of receiving my Salary and the Appointment as Equity Judge of this Province, which, with the Office I now hold, would have been at *least equal* to that of the Chief Justice of this Province; and I therefore refused an Appointment to the Bench at the Cape of Good Hope, of *even greater Emolument*. Hitherto I have only received my Salary as a Judge of the Court of King's Bench; and although, by your Dispatch of the 25th of November last, you were good enough to say, that as I left England on the Understanding that, if a Court of Equity were erected in the Province, I was to preside in it, yet, from Causes which heretofore I have been bold enough to make known to you, I have hitherto derived *no Benefit* from the kind Intentions of Lord Bathurst, Lord Goderich, and yourself, in my Favour. I left England, however, with an express Understanding of being paid as *Equity Judge* also. On that Occasion Mr. Horton sent for Mr. Stephen, in order that there might be *no Mistake*; and Mr. Balfour, Lord Goderich's Private Secretary, has since interested himself considerably in the Matter. Unless an Act be passed by the Imperial Parliament, if indeed any Act be necessary, (and, notwithstanding the Opinion of Sir James Scarlett, perhaps, on further Consideration, this will be found not to be the Case,) the Matter cannot be decided here for another Year; may I therefore venture to ask from whom I am in the meantime to receive the Salary of Equity Judge, in the Expectation of which I left England. If it is to be paid in England, I should wish it to be forwarded to my Bankers Messrs. Stevenson and Salt of Lombard Street. I believe, from what I can learn, there are no Funds here, *unappropriated*, out of which it can be paid. If however it be inconvenient that it be paid at all, may I hope, as the Chief Justiceship is soon likely to be vacant, that I may succeed to that Office, until something can be settled respecting an equitable Jurisdiction in this Province. As an English Barrister of more than Ten Years standing, the Son-in-Law of one of the eldest Scottish Peers, and the Husband of the only *titled Female* in the Province, with the Exception of Lady Sarah Maitland, I must confess I feel it *rather irksome*, under the Circumstances in which I came here, to remain in an *INFERIOR SITUATION*. I have requested Mr. Stephen to lay before you a Scheme for the Creation of Canadian Baronets, on the same Plan as that on which those of Nova Scotia were at first created. I have also taken the Liberty to transmit, through him, a Proposal for the Establishment of a Branch of the Bank of England in this Province; and I propose, should it meet with your Approbation,

tion, to devote my leisure Hours to the Classification and Consolidation of the Laws of this Colony, and also of all the other British North American Provinces, with a View to what here is anxiously desired, a Union with the Mother Country. Lord Eldon, the Attorney General, and Mr. Horne, of the Chancery Bar, will speak of me as I deserve, if any Reference as to my Professional Character be necessary. As to my Family Connections and private Character, I refer to General Sir R. Boulton, One of His Majesty's Equerries, who has known me from Infancy; and to the whole of this Province, for the Good-will borne towards me. I beg to reiterate my Thanks for the kind Consideration expressed towards me in your Dispatch of the 25th of November last, and to assure you, that I should not now have troubled you had I been installed in a Court of Equity, or known how to act otherwise than I have done, in consequence of the untoward Circumstances that have occurred. I understand there is another very urgent and zealous Candidate for the Chief Justiceship of this Province; but I trust my Claims will not be forgotten, in case an equitable Jurisdiction be not immediately erected. From my constant Practice and Experience in equitable Proceedings, I should, of course, prefer presiding in a Court of that Kind, particularly in a new one, to that of being at the Head of any other; but I hope that my Conduct as a Judge of the Court of King's Bench, since I have been here, has been such as to prove that I am not altogether unfit to preside there, until an equitable Tribunal, distinct from the Common Law Courts, be established in this Province.

I have the Honour to remain,

Sir,

The Right Hon. the Secretary of State, Most respectfully your very obedient Servant,
Colonial Department.

(Signed) JOHN WALPOLE WILLIS.

No. 2

COPY of a Letter from Mr. WILLIS to Mr. R. W. HAY.

Sir,

York, Upper Canada. 21st April 1828.

IN consequence of an Application I made to Lord Bathurst last Year, and subsequent Solicitation on my Behalf, through the Medium of my Friends, and particularly Mr. George Baillie Hamilton, then the Private Secretary of the Lord High Admiral, and formerly acting in the same Capacity to Lord Melville, you were good enough to ask, through the Intervention of Mr. Stephen, if I continued to desire a judicial Appointment to the Cape of Good Hope. I had then, however, received from Lord Bathurst the Nomination to the Offices of One of the Judges of the Court of King's Bench, and also that of Master of the Rolls or Vice Chancellor of Upper Canada; and, in the Expectation that I should hold *both* Situations, I declined your obliging Offer. Owing, however, to a Doubt entertained by the *late* Attorney General of the Power of His Majesty to erect a new Court of Equity in the Colonies, the latter, and principal Appointment, has not hitherto taken place. Under these Circumstances, although personally unknown to you, I venture to solicit your good Offices in my Favour, for obtaining for me the Chief Justiceship of this Province, now about to become vacant, and for which there is, I understand, a *very urgent Candidate*, who, without your Interference in my behalf, may probably succeed. As the Son-in-Law of one of the oldest Peers in Scotland, I confess I do not wish to be passed over, particularly as I have practised for more than Ten Years at the English Bar; and I may refer you to Lord Eldon and the present Attorney General for my professional and, indeed, personal Qualifications. Sir Robert Bolton, One of His Majesty's Equerries, has known me from a Child, and I am sure will speak of my Family, and of me individually, correctly. I beg to apologize for taking so great a Liberty, but my Distance from my Friends, and the Urgency of the Matter, will, I trust, in some Measure excuse me.

I have the Honour, &c.

The Rt. Hon. R.W. Hay, &c.

(Signed) JOHN WALPOLE WILLIS.

P. S. I have ventured to make this Application, although I am aware that the Canadas were not formerly in your Department.

No. 3.

COPY of a Letter from Mr. WILLIS to Mr. R. W. HORTON.

Sir,

York, Upper Canada, 21st April 1828.

My Appointment as One of the Judges of the Court of King's Bench in Upper Canada, and also as Master of the Rolls or Equity Judge of that Province, by Lord Bathurst, and its Confirmation by Lord Goderich, has probably not escaped your Recollection. It never can be forgotten by me *how much* I am indebted to you for the very kind Manner in which you sent for me and Mr. Stephen, to declare, that, notwithstanding the then Attorney General's Objections and Delay, I might leave England (which I was peculiarly anxious to do at a favourable Period, on account of Lady Mary Willis's then delicate State of Health,) at the Period I proposed, and that my Salary, as Equity Judge of Upper Canada, should commence from that Period (the 14th of July 1827). It seems, however, from the Dispatch of the Colonial Secretary of the 25th of November last, that the *then* Law Officers of the Crown doubted the Power of the Crown to erect an equitable Tribunal *HERE*, without the Aid of Parliament or the Local Legislature; and although it was expressly stated, that in case an equitable Jurisdiction should be established, it was to be committed to my Charge, yet, owing to the Delay of the Attorney General principally, (who, I understand, was himself anxious to obtain the Office,) the Matter came before the Local Legislature at so late a Period, that it is deferred until next Year. If in the Interim, however, His Majesty were to create the Office by His Letters Patent, either with or without the Aid of the Imperial Parliament, (for as the same Thing was done in Nova Scotia Six Years ago, without Legislative Interference, I do not see why it should not now be done in this Instance in the same Manner,) — notwithstanding Sir James Scarlett's Opinion, which I hold to be by no means congenial with that of either the Solicitor or the present Attorney General, or with that of Mr. Stephen, whose Judgment I *highly* value, or, were it not *very egotistical*, I would add, of what I believe to be right — I have every Reason to think it would be highly acceptable to the Colony. As it is, I have never hitherto received any Emolument as Equity Judge of the Province, though it was on the Understanding that *this*, together with my Appointment as a Junior Judge of the King's Bench, would be *equal at least* to the Chief Justiceship in point of *Salary*, and that I should have the UTOPIAN PLEASURE of FOUNDED a Court of Equity, that I was induced to come here, and refuse an Appointment to the Cape of greater Profit than the most I can receive in this Place. May I venture to ask *where* I am to apply for my Salary, for the Period since I came here, as *Equity Judge*? and if no such Salary be forthcoming, and no such Appointment be realized in England, may I request your good Offices, under existing Circumstances, to procure me the Office of Chief Justice of this Colony, in the Room of the present one, who is now on his Way Home to make Terms for Resignation. I sent Mr. Stephen a Plan for a Canadian Baronetage, and also for establishing a Branch Bank of England in the British North American Provinces, beginning with Canada, which certainly is as loyal and truly English as any Part of the King's Dominions. I have imposed on myself the Task of classifying and consolidating the Laws of British North America, and pointing out the Mode of accomplishing a perfect Assimilation with those of England, which I think would be a great Step of, *what here is devoutly wished for*, a Union with the Mother Country. I have sent my Friend Mr. Stephen many recent Tracts relative to this Province, which I am sure he will be happy to shew you. I wrote to Sir Charles Wetherell and Lord Eldon, to whom I am greatly indebted for their good Offices in procuring me my *intended* Appointments, to assist me in obtaining the Chief Justiceship, with your Aid, until I can obtain the Presidency in an *independent* Court of Equity; I mean a Court of Equity *unconnected* with a Court of Law. I beg to apologise for being so very troublesome and intrusive; and I have the Honour, &c.

The Right Hon. R. W. Horton,
&c. &c. &c.

(Signed) JOHN WALPOLE WILLIS.

P. S. There is a Gentleman of the English Bar, who is now, I am told, an urgent and *likely to be a successful* Candidate for the Chief Justiceship, unless I am fortunate enough to have your Aid.

No. 4.

COPY of a Letter from Mr. WILLIS to Earl BATHURST.

My Lord,

York, Upper Canada, 21st April 1828.

PREVIOUSLY to your late temporary Retirement from Office, your Lordship was kind enough to nominate me to the Situations of Master of the Rolls of Upper Canada, and One of the Judges of the Court of King's Bench of that Province; and as I have not the Honour of being personally known to you Lordship, I believe I am indebted for this Mark of your Lordship's Consideration to Lord Eldon, Sir Charles Wetherell, Mr. Horne, and Mr. Stephen, and my other Friends who interested themselves for me.

By a Dispatch of the 9th of April 1827, your Lordship had suggested to the Lieutenant Governor of this Province, that the judicial Office of Chancellor, under the Title of Master of the Rolls or Vice Chancellor, might be advantageously committed to the Chief Justice or One of the inferior Judges of the Court of King's Bench; and it was in consequence of this Suggestion that I received the Appointment from your Lordship, which was confirmed by Lord Goderich, and with a Letter from him, that I was to be entrusted with the equitable Jurisdiction of this Province. I left England with only my Commission as a Judge of the Court of King's Bench, but on the *express Promise* from Mr. Horton, the then Colonial Under Secretary, that my Pay as Equity Judge should commence from that Time, and that my *Patent* (notwithstanding Obstacles were made to it by the then Attorney General Sir James Scarlett) should be sent after me. It appears, however, from a Dispatch from the Colonial Secretary, of the 25th of November last, that the *then* Law Officers of the Crown entertained very considerable Doubts whether His Majesty could lawfully, by Letters Patent under the Great Seal, without the Intervention of Parliament or of the Local Legislature, create any new Judge in Equity in Upper Canada; wherefore the Letters Patent for creating the Office of Master of the Rolls were not proceeded with; but it was stated, that as it appeared I left England as One of the Judges of this Province, with the *express Understanding* that, in the Event of a new Court of Equity being erected, I was to preside, that Intention would of course be carried into Execution. The late Period at which the Business came before the Provincial Parliament induced them to postpone it until next Year. I am convinced, however, it would be very acceptable *here*, if, in the Interim, His Majesty were enabled, by an Act of the Imperial Parliament, (if indeed any Act be necessary, for the same Office was created about Six Years ago in Nova Scotia, without any such Act,) to carry this original Intention of your Lordship in my Favour into Effect. Indeed I cannot doubt, neither does Mr. Stephen, that it may be done without such an Act; and I know the present Solicitor General was, in the first Instance, of the same Opinion. But as the Chief Justiceship of the Province is now likely to be vacant, and a Difficulty may arise to prevent the immediate Erection of an equitable Tribunal in this Colony, may I venture to entreat your Lordship to put me in the same Situation as if your favourable Intentions towards me had been fulfilled, by endeavouring to obtain for me that Office which, in point of Emolument, is not greater than what I came here with the Expectation and Promise of receiving from the Appointments I was to fill, only one of which, however, has hitherto been productive of any Emolument? I understand that a Gentleman at the English Bar, where I practised for Ten Years previously to my coming here, is likely to fill this Situation, for which he is a very urgent Candidate, unless I can obtain your Lordship's Interference in my Favour.

I have the Honour, &c.

Earl Bathurst, &c. &c. &c.

(Signed) JOHN WALPOLE WILLIS.

No. 5.

COPY of a Letter from Mr. WILLIS to the Secretary of State for the Colonial Department.

Sir,

York, Upper Canada, 25th April 1828.

WHEN I applied to you for the Salary as Equity Judge of this Province, and expressed a Hope that, if under existing Circumstances it were inconvenient that it should be paid, and the kind Intentions in my Favour should not be carried into Effect, I might succeed to the Chief Justiceship of this Province, instead of remaining merely one of the inferior Judges of the Court of King's Bench, I neglected to transmit for your Information (but which I now do) a Copy of a Letter written by me to the then Under Secretary of State for the Branch of the Colonies to which this Province belongs, on the Faith of which, and on the Understanding that there was a Fund from which the Salary would be paid, (without resorting to the Local Revenue, which at present is fully appropriated,) I embarked with Lady Mary Willis, and the rest of my Family, for this Country. I have also ventured to inclose the leading Pamphlets on the Civil Controversy of the Religionists of the Canadas, supposing the Matter may probably come under the Consideration of the Imperial Parliament. The Pastoral Letter of the Presbyterian Clergy has been only very recently published.

I have the Honour to remain, &c.

The Rt. Hon. the Sec. of State,
Colonial Department.

(Signed) JOHN WALPOLE WILLIS.

Sir,

Gray's Inn, 18th July 1827.

IN availing myself of the Intimation you were good enough to give me on Friday last, when I had the Honour of seeing you in Downing Street with Mr. Stephen, that my Departure for Upper Canada should not be delayed on account of my Commission as Equity Judge of that Province not being completed, I beg leave to offer my best Acknowledgements for your Kindness in this Instance, as well as for your Assurance that my Salary for the Office should commence from that Day, and the Commission be forwarded to me.

I purpose leaving Town To-morrow for Liverpool, in order to sail by the next Packet.

I have, &c.

The Rt. Hon. J. Wilmot Horton, &c.

(Signed) JOHN WALPOLE WILLIS.

No. 6.

COPY of a Letter from the Rev. V. D. WILLIS to Mr. Secretary HUSKISSON.—
Inclosure.

Sir,

Gray's Inn Coffee House, 6th May 1828

WHEN my Brother, Mr. John Walpole Willis, went out to Upper Canada as one of the Judges of that Province, it was in the Expectation of having a Commission as Equity Judge superadded to his other Situation, and under the express Promise of the Colonial Secretary, Mr. Wilmot Horton, that his Salary for the latter Office should commence from the Date of their Interview,
14th

14th July 1827. The Opinion of Sir James Scarlett upon the Subject of the Equity Appointment having been delayed, and the Season fast closing when so long a Voyage and Journey with a Family could with Propriety be undertaken, my Brother was thereby enabled to proceed forthwith to his Destination, relying implicitly on the Promise thus given.

Delays and Doubts, it appears, have since arisen on the Subject of the Appointment, and, in consequence, no Salary has been paid for an Office not yet in actual Existence. Without Assurance of his Salary as Equity Judge being duly paid, my Brother would certainly not have sailed for Canada; but under the entire Conviction that it would be rendered in due Course, he arranged his Affairs accordingly, and left England; little supposing that his Income, instead of being augmented, should have that Portion of it which has been received diminished by a Rate of Exchange, imposed upon all Money remitted to England, of *not less than Eleven and a Half per Cent.*

The Injury his Affairs have thus sustained must be evident, nothing being allowed for the Expences of Voyage or Outfit.

If there be Hardship in his Case, I am aware of some Difficulty on the Part of the Government.

It cannot, however, I am persuaded, be the Wish of your Department to disappoint the reasonable Expectations of a Servant of the Crown, far less to evade the Fulfilment of an express Engagement. My Brother has empowered me, by the proper Forms, to act for him in his Absence; and I have every Reliance upon your Candour and Sense of Justice, for taking such Steps as you shall deem proper to make good the Engagement under which he went out to execute that Office, which, it is evident, it is not his Fault that he has not hitherto been able to perform.

I inclose a Copy of a Letter written by him to Mr. Secretary Wilmot Horton.*

I have, &c.

The Right Hon. W. Huskisson, &c. &c.

(Signed) W. D. WILLIS,
Minister of Trinity Church, Bath.

No. 7.

COPY of a Letter from Mr. R. W. HAY to the Rev. W. D. WILLIS.

Sir,

Downing Street, 19th May 1828.

I AM directed by Mr. Secretary Huskisson to acknowledge the Receipt of your Letter of the 6th Instant, and to acquaint you, that he understands that your Brother was perfectly aware, previous to his Departure for Canada, of the Difficulty which existed with respect to his Appointment as an Equity Judge; and as both the Office itself, as well as the Amount of Salary to be assigned to it, depends upon the Decision of the Provincial Legislature, it is quite impossible for Mr. Huskisson to entertain your Request for additional Salary for your Brother; and I must add, that Mr. Wilmot Horton has no Recollection whatever of having made any Promise to Mr. Willis which was not entirely contingent on the Establishment of the Office.

I am, &c.

The Rev. W. D. Willis,
Gray's Inn Coffee House.

(Signed) R. W. HAY.

* See the preceding Page.

No. 8.

COPY of a Letter from Mr. WILLIS to the Secretary of State.

Sir,

York, Upper Canada, 8th May 1828.

The Expectation of presiding in a Court of Equity in this Province induced me to leave England, and to refuse a judicial Situation at the Cape of Good Hope of nearly Double the Emolument of that I now hold, as merely One of the Puisné Judges of this Colony; but an Opportunity will probably present itself, by the Resignation of the Chief Justice, of my being placed in a Situation equivalent to that of Equity Judge (though not so consonant to my Feelings), until that Appointment can be made; and I now beg, through the Medium of his Excellency the Lieutenant Governor, to solicit this Promotion.

I have the Honour, &c.

The Rt. Hon. the Secretary of State,
Colonial Department.

(Signed)

JOHN WALPOLE WILLIS.

No. 9.

COPY of a Letter from Mr. R. W. HAY to Mr. WILLIS.

Sir,

Downing Street, London, 30th June 1828.

I AM directed by Secretary Sir George Murray to acknowledge the Receipt of your Letters of the 21st April and 8th May last; and to acquaint you that he cannot hold out any Hope of your succeeding to the Office of Chief Justice of Upper Canada, whenever that Appointment may be vacant. It is equally out of his Power to recognize your Claim to additional Salary as an Equity Judge, as there was no Expectation held out to you of any extra Allowance which was not entirely dependent on the Establishment of the Office of Equity Judge, and the Performance of the necessary Duties attached to it.

I am, &c.

John W. Willis, Esq., Upper Canada.

(Signed)

R. W. HAY.

No. 10.

COPY of a Letter from Mr. WILLIS to the Secretary of State for the Colonial Department.

Sir,

York, Upper Canada, 31st May 1828.

ON account of the Absence of the Chief Justice, by Permission of the Lieutenant Governor, the Two Puisné Judges of this Province were alone present in the Court of King's Bench established in this Colony during the last Term. Much Difference of Opinion existed between us, which, by preventing any Decision, may *materially injure* the Parties interested. This has led me to investigate minutely the Constitution and Power of the Court; and although I find it has been the very frequent Practice for *Two*, or even *One*, of the Judges to sit in "*Bank*," as it is called, yet as the Provincial Statute by which the Court is established requires "that His Majesty's Chief Justice, "together with Two Puisné Justices, shall *preside* in the said Court," I now consider all that hitherto has been, or may hereafter be done, contrary to the express Terms of the Act, altogether void.

Entertaining this Opinion, I feel bound to express it publicly, when the Court shall again open (the 16th June). I have endeavoured to explain myself more fully to Mr. Stephen, as Counsel to your Department, on the Subject, which I have ventured to mention to you the Moment I came to a Conclusion upon it, in order that the Excitement, which I fear will inevitably be produced throughout the Colony, may be obviated as speedily as possible.

I have, &c. &c.

Right Hon. the Secretary of State,
Colonial Department.

(Signed)

JOHN WALPOLE WILLIS

No. 11.

COPY of a Letter from Mr. WILLIS to the Secretary of State for the Colonial Department, dated York, Upper Canada, 23d June 1828.— Ten Enclosures.

Sir,

York, Upper Canada, 23d June 1828.

I FEEL it my Duty, as One of the Judges of this Province, most respectfully to solicit your Attention to the official Documents which I now transmit, respecting the State of the Administration of Justice.

The first Class respects the Manner of conducting Criminal Prosecutions ; and the second Class relates to the Constitution and Practice of the English Court of Judicature in the Colony, that is, the Court of King's Bench as established by the Local Legislature, there being hitherto no Court of Equity.

All these Documents have already been laid before the Local Government.

I have the Honour, &c.

To the Right Hon. the Secretary of State, (Signed) JOHN WALPOLE WILLIS.
Colonial Office.

Inclosure, No. 1.

Sir,

York, Upper Canada, 12th April 1828.

As Judge of Assize, Yesterday, I stated that the Law Officers of the Crown (who have hitherto always conducted, and who alone are paid by the Public for all Criminal Proceedings in this Province) were, in my Opinion, bound to prosecute of their own Accord for all Crimes which they knew to have been committed ; but the Attorney General (certainly not in so courteous a Manner as the Bench is usually addressed in England) disclaimed that Duty, admitting, however, that he and the Solicitor General were the Public Prosecutors. I then said, that the Question must be decided by the Government. As nothing can be more necessary for the due Administration of Justice than that the Source from which all Public Prosecutions must originate should be distinctly understood, I do not think I should honestly discharge the Duties of my Office, did I not respectfully submit this Matter to your Excellency's Notice.

I have, &c.

To the Lieutenant Governor (Signed) JOHN WALPOLE WILLIS.
of Upper Canada.

N. B. Transmitted through Major Hillier, Private Secretary, &c.

Sir,

York, Upper Canada, 14th April 1828.

I AM sorry to have Occasion again to appeal for a Decision respecting the Duties of the Attorney General of this Province, who now repudiates (as I understand him) what he stated on Friday last, viz. that Criminal Prosecutions in this Province are, as in England, open to the Bar ; and he has this Day, in open Court, further asserted, that, as His Majesty's Attorney General for this Province, he is answerable for his Conduct in his LEGAL Capacity, *not to any of His Majesty's Judges of this Colony*, but only to the King's Government. If this be so, the Question is, whether the Attorney General, who is not only a Barrister, but also a practising ATTORNEY of this Court, or the Judge who presides, is to be superior ? I had Occasion to notice publicly the greater Mildness of the Criminal Law, and the Administration of it there, as it now stands, to that which is admitted into this Province, which is what it was in England in 1792 ; and I now call on your Excellency to observe the Improvements since that Period, and especially those which have recently been made by the Right Honourable the present Secretary of State for the Home Department. A Sense of the Duty attached to the Dignity of my Office compels me, however reluctantly, to add, that the Language of the Attorney General was such that I could only tolerate it from his being an Officer of Government, and from my Wish on that Account not to obstruct the Public Business. In this Controversy I entirely disclaim all personal Feeling. I do not, nor can

I ever condescend to entertain it in any Public Measure ; but the Crisis is now arrived at which it must be determined how Criminal Prosecutions here are to be conducted, and how far the Law Officers of the Crown are answerable to the Judges of the Court.

I have the Honour, &c.
To the Lieutenant Governor. (Signed) JOHN WALPOLE WILLIS.

Forwarded like the last.

Sir, The Cottage, Quintin, 14th April 1828.

I AM commanded by his Excellency the Lieutenant Governor to acknowledge the Receipt of your Communication of the 12th Instant, and to acquaint you that he has directed the same to be laid before the Attorney General for the necessary Explanation.

I have the Honour to be,

Sir,

Your most obedient Servant,
(Signed) G. HILLIER.

The Hon. Mr. Justice Willis.

Sir, Government House, 17th April 1828.

I AM commanded by the Lieutenant Governor to acknowledge the Receipt of your Letter of the 14th Instant, and to acquaint you that he has referred it to the Attorney General for Explanation.

I have the Honour, &c.

(Signed) G. HILLIER.

The Hon. Mr. Justice Willis.

N. B.—No further Notice has ever been taken of this Business, except, indeed, the Circular which follows can be so considered.

(Signed) J. W. WILLIS.

(Circular.)

Inclosure, No. 2.

York, 12th May 1828.

Sir,

IN the last Session of the Legislature, a Select Committee of the House of Assembly, in a Report upon the Petition of William Forsyth, declared, "that some of the most daring Outrages against the Peace of the Community had passed unprosecuted;" They further declare, "that the Crown Officers, who exercise the exclusive Right of conducting Criminal Prosecutions at the Court of Oyer and Terminer and General Gaol Delivery, are in the habit, even in the first Instance, of being retained, and taking an active Part in the Defence of the Civil Action for the Wrong, by which it is inevitable that Prosecutors will be discouraged to apply to them for Professional Aid, and Justice, therefore, in many Cases fails, unless the Right of Prosecutor and of the Bar are asserted and upheld, as in England."

The Committee state, "That they did not extend their Examinations, as they intended, to the Crown Officers, because they report no specific Measure."

It is perfectly true, that I had no Opportunity of repelling these Statements, and equally true, that I knew nothing of any such Report being made, or intended to be made, until I saw it in the Public Prints after the Session was ended. I then learned that it had been brought into the House on the last Day of the Session, or on the Day before, but not moved upon.

I now take the Liberty of requesting that, as a Member of the Bar, you will have the goodness to state what Instances of daring Outrages have within your Knowledge passed unprosecuted within this Province.

Whether you attributed any such Instances to a Failure on my Part to discharge my Duty as Attorney General, and on what Ground you formed that Opinion.

Finally, I beg you will state explicitly in what Cases you have known me, during the Fifteen Years that I have been a Crown Officer in this Province, retained and taking an active Part in the Defence of any Civil Action for a Wrong done, which Wrong ought to have been made the Subject of a Criminal Prosecution, but was not, for the Reason this Report intimates, that I was so retained

retained by the Wrong-doers, and that the Prosecutor or Prosecutors were thereby discouraged from applying to me as Attorney General.

You will oblige me by stating the Particulars of any Cases which have come to your Knowledge at any Period in the Course of your Professional Practice.

I have, &c.
(Signed) J. W. ROBINSON.

Inelasure, No. 3.

COPY of a Report of the Select Committee, to whom was referred the Petition of WILLIAM FOISYTH, with the Testimony of Evidence examined thereon.

THE Committee to whom was referred the Petition of William Forsyth, beg leave to report as follows :

It appears to your Committee, that some of the most daring Outrages against the Peace of the Community have passed unprosecuted, and that the Persons guilty have, from their Connections in high Life, been promoted to the most important Offices of Honour, Trust, and Emolument in the Local Government.

It appears that the Crown Officers, who exercise an exclusive Right to conduct Criminal Prosecutions at the Courts of Oyer and Terminer and General Gaol Delivery, are in the habit, even in the first Instance, of being retained, and taking an active Part in the Defence of the Civil Action for the Wrong, by which it is inevitable that the Prosecutors will be discouraged to apply to them for Professional Aid, and Justice, therefore, in many Cases fails, unless the Rights of Prosecutors and of the Bar are asserted and upheld, as in England.

From the Testimony given, your Committee do not hesitate to come to that Conclusion, in which they are supported by the Testimony of the Honourable Mr. Justice Willis, and nearly all the Witnesses examined.

It also appears highly expedient, that the Deputy Clerks of the Crown, in their respective Districts, should attend to do the Duties of Clerks of Assize, by which much would be saved in the Expenditure for the Administration of Public Justice. The Evidence also suggests the Expediency of refusing the Charges usually made for Opinions given by the Crown Officers to his Excellency, as they both receive a Salary, fairly pronounced to be for that Purpose, and ample in Amount, while the heavy Debt accumulated against the Province, besides an increasing Expenditure renders every practicable Reduction most important.

Your Committee have not extended their Examinations, as they intended, to the Crown Officers, and others, because they report no specific Measure ; but submit the Expediency of considering the Matter more fully at the next Session of Parliament.

(Signed) B. C. BEARDSLEY, Chairman.

Committee Room, House of Assembly, 28th February 1828.

PRESENT,
Mr. Beardsley, Chairman.
Mr. Bidwell. Mr. Matthews.
Mr. Perry. Mr. Hornor.

EVIDENCE.

The Hon. Mr. Justice Willis.

Q. ARE you aware of any Provincial or English Law, by which the Members of the Bar, educated in this Province or in England, are excluded from conducting Public Prosecutions as in England ?

A. I know of no Provincial Law against it. I rather draw an Inference in favour of the Provincial Bar, from the Provincial Statute introducing the Criminal Law of England as it was in the Year ; for I presume the Mode

of

of conducting Public Prosecutions in this Province, must be taken to be the same as it was in England at the Time up to which the Criminal Law was introduced.

Q. What was the Mode of conducting Public Prosecutions in England at that Time, with reference to the Rights of the English Bar?

A. In all Matters of Revenue, Treason, and Personal Rights of the Crown, and those under its immediate Protection, as the Affairs of Lunatics and Charities, the Crown Officers are bound to protect the Public Rights, in the same Way as any Counsel generally retained by his Client is bound to protect his Rights. But in all other Matters in which the Crown is not so immediately concerned, as in Felonies, and in those Misdemeanors which are not prosecuted in the Crown Office, or by *ex officio* Information, I have always understood the Right of being employed by Prosecutors to be open to the Bar.

Q. Do you think it desirable that the Practice in this Province should be assimilated as much as possible to the Practice of England?

A. Decidedly so; in this, as in every thing else.

Q. The Attorney and Solicitor General being in the habit of taking Fees to defend Criminals in Civil Actions, even when they precede the Public Prosecutions, do you, under such Circumstances, see any additional Propriety in securing to the Bar in this Province the Rights enjoyed by the Profession in England?

A. Decidedly; and I think it highly improper in any Crown Officer to defend the Persons in a Civil Action for the Injury, when those Persons are to be, or, for the due Ends of Public Justice, ought to be prosecuted criminally.

Q. Do you think that such a State of Things is calculated to deter Prosecutors from applying to those Crown Officers who have engaged against them in the Civil Defence of the Wrong-doers?

A. I never would employ, to conduct the Public Prosecution for the Injury I had received, the Professional Person who defended against me in the Civil Action. I should think that the Impressions he would have received would be so strong, that I could not but suspect (although my Suspicions might be groundless) that he would be influenced by them.

Q. Is the Committee to understand that you think the Ends and Character of Public Justice would be facilitated and secured by a Change of this System?

A. Certainly; and more especially placed, as it ought to be, above every Suspicion.

Q. Do you think it would be a desirable Plan to allow the Prosecutor to be paid his reasonable Expences out of the District Treasury where the Trial is had, upon Conviction?

A. I do; and I think the Prosecutor ought not to be paid his Expence till Conviction, unless the Judge certifies. This, I believe, is in accordance with several recent English Statutes, and I conceive it to be a desirable Security against malicious or groundless Prosecutions.

Q. Do you think that if the Fines and Forfeitures in every District were paid into the District Treasury, it would be an expedient Source for the Payment of the Expences of the Public Prosecutions?

A. If the Fines and Forfeitures form a Part of the general Provincial Revenue, or the Crown was pleased to relinquish them for those Public Purposes, I think it would be very desirable indeed.

Q. If the present System of Payment for Public Prosecutions were continued, what would be the Effect, as Population and Crime increase, upon the Public Revenue?

A. It would be, upon an ordinary Calculation, most oppressive; and in that point of view I think the Expences of the Clerks of Assize, both as they are chargeable upon the Public Revenue and upon the Suitors, might, with much Advantage, be done away. The Dues of Clerk of Assize, as at present discharged by him, might be performed by the Deputy Clerk of the Crown, who has the Custody of the Proceedings in the Suits in his District, and who would be well remunerated by a Sum small when compared with the present Expenditure for that Purpose. It is desirable that Justice should not be made unnecessarily expensive; but I think it most desirable that the Judges

should, in their Circuits, be attended in a Manner suited to the Dignity of their Duties and Station.

Q. Do you think that the Attorney or Solicitor General could at their Pleasure take off the Hands of another Counsel a Brief in a Criminal Prosecution, put into his Hands by a Prosecutor?

A. I think not, with the Exception of the Cases mentioned in my Second Answer.

Q. The Attorney General and Solicitor General receive, the first £300, and the second £100 Sterling per Year; do you think that Retainer sufficient for the Advice given to the Local Government, without Charges for the same against the Public Revenue.

A. I think so; the Salary they receive I regard as the Salary to the Judges for the Duties they perform.

8th March 1828.

Mr. Justice Sherwood.

Q. Do you think that the Bar in this Province has the same Right as the Bar in England, in conducting Criminal Prosecutions, and subject only to the same Restrictions?

A. I think they have the same Right, subject to the same Restrictions.

Q. Have these Rights been hitherto generally claimed by the Bar, and exercised?

A. I believe they have not.

Q. Do the Crown Officers claim an exclusive Right to conduct Criminal Prosecutions?

A. I have never made the Enquiry.

Q. Considering that the Crown Officers are in the habit of taking Fees for the Defence of Civil Actions, out of the Facts of which a Criminal Prosecution must or ought to arise, do you think it right that the Prosecutor should have the Power to apply to other Professional Men for the Conduct of his Prosecution?

A. It is a Subject to which I have not given sufficient Attention to form an Opinion.

Q. Do you consider that the Existence of such an exclusive Right on the Part of the Crown Officers, under the Circumstances mentioned in the preceding Question, calculated to discourage Prosecutors from instituting a Prosecution?

A. I really cannot say.

Q. Do you consider that the Professional Interest taken by the Crown Officers in the Civil Suit, the Facts with which they may have been thereby acquainted, and the real or supposed Prejudices which they may have acquired in the Conduct of the Suit, calculated to impair the Confidence which the Prosecutor or the Public ought to have in the Administration of Criminal Justice?

A. I have not had sufficient Opportunity to form an Opinion upon that Subject.

Q. Do you think that the Prosecutor ought to pay the Expences of his Prosecution if he fails in a Conviction, and the Judge do not certify?

A. I am not prepared to answer that Question without further Consideration.

Q. Do you think that if the Fines and Forfeitures in every District were paid into the District Treasury, it would be an expedient Source for the Payment of the Expences of the Public Prosecutions of each District?

A. I am not prepared to give an Answer to that Question.

B. C. Beardsley, Esq., Barrister at Law.

Q. What do you consider to be the Rights of the Bar in this Province, in conducting Criminal Prosecutions?

A. I consider them to be the same as they are in England.

Have

Q. Have these Rights been hitherto exercised, and if not, why not ?

A. They have been exclusively exercised by the Crown Officers, as far as my Knowledge extends, except at the Quarter Sessions. That Monopoly I have understood to be claimed, and scarcely contested, being considered as sanctioned by the Court of King's Bench, and therefore I should consider the Assertion of the Right as hopeless.

Q. Do you think the Assertion of the Rights by the Bar would be conducive to the Interests of the Bar and of the People ?

A. I certainly think it would. Such an Exclusion must be prejudicial to the Bar; and the Confinement of the whole Province to Two Professional Men, against whom Prosecutors may have Prejudices, (whether well or ill founded,) and to whom they can, in the outer Districts, only have Access in the Period of the Assizes, and who are often retained in a Civil Action, out of which the Criminal Prosecution must arise, has, in my Opinion, a direct and certain Tendency to prejudice Public Justice.

Q. Do you think that such a State of Things is calculated to deter Prosecutors from applying to those Crown Officers who have engaged against them in the Civil Defence of the Wrong-doers ?

A. Most certainly I do. It would have that Effect upon me; and I cannot but consider it would, in a greater or less Degree, have that Effect upon others.

Q. Do you think the Character of Public Justice likely to be impaired by such a State of Things ?

A. I certainly do, and I think it would be improved by a Change.

Q. Ought the Prosecutor to be paid in the Event of failing in a Conviction ?

A. By no means; it would induce Persons, from vindictive Feelings, to prosecute, as has been the Case to my Knowledge in some Instances, from running no Risk of personal Expence; for in this Province it is charged against the Public Revenue.

Q. Do you think that if the Fines and Forfeitures in every District were paid into the District Treasury, it would be an expedient Source for the Payment of the Expences of Public Prosecutions ?

A. I certainly think it would; and it would further relieve the Provincial Treasury from heavy Charges now made against it, and from an Increase, inevitable in Time, beyond what this or any Country can bear.

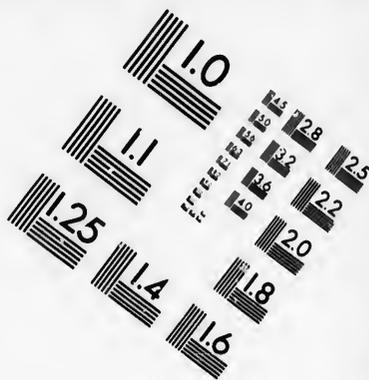
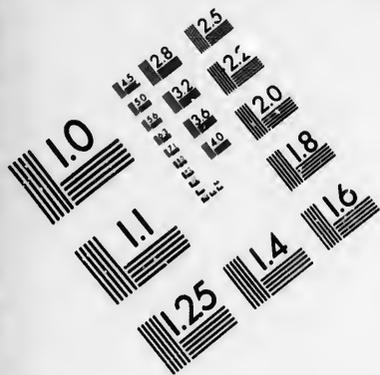
Q. Do you recollect any other Means of protecting the Public in Criminal Prosecutions ?

A. Yes, many. I think the Clerks of Assize, who have been and still are young, either under Age or not much over it, do but ill fill a Situation with so many Responsibilities as are attached in this Province to a Clerk of Assize, who has the Custody of all Records, Exhibits, Indictments, the Pannel of the Jury, the swearing of Witnesses and Jurymen, and other Duties, as the making up the Postea, and the Arraignment of Prisoners. I have heard Dissatisfaction expressed, and have felt it myself not without Reason. I also think there should be an Improvement of the Jury Law; and that the Sheriffs should hold their Offices during good Behaviour, and not during Pleasure; and it is my strong Opinion, that the same Rule should be extended to the Judges.

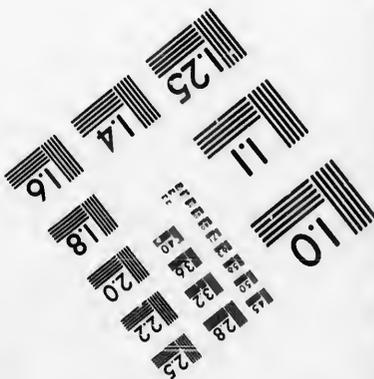
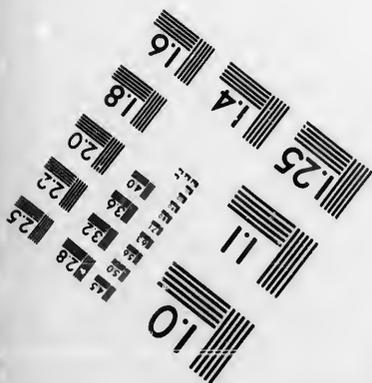
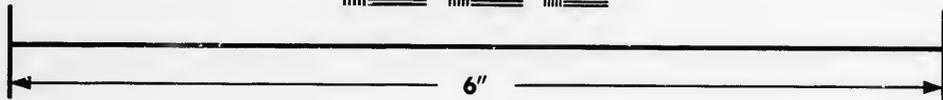
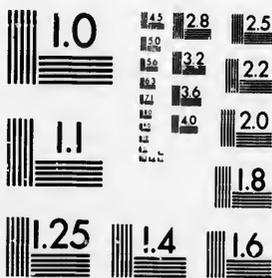
Q. What Improvement would you suggest in the Clerks of Assize ?

A. I still hold the Opinion I have expressed in the Legislature, that the Deputy Clerks of the Crown in every District should act as Clerks of Assize, as they have the Custody of the original Papers and the passing of the Records, and are also better fitted from Age and Character. It would also relieve the Suitors from a heavy Expence, as they are, by the Table of Fees, allowed Charges which amount to as much as is taxed to Counsel who is Attorney in the Cause; and the Deputy Clerk of the Crown, from his Residence in the District, could not require such Fees. It would also relieve the Provincial Revenue from the present Charges made by the Clerks of Assize in Criminal Prosecutions. I have heard, and have good Reason to believe, that these Youths, during the Assize, engage in gambling and other Amusements, vulgarly called Rows, as fighting and frolicking.





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Archibald McLean, Esq.

Q. How long have you been a Member of the Provincial Bar, and what Offices do you hold?

A. I have been a Member of the Bar since 1813, and am Clerk of the Peace of the Eastern District.

Q. Have the Members of the Provincial Bar engaged in the Conduct of Public Prosecutions as in England?

A. They have not, except at the Quarter Sessions.

Q. Do you consider that the Provincial Bar have the same Rights in conducting Criminal Prosecutions in this Province as the Bar in England, and subject only to the same Restrictions?

A. I am of that Opinion.

Q. Do you consider the Mode of conducting Public Prosecutions in England as Part of the Judicial System in that Country?

A. I do.

Q. Has the Adoption of that System in this Province generally, and the Introduction of the Criminal Law by the Provincial Enactment for that Purpose, in your Opinion, implied the Existence of the same Rights of the Bar here as in England in conducting Criminal Prosecutions?

A. In my Opinion it has; and I consider that the Criminal Law is to be publicly administered here in the same Manner as it is in England.

Q. Have you ever known that Right claimed and exercised by any other Member of the Bar, other than the Crown Officers?

A. It was once claimed by Mr. McDonnell, afterwards Attorney General in this Province; but it was not persisted in, from some Objection then made to it by the Court. Mr. Firth was then Attorney General.

Q. Do you know why the Right has not been more generally claimed and exercised by the Bar?

A. I do not. It has generally been considered as the Duty of the Crown Officers to prosecute. They have hitherto exercised an exclusive Right; and, except in the Case I have mentioned, it has never been contested.

Q. Do you know upon what Ground such an exclusive Right is claimed?

A. I do not.

Q. Do you think it would be an expedient Rule that a Public Prosecutor should himself bear the Expences of his Prosecution if he fails in a Conviction, unless the Judge certifies?

A. I think it would be very desirable, unless the Judge should certify.

Q. Is it desirable that the Practice in this Province, as to the Expences of Prosecution, should be assimilated, as much as possible, to the Practice in England?

A. I do not think any Public Good would result from it, as Prosecutors would have to pay the Expences of Prosecution themselves, by which many Persons would be deterred from prosecuting, and Criminals would not be brought to Justice.

Q. How are Public Prosecutions now paid in this Province, and what the Amount for each Conviction?

A. They are charged to the Provincial Revenue; and the Amount for each Conviction, to the Crown Officer, I believe to be, by the present Table of Fees, Seven Pounds.

Q. What would be the Effect of that System in the Course of Time, as Crime and Prosecutions multiplied, as they are in Great Britain, upon the Public Revenue?

A. It would of course be a Charge upon the Revenue, and a serious one too. I do not know the Number of Criminal Prosecutions in England; but if the same Sum were charged against the Revenue of Great Britain for every Public Prosecution and Conviction as is charged in this Province, it would be a serious Charge against the Revenue even of that Country.

Q. Will the Practice of the Crown Officers, in taking Fees to defend in a Civil Action Persons guilty of an Offence, to be the Subject of a Prosecution, tend to discourage the Persons injured from applying to them for Professional Advice and Aid?

A. I do not think it would.

Q. Do

Q. Do you think such a Practice in no Way prejudicial to the Ends and Character of Public Justice, supposing the Crown Officers to claim an exclusive Right to conduct Public Prosecutions?

A. I do not think it in any Way prejudicial, inasmuch as no Persons are deterred from coming forward to prosecute, in consequence of the Crown Officers being retained in a Civil Action arising from the same Cause.

Robert Baldwin, Esq., Barrister at Law.

Q. Are Public Prosecutions open to the Members of the Bar generally.

A. I have always understood that the Attorney and Solicitor General have claimed the exclusive Right of conducting Criminal Prosecutions in this Province. The following Case occurred some Years ago in the Court of King's Bench, which I well recollect:—My Father, William Warren Baldwin, Esq., in the Case of the King v. Ellrod, for Bigamy, wished to proceed to Outlawry; and for that Purpose moved the Court for a Writ of Exigent. The Court thereupon addressed the Crown Officers, enquiring whether they consented to the Right of making such a Motion. The Crown Officer (Attorney General) said he would look into the Question, and answer another Day. On a subsequent Day, upon the Motion being renewed, the Attorney General, John B. Robinson, Esq., informed the Court, that he had looked into the Authorities, and could find no Authority against the Right to make the Motion claimed by Mr. Baldwin. I was at that Time a Student at Law only; but I distinctly recollect it was conceded as a Matter of Right, and not of Courtesy. The Solicitor General certainly did, at the Time, in a low Tone of Voice, suggest to the Attorney General not to give up the Right. From the above Case, I infer a Doubt of that exclusive Right countenanced by the Court, and conceded by the Attorney General; but I believe the Impression upon the Bar generally is, that the exclusive Right is claimed and exercised by the Crown Officers.

Q. Do you, as a Professional Man, consider that the Bar in this Province have the same Rights as the Bar in England in conducting Criminal Prosecutions?

A. Undoubtedly.

Q. Does it come within your Knowledge that the Crown Officers defend Persons in a Civil Action, out of which a serious Criminal Prosecution might or ought to follow?

A. I have known both of them to do so.

Q. What Effect do you apprehend to follow such a Practice, with respect to its Discouragement of Prosecutors so situated?

A. I think it must necessarily discourage Prosecutors so situated; and I feel that the Parties prosecuting would have Reason for Discouragement; for I think that, with the most conscientious Endeavour to do Justice, the Professional Man so situated might not be able to do it. Willingly I would never place myself in such a Situation; for I should distrust my own Power over myself in such a Situation, and this I say independent of any unfavourable Impression which might be made upon the Public Mind with respect to the pure Administration of Criminal Justice.

Q. Do you think a Change in the System would conduce to the Interests and Character of the Bar, and the pure and unsuspected Administration of Criminal Justice?

A. I think it would conduce to the pure and unsuspected Administration of Criminal Justice; and therefore would most certainly conduce to the Interests and Character of the Bar.

Q. Do you think it would be desirable that the Fines and Forfeitures in every District should be paid into the District Treasury, and be applied to the Payment of the Expences of Criminal Prosecutions in each District?

A. I think it would be a desirable Mode.

Thomas Taylor, Esq., of the Middle Temple, Barrister at Law.

Q. Have the Bar in this Province the same Right to conduct Criminal Prosecutions as the Bar in England, subject to the same Restrictions?

A. I think they have, subject to the same Restrictions.

Q. Do the Crown Officers in this Province claim an exclusive Right to conduct Criminal Prosecutions?

A. They exercise an exclusive Right.

Q. Under what Law is that exclusive Right exercised?

A. I know of no Law to make the Right otherwise here than it is in England.

Q. The Crown Officers taking Fees to defend Wrong-doers in a Civil Action for the Injury, do you think it desirable the Prosecutors should exercise the Right of electing Counsel to prosecute criminally?

A. Yes in those Cases I do.

Q. Do you think that such a Practice on the Part of the Crown Officers, including the exclusive Right exercised of conducting Criminal Prosecutions, is calculated to discourage Prosecutors from prosecuting criminally?

A. I think in some Cases it might discourage.

Inclosure, No. 4.

Sir,

York, Upper Canada, 3d June 1828.

I HAVE now to request you to lay the inclosed Letters (which relate to Public Business, in my Opinion of the *greatest Consequence* to the Colony,) before His Excellency the Lieutenant Governor. Not having done so in the first Instance was entirely owing to my not being sufficiently acquainted with official Forms, and not, as I beg you will assure his Excellency, with the *slightest Intention* of any *personal Disrespect*. On the contrary, I conceived, that by leaving the Letters *purposely unsealed* I had done all that was usual, and what was least obtrusive on this Occasion; presuming that the Letters would not have been forwarded *if any Part* of them met with his Excellency's Disapprobation.

Should I not now have pursued the proper Course, may I beg of you to point out to me specifically how I am to proceed.

I have, &c.

Major Hillier, &c. &c.

(Signed) JOHN WALPOLE WILLIS.

Inclosure, No. 5.

Sir,

Government House, 4th June 1828.

I HAVE the Honour to acknowledge the Receipt of your Letter of Yesterday, which I have laid before the Lieutenant Governor, and I have been commanded by his Excellency to acquaint you, that your Letters to the Secretary of State and to Mr. Stephen will be forwarded.

If those Circumstances should occur to which you call the Attention, not of this Government, but of the Secretary of State, it will remain for his Excellency to pursue whatever Course such Circumstances may appear to him to require.

I have the Honour to be,

Sir,

Your most obedient humble Servant,

(Signed) G. HILLIER.

To the Hon. Mr. Justice Willis.

Inclosure, No. 6.

Sir,

York, Upper Canada, 5th June 1828.

I MOST unequivocally declare, or rather *repeat*, that by leaving the Letters I inclosed to you open, and requesting them to be laid before the Lieutenant Governor, my Object was to call the Attention of *his Excellency*, as well as that of the Secretary of State for the Colonies, to the whole of their Contents.

I have, &c.

(Signed) JOHN WALPOLE WILLIS.

To Major Hillier, &c. &c.

Inclosure, No. 7.

Sir,

York, Upper Canada.

ALTHOUGH, from the Communications I have already made, his Excellency must be apprised of my Opinion respecting the Constitution of the Court of King's Bench in this Province, yet as I publicly declared my Sentiments on this Subject in the Court House Yesterday (the First Day of Trinity Term), in recalling an Order, so far as I was concerned in it, which was made without the Aid of the Chief Justice of this Province, I have again to request you to acquaint the Lieutenant Governor, that in my Judgment the Court of King's Bench, as established by the Provincial Legislature, cannot, without an express Violation of the Statute, be held, unless the Chief Justice, together with Two Puisné Justices of this Province, preside therein. I think, therefore, I should be acting illegally, were I to sit on the Bench, and assume, either alone or in conjunction with the other Puisné Judge, those Powers which are delegated, according to my Construction of the Act, to the Chief Justice, together with the Two Puisné Justices, and not to any *One* or *Two* of them, particularly without the Presence of the Chief Justice. I shall, however, await his Excellency's Commands on this Subject. In the meantime I am and always shall be desirous to discharge such of the Duties as, under existing Circumstances, I can legally perform.

Major Hillier, &c. &c.

I have, &c.
(Signed) JOHN WALPOLE WILLIS.

Sir,

York, Upper Canada, 17th June 1828.

I HAVE inclosed, for the Information of his Excellency the Lieutenant Governor, a Copy of the Opinion which I delivered Yesterday, and I beg most particularly to call the Attention of his Excellency, not only to that Part of it which relates to the Establishment of the Court by the Provincial Legislature, but also to the British Statutes respecting Leave of Absence, to which I have referred in my Opinion, and to the Consequences, in case these Statutes have not been strictly complied with, so far as they may affect the present State of the Court of King's Bench, and the general Administration of Justice in the Colony.

I have been prevented, by not having a regular Clerk, sending it sooner. I also inclose, for the same Purpose, a Copy of the Minutes of the Clerk of the Crown, and a Copy of an Application left with me by some Members of the Bar this Day, with which I have so far complied as to direct a Copy of my Opinion to be made for them, and to express my Readiness to act in any way I legally can for the Furtherance of Justice. I informed Mr. Justice Sherwood, so long since as the 3d Ultimo, of the Conclusion I had come to on this very important Subject. May I request the Inclosures, after perusal, to be transmitted to the Colonial Secretary.

I have, &c.
(Signed) JOHN WALPOLE WILLIS.

Sir,

Government House, 20th June 1828.

WITH reference to your Letter of the 18th Instant, the Lieutenant Governor has directed me to acquaint you, that he has perused the Opinion delivered by you, and will deem it expedient to bring it under the Consideration of His Majesty's Government.

In reply to that Part of your Letter of the 17th Instant in which you state that you shall await the Lieutenant Governor's Commands, I am directed to inform you, that his Excellency feels it to be obvious that the Government cannot require you to act in a Manner which you have stated to be in your Opinion clearly illegal.

The Hon. Mr. Justice Willis, &c. &c.

I have, &c.
(Signed) G. HILLIER.

York, Upper Canada, 21st June 1828.

Sir,
I HAVE ventured to lay before those Members of the Profession by whom the Application was made to me, on the 17th Ultimo, which I inclosed to you, my Letters of that Date and your Answer of Yesterday, under the Impression that nothing tends so much to prevent both public and private Inconvenience and Misunderstanding on all Occasions as Candour.

Major Hillier, Private Sec. &c. &c.

I have, &c.
(Signed) JOHN WALPOLE WILLIS.

Inclosure, No. 8.

York, 7th April 1828.

I AM sure, Sir, you will pardon me in immediately addressing your Excellency on a Subject so important as you will feel the present to be—I mean the intended Absence of the Chief Justice from the Province,

It is publicly mentioned that he purposes to set off for England (on Leave, it must be presumed, from your Excellency) in the Course of a few Days. This will be before the approaching King's Bench Term of Easter. Your Excellency cannot be aware of the Injury suffered by Parties in Court when Two Judges only sit. Many Motions of the utmost Importance to Parties in Court may be lost for ever, (as a Client of mine heretofore previously experienced under similar Circumstances,) when the Judges happen to be divided in Opinion. On such Occasions the Counsel making the Motion usually loses its Benefit for his Client, however just the Object of it; the opposite Party being at liberty to proceed. Your Excellency will readily perceive, that I could not presume to speak to a Judge on a Matter of his general Duty; and that, however inconvenient or injurious to my Client such an Event (the Presence of Two Judges only) may be, yet it forms no Ground of usual or legitimate Application to Court or to a Judge. I therefore feel it incumbent upon me, as a Barrister generally, and a Counsel particularly engaged, to apprise your Excellency of the Public Inconvenience likely to accrue by the early Absence of the Chief Justice, and trust that your Excellency will not only pardon the Intimation, but also be pleased to suspend the Leave (if given) till after Easter Term next. Nothing can be further from me than a Wish to subject the Chief Justice to a Disappointment, which this probably may be, for a short Time; but I should err still more seriously, did I neglect my Client's Interests, by omitting on this Occasion to address your Excellency, which I do with perfect Deference.

I have the Honour, &c.
(Signed) W. W. BALDWIN.

(ANSWER.)

Government House, York, 18th April 1828.

Dear Sir,
THE Lieutenant Governor, as I have already acquainted you, made a Communication to the Chief Justice on the Subject of the Letter which you addressed to his Excellency some Days since. I am now to inform you, that in reply the Chief Justice stated to his Excellency, that he was not aware of any Case now before the Court that can occasion any Difference of Opinion between the Two Judges who remain on the Bench; and moreover represented that the State of his Health is such as to preclude all Hope that in the Event of his Departure having been delayed he would have been able to attend to his Duties on the Bench.

W. W. Baldwin, Esq.

I have, &c.
(Signed) G. HILLIER.

Dear Sir,
INCLOSED I send you a Copy of my Letter to his Excellency, with Mr. Secretary Hillier's Answer. Mine being written for Public Purposes, I can have no Objection to your using it as such.

30th Mar: 1828.

I am, dear Sir, &c.
(Signed) W. W. BALDWIN.

N. B.—I knew nothing of the above Correspondence until after Easter Term, when I was informed of it by Dr. Baldwin, when conversing on the Inconveniences that had arisen in consequence of the Absence of the Chief Justice. Dr. Baldwin is the Treasurer of the Law Society, and, I believe, the Senior Barrister of the Court.

Inclosure, No 9.

COPY of an Opinion delivered by Mr. Justice WILLIS on the Constitution of the Court of King's Bench.

[For this Document see p. 67.]

Inclosure, No. 10.

A Statement of the Names of the Judges of the Court of King's Bench actually present in Court at the several Terms since its first Constitution.

[For this Document see p. 107.]

No. 12.

COPY of a Letter from Mr. R. W. HAY to Mr. WILLIS.

Sir, Downing Street, London, 30th July 1828.

I AM directed by Secretary Sir George Murray to acknowledge the Receipt of your Letter to him, dated the 3d of June last, inclosing various Documents respecting the Manner of conducting Criminal Prosecutions in Upper Canada, and respecting the Competency of the Court of King's Bench to act in the Absence of the Chief Justice.

Sir George Murray directs me to acquaint you, that it is a settled Rule in this Department of Government to confine the Correspondence of the Secretary of State upon Subjects connected with the Administration of a Colonial Government to the Officer administering the Government of the Colony. He must, therefore, decline engaging in any Correspondence with yourself on the Subjects which you have brought under his Notice. The Lieutenant Governor is in Possession of the Views entertained by His Majesty's Government upon those Questions, and will make such Communications upon them to yourself as he may deem proper.

I am, however, instructed to remark, that Sir George Murray has read with great Regret a Passage in one of your Letters, from which it appears that on the 3d of May you had formed a Conclusion as to the Incompetency of the Court to act in the Absence of the Chief Justice; while it appears that your earliest Communication on the Subject to the Lieutenant Governor was not transmitted till the 3d of the following Month. It is at least to be lamented that his Excellency was left for a whole Month in Ignorance of an Opinion involving practical Consequences of such extreme Importance to the Peace and Welfare of the Province at large.

I have, &c.
(Signed) R. W. HAY.

John W. Willis, Esq., &c. Upper Canada.

No. 13.

COPY of a Letter from Mr. WILLIS to Mr. STEPHEN.

My dear Sir, York, Upper Canada, 30th June 1828.

I LONG since informed you of my Opinion respecting the Constitution of the Court of King's Bench, as established in this Province. The inclosed Newspaper contains the Substance of my public Declaration respecting it, the first Day of last Term (the 16th of June). On the 17th of June I wrote to acquaint the

3 B

Lieutenant

Lieutenant Governor of the Opinion I had delivered, stating at the same Time, that, in my Opinion, I should be acting illegally were I to sit on the Bench, and assume, either alone or in conjunction with the other Puisné Judge, the Powers which are delegated (according to my construction of the Act) to the Chief Justice *together with* Two Puisné Justices, and not to any *One* or *Two* of them, particularly without the Presence of the Chief Justice.

I added, that I should however await *his Excellency's Commands* on this Subject; and that in the meantime I should be always *most desirous to discharge* such of the Duties as, under existing Circumstances, I could legally perform. On the same Day I again wrote, sending a Copy of my Opinion to the Lieutenant Governor the Moment it was finished, and stating my Readiness to act in any way I legally could for the Furtherance of Justice. On the 28th of June I received an official Letter, stating that his Excellency had perused my Opinion, and should deem it necessary to bring the Matter under the Consideration of His Majesty's Government; and that, in Reply to that Part of my Letter of the 17th in which I stated I should await his Excellency's Commands, that *his Excellency felt it obvious that the Government could not require me to act in a Manner which I considered, in my Opinion, illegal.* On the 25th of June I received a Letter from the Executive Council, asking (with reference to the Opinion I had delivered on the 16th, and the Letter of the 17th, stating my Willingness to discharge any Duties I could legally perform) for their Information any Explanation I might be pleased to offer respecting the Duties I contemplated, as well with regard to Term and Chamber Business as with regard to the Circuit Courts, including of course the Trial of Records emanating from the Court of King's Bench, whether containing Pleadings of the present or any preceding Term, and whether passed before or since "the Departure of the Chief Justice." In answer, I immediately addressed a Note to the President of the Executive Council, saying I should "have much Pleasure in affording the UTMOST EXPLANATION in my "Power on the very important Topics to which he had referred, at as early a "Period as the Magnitude of the Enquiry would permit." The following Day (June 26) I received another Note from the Council, requiring an *explicit Declaration* as to which, if any, of the Duties enumerated I was prepared to discharge; and although I IMMEDIATELY sat down to answer the Note, before any Answer could arrive the Council was dissolved, having previously reported to the Lieutenant Governor, who accordingly, as it appears, signed a *Commission, removing me from the Office of a Judge of this Province*, to which I was (in a *great Measure THROUGH YOUR INSTRUMENTALITY*) APPOINTED BY HIS MAJESTY. This Commission, together with a Letter assigning the Reasons of it, were put into my Hands by the Secretary of the Province on Saturday last (June 28). I send you a Copy of my Answer to the last Note of the Executive Council, and also a Copy of Major Hillier's Letter accompanying the Commission for my Amotion; and I shall in a few Days send all the Correspondence, together with a Petition, to His Majesty in Council, on the Subject. Immediately on the Receipt of this Commission, or *Release* rather, I wrote the following Note to the Governor's Office:

" Sir,

28th June 1828.

" I beg to inform the Lieutenant Governor, that I *protest* against the Legality of my Suspension, particularly as it is admitted that his Excellency the Lieutenant Governor (according to your Letter of the 2d of this Month,) " *feels it obvious that he cannot command me to do any Act which I consider* " ILLEGAL. I request Leave of Absence may be granted to me by *those duly* " *qualified*, until His Majesty's Pleasure respecting my Conduct be ascertained.

" To Major Hillier, Private Secretary, &c."

To this I have hitherto received no Answer. I have been insulted on the Bench, libelled in a Paper under the Controul of Government, vilified in the Execution of my Dnty, and threatened so as to be put in Danger of my Life by the Clerks of the Attorney General, AND AMOVED FROM OFFICE. I brought my Family here with the Expectation of almost double the Income I have been paid, incurring an Expence of more than £1,500, calculating on the Salary I was to receive, and on a *permanent Residence* in this delightful Country.

Country. I still hope this may be realized. I shall leave Lady Mary Willis and our Child, together with my Sister, here, until I return from England, whither I shall proceed as speedily as I can, to demand (and I am sure not in vain) ENQUIRY AND JUSTICE. My Crimes have been, *being sent from England, and doing my Duty*. The whole Country are up in Arms about it, and Petitions and Deputies are talked of in all Quarters. I regret exceedingly that any such fearful Commotion should take place at this Period (the Eve of a General Election); and I really am most apprehensive of the Consequences. English Judges, English Law Officers, and English Laws altogether, would put a stop to all the Mischief.

I am sure I shall not ask for pecuniary Recompence without receiving it from His Majesty's Government.

Recompence for my mental Sufferings and the Anguish of my Family, and for the Fears they have long entertained for my Life, I can never obtain. Will you have the goodness to lay this Letter (long and agitated as it is by the Feelings which now govern me) before the Secretary of State; and further oblige me by writing to me at my Brother's, 35, Park Street, Bath, on the Subject. I obtained Permission to give the utmost Publicity to the whole of my Correspondence with the Local Government; but as I am sure it would tend to increase the present alarming Excitement, I shall endeavour to forbear doing so (at least for the present), submitting rather to unmerited Calumnies, than to be even the remote Cause of inflaming the already greatly irritated Minds of the vast Majority of the Province on this Subject. All the Correspondence will be forwarded as soon as I can get it copied.

Believe me, my dear Sir,

Yours, &c. &c.

James Stephen, Esq., &c. &c.

(Signed) JOHN WALPOLE WILLIS.

P. S. I shall not mention this Business to the many kind and very influential Friends I have the good Fortune to possess, (who, I am sure, if necessary, would even carry it to the highest Quarter,) till I hear more from you about it. It would be very gratifying to Lady Mary Willis also to hear from you, as she would do so earlier than from me. Meetings are called, and I am receiving from all Quarters the utmost Assurances of Regard and Respect, merely for having done Justice, which they say will not now be obtained. A Deputation from the County of Lincoln, in the District of Niagara, the most populous and wealthy County in the Province, has just been here, offering to return me as their Member. I of course has no Business, in my Opinion, with Politics. General Maitland now, I understand, says I wrote irritating Letters to him, which caused him to remove me. He however admitted to Lady Mary Willis, in the most unqualified Manner, that I had never been guilty of the slightest Disrespect. I am quite SURE unless something be DONE SPEEDILY, this will not long remain a British Province. The People all are most truly and devotedly attached to the British Government, but do not like the present State of Things with respect to the Officers of the Local Government. The Executive Council consisted, I am told, of James Baby, Inspector General; George Markland, a Storekeeper at Kingston; Peter Robinson, Brother of the Attorney General; and James Macaulay, a Half Pay Lieutenant and an Attorney of the Court of King's Bench, whose Appointment as a Judge by the Local Government was superseded by my Arrival, and who now is again, I understand, to be appointed. The Attorney and Solicitor General, I have Reason to believe, were concerned in the Libel on me as a Judge. I set off in about a Fortnight.

No. 14.

COPY of a Letter from Mr. WILLIS to Mr. Secretary HUSKISSON.

Sir,

York, Upper Canada, 1st July 1828.

THE Opinion I have long since made you acquainted with, respecting the Constitution of the Court of King's Bench in this Colony, now is given as the alleged

alleged Reason for my Amotion by the Local Government on the 26th Instant, from that Seat on the Bench in this Province to which I had the Honour of being appointed by His Majesty. I have to request your particular Attention to the inclosed Correspondence, and especially to that Part of it which relates to my Removal. My Opinion, however, still remains *totally unswayed*. His Excellency the Lieutenant Governor, previously to the Steps being taken which I now complain of as **ALTOGETHER ILLEGAL AND UNJUST**, directed me to be informed, that it was *obvious* he could not command me to act in a Manner *considered contrary to Law*. The Truth is, my Appointment *originally* was displeasing to the Local Government; it displaced a Judge, (Mr. James B. Macaulay, a Half-pay Lieutenant and Attorney, and acting as a Provincial Executive Councillor,) who had been nominated by the Local Government. As an English Barrister, (and as such I refer you to Lord Eldon and Sir Charles Wetherell,) as an Individual, (and as such I refer you to General Sir Robert Bolton, one of His Majesty's Equerries, and the Dowager Comtess of Manvers,) and as the Son-in-Law of one of the oldest British Earls, I ask for *immediate Enquiry*. Justice, I am sure, will follow. I fear, from the present agitated State of the Province, the *worst Results*. I purpose setting out for England (33, Park Street, Bath) in about a Fortnight, and thence will attend any Appointment, and at any Place you may do me the Honour to fix. I leave Lady Mary Willis and my Family here, in the *fullest Confidence* of speedily returning in the most *satisfactory Manner*.

I have the Honour, &c.

To the Right Hon. W. Huskisson, &c. &c.

(Signed) JOHN WALPOLE WILLIS.

P. S. I am credibly informed that it is not Mr. Macaulay, but his Brother-in-Law, a Mr. Christopher Hagerman, Collector of the Duties of the Port of Kingston, a Candidate for the Representation of that Town, an Attorney and a District Judge, and above all a political Friend of Mr. Robinson, the acting Attorney General, who has been appointed to succeed me. May I request the inclosed Memorial may be laid before His Majesty?

Sir,

York, Upper Canada, 28th June 1828.

I BEG you to inform the Lieutenant Governor, that I protest against the Legality of my Suspension, particularly as it is admitted, according to your Letter of the 20th of this Month, that the Lieutenant Governor feels it to be obvious that he cannot command me to do any Act which I considered *illegal*. I request Leave of Absence may be granted to me by those duly qualified, until His Majesty's Pleasure respecting my Conduct be ascertained.

I have, &c.

To Major Hillier, Private Secretary, &c. &c.

(Signed) JOHN WALPOLE WILLIS.

Sir,

Government House, York, 27th June 1828.

I AM commanded by the Lieutenant Governor to acquaint you, that the Executive Council having had under Consideration the present State of the Court of King's Bench, with a View to remedy the Inconveniences and Obstruction with which Public Justice is threatened, as well with reference to the present Term as to the approaching Circuits, have reported to his Excellency, that they have called upon you to explain what Duties of a Judge you contemplated in your Letter to me of the 17th Instant, as those which you would consent to discharge; and that your Answer is not satisfactory upon a Point on which it was absolutely necessary to have from you an explicit Understanding.

That having been, therefore, left to interpret for themselves the Effect of the Opinion delivered by you on the 16th Instant, and being unable to comprehend any Duties compatible with the Principles therein avowed, and the Steps taken by you, which you can legally perform as a Judge of the Court of King's Bench, legally commissioned to hold the said Court at such Times and Places as the Law requires, the Executive Council anxiously looked for some Remedy to prevent a Failure of Justice in the Country, that might have enabled the Government to dispense with the Necessity of any present Interference with your Appointment,

Appointment, in order that the whole Course of your Proceedings might be referred to the Decision of His Majesty's Government. But, that being advised that the Bench of Justice cannot be increased in Numbers without giving rise to a Question as to the Legality of such Increase, and viewing with anxious Concern the Evils resulting from your Conduct, which threaten to increase, to the great Obstruction of Justice, and Injury and Inconvenience of the Public; sensible also of the absolute Necessity of the Circuit Courts being regularly held, the Public having a Right to expect the Trials to proceed as usual; yet, wanting Time to communicate with the Parent Government, fully believing that your abstaining from the full Discharge of your Public Duties was unauthorized, strongly disapproving, also, in other Respects of the Course you have taken throughout—the Executive Council report, that they with Pain feel it an incumbent Duty, due to the King's Government and to the Country, to recommend your Removal from Office until His Majesty's Pleasure be known, in order to enable the Lieutenant Governor to supply an efficient Court, that there may be no Impediment to the Administration of Public Justice.

I am to acquaint you, that the Lieutenant Governor laments exceedingly the Necessity of this Step; but he reflects with Satisfaction, that it is open to you to appeal to the King in Council as to the Sufficiency of the Cause; and his Majesty's commands me to assure you, that it would not, however justifiable, take place, without a previous Reference to His Majesty, if the Circumstances which the Superior Court of the Province is placed by these new and extraordinary Proceedings had rendered the Delay possible.

I have, &c.

Salpote Willis.

(Signed) G. HULLIER.

Honourable Sir,

York, Upper Canada, 26th June 1828.

HAVING in Easter Term joined in an Order of the Court of King's Bench, and also delivered my Sentiments in the Causes then argued before Mr. Justice Sherwood and myself, following, *incautiously* as I admit, the Practice which had been previously adopted, when convinced of the Error of such Proceeding, and in order to rescind, so far as I was concerned, the Order I had joined in, and to declare what I considered to be the Effect of my Judgments, I felt myself *legally, judicially,* and religiously bound, by virtue of that Oath which was taken by me in your Presence, when I entered upon the Office to which His Majesty has graciously appointed me, to take the earliest legal Opportunity of declaring, not only my Opinion, but also my firm Conviction, (which must remain till over-ruled,) that the Court of King's Bench, as established by the Legislature of this Province, cannot legally sit in Bank, unless the Chief Justice, together with Two Puisné Justices, preside in such Court. It is a Court of statutory Creation; and all or every of the several Duties permitted by the Legislative Enactments of the Province (with which the Honourable Executive Council, as Legislators, must be fully acquainted,) to be discharged by One Judge, or One in conjunction with the Chief Justice, I shall always be ready to perform. The precise Nature of those Duties (in case there be any Question respecting them) I can only give my Opinion upon *judicially* when *legally* before me. It is not for Want of that Respect which no one feels more than I do for the Honourable Executive Council, that I do not now go more fully into the Question. But the Comments on the extra-judicial Opinion first given in the Case of Ship Money will not be forgotten. In the Opinion of a most eminent English Jurist, (an Opinion expressed in a Work of such Celebrity as to be almost tantamount to a Decision—I allude to that of the celebrated legal Antiquarian and Editor of Lord Coke's Comments on Littleton,) "However numerous and strong the Precedents may be in favour of the King's consulting Judges in Questions in which the Crown (as I conceive in the present Case) is materially interested, it is a Right to be understood with many Exceptions, and such as ought to be exercised *with great Reserve*, lest the rigid Impartiality so essential to the judicial Capacity should be violated. The Anticipation of judicial Opinions in Cases actually pending (as I think is the Case here) should be particularly guarded against; and therefore a wise and upright Judge

" Judge will ever be cautious how he answers Questions, *extra-judicially*, of such a Tendency. So far one may venture to qualify the Right of thus being required to do so, because even the House of Lords have declined taking the Opinion of the Judges for Reasons of this Sort, though their Attendance on that Body is confessedly for assisting the Lords in Matters of Law." (See Fortesc. Rep. 384, 385.) Under these Circumstances, I most respectfully submit, previously to entering further into the Subject, whether I can LEGALLY REQUESTED SO to do by the *Honourable the Executive Council*?

I must add, my private Wish is to give the fullest Information on the Subject, but Regard must be had to my OATH, and to established and constitutional Law.

I have, &c.

To the President of the Executive Council.

(Signed) JOHN WALPOLE WILLIS.

Sir,

Executive Council Office, York, 26th June 1828.

I HAVE to acknowledge the Receipt of your Letter of Yesterday's Date.

With reference to my Communication, I am requested by the Council to state, that their Desire is to receive an explicit Declaration as to which, if any, of the Duties enumerated by me you are prepared to discharge; and to add, that the Public Service requires your early Answer.

I have, &c.

The Hon. Mr. Justice Willis.

(Signed) J. BABY, Presiding Councillor.

Sir,

Government House, 25th June 1828.

I HAVE submitted your Letter of this Date to the Lieutenant Governor, and am directed to observe to you, that whenever his Excellency may deem it necessary to animadvert on the Conduct of any Officer of this Colony, he will, of course, choose his own Time, and use the proper Channel for that Purpose.

I am further to add, that you were fully informed of the natural and established Course for communicating with the Head of the Government. On your Demand, obviously originating from a very different Course of Proceeding, his Excellency purposely forbears to comment.

I have the Honour to be,

Sir,

Your most obedient humble Servant,

The Hon. Mr. Justice Willis.

(Signed) G. HILLIER.

Sir,

York, 25th June 1828.

I HAVE to solicit, in the most respectful Manner, that I may be immediately informed, if his Excellency the Lieutenant Governor has any and what Complaint to make respecting my Public or Official Conduct.

I have the Honour to be,

Your very obedient Servant,

Major Hillier, &c. &c.

(Signed) JOHN WALPOLE WILLIS.

Sir,

York, Upper Canada, 25th June 1828.

I HAVE to acknowledge the Receipt of your Letter of this Date; and to inform you, that I shall have much Pleasure in affording the *UTMOST EXPLANATION* in my Power on the very important Topics to which you have referred, at as early a Period as the Magnitude of the Enquiry will permit.

I have the Honour to remain,

Most respectfully, your very obedient Servant,

The Honourable the President of the Executive Council, &c. &c. &c.

(Signed) JOHN WALPOLE WILLIS.

Sir,

Executive Council Office, York, 25th June 1828.

His Excellency the Lieutenant Governor having referred to the Executive Council the present State of His Majesty's Court of King's Bench, accompanied, amongst other Documents, with your Letter to his Excellency's Private Secretary of the 17th Instant, in which you state that, " you are and always shall

“ shall be most desirous to discharge such of the Duties as, under existing
“ Circumstances, you can legally perform;” and the Government having
ever been of Opinion, that the Court of King’s Bench has hitherto been legally
held, and the Duties of the Judges well understood;

I am directed by the Council, with reference to the Opinion publicly deliv-
ered by you on the 16th Instant, to request, for their Information, any
Explanations you may be pleased to offer respecting the Duties you contem-
plate, as well with regard to the Term and Chamber Business as to the Circuit
Courts, including, of course, the Trial of all Records emanating from the
King’s Bench, whether containing Pleadings of the present or any preceding
Term, and whether passed before or since the Departure of the Chief Justice.

I have the Honour to be, Sir,

Your most obedient humble Servant,

(Signed) J. BABy,

Presiding Councillor.

The Hon. Mr. Justice Willis.

Sir,

York, Upper Canada, 21st June 1828.

I HAVE ventured to lay before those Members of the Profession by whom
the Application was made to me on the 17th Ult. which I inclosed to you, my
Letter of that Date, and your Answer of Yesterday, under the Impression that
nothing tends so much to prevent both public and private Inconvenience
and Misunderstanding as Candour.

I have the Honour to remain, Sir,

Your very obedient Servant,

(Signed) JOHN WALPOLE WILLIS.

To Major Hillier, &c. &c.

Sir,

Government House, 20th June 1828.

WITH reference to your Letter of the 18th Instant, the Lieutenant Governor
has directed me to acquaint you, that he has perused the Opinion delivered by
you, and will deem it expedient to bring it under the Consideration of His
Majesty’s Government.

In reply to that Part of your Letter of the 17th Instant in which you state
that you shall await the Lieutenant Governor’s Commands, I am directed to
inform you, that his Excellency feels it to be obvious that the Government
cannot require you to act in a Manner which you have stated to be, in your
Opinion, clearly illegal.

I have the Honour to be, Sir,

Your most obedient humble Servant,

(Signed) G. HILLIER.

The Hon. Mr. Justice Willis.

Sir,

Government House, 18th June 1828.

I HAVE the Honour to acknowledge the Receipt of your Communications of
Yesterday, which have been duly submitted to his Excellency the Lieutenant
Governor.

I have the Honour to be, Sir,

Your most obedient humble Servant,

(Signed) G. HILLIER.

The Hon. Mr. Justice Willis, &c.

Sir,

York, Upper Canada, 17th June 1828.

I HAVE inclosed, for the Information of his Excellency the Lieutenant
Governor, a Copy of the Opinion which I delivered Yesterday. I have been
prevented, not having a regular Clerk, sending it sooner; and I beg most
particularly to call the Attention of his Excellency, not only to that Part of
it which relates to the Establishment of the Court by the Provincial Legislature,
but also to the British Statutes respecting Leave of Absence, to which I have
referred in my Opinion, and to the Consequences in case those Statutes have
not been strictly complied with, so far as they may affect the present State of
the Court of King’s Bench, and the general Administration of Justice in this
Colony. I also inclose, for the same Purpose, a Copy of the Minutes of the
Clerk of the Crown, and a Copy of an Application left with me by some of the

the Members of the Bar this Day, with which I have so far complied as to direct a Copy of my Opinion to be made for them, and to express my Readiness to act in any way that I legally can for the Furtherance of Justice. I informed Mr. Justice Sherwood, so long since as the 3d *Ultimo*, of the Conclusion I had come to on this very important Subject. May I request the Inclosures, after perusal, may be transmitted to the Colonial Secretary.

I have the Honour to be,

Sir,

Your obedient Servant,

(Signed) JOHN WALPOLE WILLIS.

To Major Hillier, &c. &c.

Sir,

York, Upper Canada, 17th June 1828.

ALTHOUGH, from the Communications I have already made, his Excellency must be apprised of my Opinion respecting the Constitution of the Court of King's Bench in this Province, yet as I publicly declared my Sentiments on this Subject in the Court House Yesterday, (the First Day of Trinity Term,) in recalling an Order, so far as I was concerned in it, which was made without the Aid of the Chief Justice of this Province, I have to request you again to acquaint the Lieutenant Governor, that in my Judgment the Court of King's Bench, as established by the Provincial Legislature, cannot, without an express Violation of the Statute, be held, unless the Chief Justice together with the Two Puisné Justices of this Province preside therein; I think, therefore, I should be acting illegally were I to sit on Bench, and assume, either *alone* or in conjunction with the other Puisné Judge, those Powers which are delegated, according to my Construction of the Acts, to the Chief Justice together with Two Puisné Justices, and to any *One* or *Two* of them particularly, without the Presence of the Chief Justice.

I shall, however, await His Excellency's Commands on this Subject. In the meantime I am and always shall be most desirous to discharge such of the Duties as, under existing Circumstances, I can legally perform.

I have the Honour to remain,

Sir,

Your very obedient Servant,

(Signed) JOHN WALPOLE WILLIS.

To Major Hillier, &c. &c.

Dear Sir,

York, Upper Canada, 18th June 1828.

IN answer to the written Application made by you, on behalf of yourself, Mr. Washburn, and Mr. Robert Baldwin, as Attornies and Barristers, to me, as One of His Majesty's Judges of the Court of King's Bench of this Province Yesterday, I beg to assure you, and to request you will state, in the most public and unequivocal Manner, that I am and always shall be most willing to act in any way that I legally can for the Furtherance of Justice. I have already apprised his Excellency the Lieutenant Governor, and through him to his Majesty's Principal Secretary of State, of the Conclusion I have come to respecting the Constitution of the Court, of the Impropriety, in my Opinion, of its being held, unless the Chief Justice together with *Two* Puisné Justices preside therein; and I now await his Excellency's Command on the Subject. I have directed a Copy of the Opinion I delivered on Monday, when recalling the Order, so far as I am concerned, which I concurred in last Term, during the Absence of the Chief Justice to be copied; and when it is completed, I hope in an Hour or Two, it shall be forwarded to you. I am sorry the Length of it prevents me sending a Copy for each of the Applicants.

I remain, dear Sir,

Your faithful and obedient Servant,

(Signed) JOHN WALPOLE WILLIS.

H. W. Baldwin, Esq.

May it please your Lordship,

THE Opinion delivered Yesterday by his Lordship, Mr. Justice Willis, on the present State of the Court of King's Bench, is of such Importance to the Public, and so deeply involving ourselves in the Discharge of our Professional Duties to our Clients, that it becomes indispensably necessary with us to consider the Matter

Matter of that Opinion most materially. Feeling that such proposed Consideration may be imperfect, without also hearing the deliberate Opinion of his Lordship Mr. Justice Sherwood, we beg leave to express our Hope that we shall hear such his Lordship's Opinion also. It would be very satisfactory to us to be favoured with written Copies of these Opinions; yet knowing this to be in the Option of your Lordships, we trust you will excuse this Part of our Application, if at all unpleasant. We do not wish to trust to the hasty Notes taken by ourselves or the Editors of the Public Prints.

We would not willingly press upon your Lordships with any inconvenient Haste, but under the present Circumstances Time is not at our Disposal; and therefore trust, that if his Lordship Mr. Justice Sherwood should decline an early Delivery of his Opinion, so very desirable to us, that he would be pleased to withhold his Judgment in any Matter wherein our Clients may happen to be concerned, until, as their Counsel, we be better advised as to the Course to be adopted.

(Signed) H. W. BALDWIN.
S. WASHBURN.
ROBERT BALDWIN.

Trinity Term, 9th Geo. 4th.

Monday, 16th June 1828.

Present the Honourable Mr. Justice Sherwood and
The Honourable Mr. Justice Willis.

Upon the Judges taking their Seats, Mr. Justice Willis stated, that by the Provincial Statute (34 Geo. 3. cap. 2.) which established the Court of King's Bench in this Province it is enacted, that the Chief Justice of the Province, together with Two Puisné Justices, shall preside in the said Court; that the Chief Justice being absent, in his Opinion Two Puisné Judges could not legally constitute the Court; that therefore he should decline interfering, except in such Matters as he could dispose of as a single Judge of the Court. Mr. Justice Sherwood ordered the Court to be adjourned till To-morrow at 12 o'Clock, against which Mr. Justice Willis protested, as, in his Opinion, there was no Court to adjourn, and thereupon withdrew; when Mr. William Henry Draper, Esq. was sworn and admitted a Barrister, and the Court adjourned, by Order of Mr. Justice Sherwood, till To-morrow at 12 o'Clock.

Ordered, by Mr. Justice Willis, That the Rule of this Court made in Easter Term last be rescinded so far as his Authority is concerned, the same having been granted, in his Opinion, contrary to Law — the Court not being full at the Time of passing the same.

Sir,

York, Upper Canada, 5th June 1828.

I most unequivocally declare, or rather *repeat*, that by leaving the Letters I inclosed to *you open*, and requesting them to be laid before the Lieutenant Governor, my Object was to call the Attention of his Excellency, as well as that of the Secretary of State for the Colonies, to the *whole of their Contents*.

I have the Honour to be,

Your very obedient Servant,

Major Hillier, Private Sec. &c. &c.

(Signed) JOHN WALPOLE WILLIS.

Sir,

Government House, 4th June 1828.

I HAVE the Honour to acknowledge the Receipt of your Letter of Yesterday, which I have laid before the Lieutenant Governor, and I have been commanded by his Excellency to acquaint you, that your Letters to the Secretary of State and to Mr. Stephen will be forwarded.

If those Circumstances should occur to which you call the Attention, not of this Government, but of the Secretary of State, it will remain for his Excellency to pursue whatever Course such Circumstances may appear to him to require.

I have the Honour to be, Sir,

Your most obedient humble Servant.

The Hon. Mr. Justice Willis.

(Signed) G. HILLIER.

Sir,

York, Upper Canada, 3d June 1828.

I HAVE now to request you to lay the inclosed Letters (which relate to Public Business, in my Opinion of the greatest Consequence to the Colony), before his Excellency the Lieutenant Governor. Not having done so in the first Instance was entirely owing to my not being sufficiently acquainted with official Forums, and not, as I beg you will assure his Excellency, with the slightest Intention of any personal Disrespect. On the contrary, I conceived that by leaving the Letters *purposely unsealed* I had done all that was usual, and what was least obtrusive on this Occasion; presuming that the Letters would not have been forwarded if any Part of them met with his Excellency's Disapprobation. Should I not now have pursued the proper Course, may I beg of you to point out to me specifically how I can proceed.

Your obedient Servant,

Major Hillier,
&c. &c.

(Signed) JOHN WALPOLE WILLIS.

Sir,

York, Upper Canada, 12th April.

As Judge of Assize, Yesterday, I stated that the Law Officers of the Crown (who have hitherto always conducted, and who are paid by the Public for all Criminal Proceedings in this Province,) were, in my Opinion, bound to prosecute for all Crimes which they know have been committed, of their own Accord; but the Attorney General, certainly not in so courteous a Manner as the Bench is usually addressed in England, disclaimed that Duty, admitting, however, that he and the Solicitor General were the Public Prosecutors. I then said, the Question must be decided by the Government, and as nothing can be more necessary for the due Administration of Justice than that the Source from which all Public Prosecutions must originate should be distinctly understood, I do not think I should honestly discharge the Duties of my Office did I not respectfully submit this Matter to your Excellency's Notice.

I have the Honour to remain, Sir,

Your most obedient and very humble Servant,

To the Lieutenant Governor of U. C.

(Signed) JOHN WALPOLE WILLIS.

Sir,

York, Upper Canada, 14th April 1828.

I AM sorry to have Occasion again to appeal for a Decision respecting the Duties of the Attorney General of this Province, who now repudiates (as I understand him) what he stated on Friday last, namely, that Criminal Prosecutions in this Province are, as in England, open to the Bar; and he has this Day in open Court further asserted, that as *His Majesty's Attorney General* for this Province, he is answerable for his Conduct in his *legal Capacity*, not to any of His Majesty's Judges of this Colony, but solely to the King's Government. If this be so, the Question is whether the Attorney General, who is not only a Barrister, but is also a practising Attorney and Officer of the Court, or the Judge who presides, is to be superior? I had Occasion publicly to notice the great Mildness of the Criminal Law of England, and the Administration of it there, as *it now stands*, to that which is admitted into this Province, which is what it was in England in 1792; and I now call your Excellency's Observance to the great Improvements since that Period, and especially those recently made by the Right Honourable the Principal Secretary of State for the Home Department. A Sense of Duty, attached to the Dignity of my Office, compels me, however reluctantly, to add, that the Language of the Attorney General was such, that I could only tolerate it from his being an Officer of Government, and from my Wish on that Account not to obstruct the Public Business. In this Controversy I entirely disclaim all personal Feeling; I do not, nor can I ever condescend to entertain it in any Public Measure; but the Crisis has now arrived at which it must be determined how Criminal Prosecutions here are to be conducted, and how far the Law Officers of the Crown are amenable to the Judges of this Province.

I have the Honour to remain, with the greatest Respect, your Excellency's most obedient and very humble Servant,

The Lieutenant Governor, Upper Canada.

(Signed) JOHN WALPOLE WILLIS.

May it please your Lordship,

York, 23d June 1828.

THE learned Opinion delivered by the Honourable Mr. Justice Willis, upon which we have bestowed an anxious Consideration, renders painfully certain, in our humble Judgment, the Apprehensions entertained respecting the due Administration of Public Justice. Unanimity among the Judges is important, if not essential to the satisfactory Discharge of the Duties pertaining to any Court. When such Court is the only one of Superior Jurisdiction in the Country in which it is established, the Importance of such Unanimity, not only to the Court itself, but to the Country at large, must necessarily be greatly increased, and the Want of it the more felt as a Public Evil; and when this is attended with an Impossibility of determining between contending Opinions, and Suitors thereupon fail, such Evil appears to have arrived at its greatest possible Extent. Long before the Question as to the legal Constitution of the Court arose, or was (as far as we are informed) even thought of, much Inconvenience was experienced by the occasional Absence of Judges, and especially of the Chief Justice; and such was the Apprehension of the practical Civil Consequences of the King's Bench being without a casting Voice, that previous to Easter Term last an humble Memorial was presented to his Excellency the Lieutenant Governor, pointing out in some Respects the Failure of Justice in such a State of Things, and requesting his Excellency to withhold his Leave of Absence from the Chief Justice, whose Departure from the Province was at that Time publicly spoken of. His Excellency, however, did not think proper so to do, and the evil Consequences anticipated have been realised. All that could be done by those who had only their humble Suggestions and Remonstrances to offer was done. The Responsibility must rest where it has been wisely placed by the Constitution of the Country.

During the Terms of Michaelmas and Hilary last past, with a full Bench, there were not fewer than Ten Cases wherein Differences in Opinion arose among the Judges on important Points; and in Easter Term last, during which the Chief Justice was absent, the Puisné Judges were divided in Opinion in Six several Cases. In such a State of Things substantial Justice cannot be said to be administered. In our humble Opinions, supported as they are by that of Mr. Justice Willis, we think the Legislature intended, by the express Provision of the Act establishing the Court, to guard, in the only Way in which the Means of the Country would admit, against the Evils under which we now labour, this express Provision being, "that His Majesty's Chief Justice of this Province, together with Two Puisné Justices, shall preside in the Court of King's Bench in this Province." We can have no Doubt but that we should have every Reason to feel happy at the Security thus established for the Rights, the Liberties, and indeed the Lives of our Fellow Subjects in this Province, had not this salutary Provision been too often slighted, in the frequent Absence of Judges, especially the Chief Justice, not only by long Journeys out of the Province, but by frequent Attendance at Councils and in the Provincial Legislature. And here we beg leave to remind your Lordship, that, before entering upon the Consideration of this Question as to the Constitution of this Court, of so much Importance to ourselves, our Clients, and the Country generally, we endeavoured to obtain all the Aid to our Judgments which lay within our Reach. In pursuit of this we solicited your Lordship to favour us with a Statement of your View of the Question; and, for the more correct Understanding of such your Lordship's View, we also solicited a Copy. From Mr. Justice Willis we for the like Purpose requested a Copy of the Opinion which he had delivered on this Subject on the first Day of this Term. The latter we have received, and considered. Your Lordship, however, declined this our Request, on the Ground that any Opinion so given would be extra-judicial, as not arising in any Cause before the Court; at the same Time giving it to be publicly understood that your Lordship would continue to execute the Duties of the Court as it had frequently heretofore been done, that is to say, by One Judge in the Absence of the other Two. Humbly differing from your Lordship in this Objection to the general Question, yet most desirous of the Assistance of your Lordship's Sentiments, we patiently awaited the Opportunity of the Question arising directly in some particular Cause, that your Lordship might thus

thus be relieved from the Difficulty which we understood to be the only one that prevented you from granting our Request. This Opportunity occurred on the last Day your Lordship sat, in the Cases of M'Nair v. Mitchell, and Wallis v. Landon; and the Question was raised. But your Lordship merely favoured us with a Decision, by over-ruling the Objection to your Authority, leaving us wholly at a Loss for the Grounds upon which that Decision was founded. Under these Disadvantages we entered upon the Consideration of the whole Question; and, after the best Attention which we have been enabled to give it, and a careful Reference to most of the Authorities quoted by Mr. Justice Willis in his elaborate Opinion, we feel ourselves irresistibly led to the same Conclusion at which that learned Judge has arrived. Your Lordship, therefore, will permit us to say, that, in our humble Opinions, without the Presence of the Chief Justice and Two Puisné Justices, the Court of King's Bench in this Province is not so constituted as to be competent to proceed with Business in Bank. Although the many practical Evils attendant on the contrary Doctrine may have influenced our Opinion, we are far from thinking it a Question merely of Doubt upon the strictest Principles of Law; and in this we anticipate your Lordship's cordial Concurrence, that there are no Laws demanding a more religious Observance than those which limit and define the Power of Individuals forming the Government over their Fellow Creatures. And serious as must be the Consequence of the temporary Stoppage of the Administration of Justice in a whole Country, we cannot help looking on it as one eventually far less dangerous to the Interests of Society than the Sacrifice of any the least Part of an important Principle; and surely none can be more important than the Obligation on all Public Functionaries to observe, to the Letter, the Bounds of those Powers with which we are invested.

We therefore deem it a Duty which we owe to our Profession, to our Clients, and to the Public, thus, in the most open and solemn Manner, to express our Opinions upon this important Question; and, as the necessary Conclusion from these Opinions, to protest against any Proceedings being had, at least in any Cause in which our Clients are concerned, until the Court be established according to the Provisions of the Provincial Statutes.

(Signed)

H. W. BALDWIN.

JOHN RALPH.

ROBERT BALDWIN.

No. 15.

COPY of a Petition from Mr. WILLIS to His MAJESTY.

To the King's most Excellent Majesty.

Sire,

York, Upper Canada, 1st July 1828

As a Judge of Your Province of Upper Canada by Your Royal Appointment, as the Son-in-Law of an ancient British Peer (the Earl of Strathmore), and as an English Barrister and British Subject, I am sure I shall not sue in vain to Your Majesty for Enquiry and Justice, even though Your Representative in this Colony be the Subject of Complaint.

Sworn to administer Justice according to Law, I declared it to be my Opinion that the Court of King's Bench in this Province could not be held in the Absence of the Chief Justice (now in England by the Permission of the Lieutenant Governor).

For relying on that Opinion until it should be legally over-ruled, and for adhering to my Oath to respect the Laws, the Lieutenant Governor of this Province, (though expressly stating that he could not command me to act in a Manner I considered illegal,) without affording me an Opportunity of Defence, or even of being heard, has taken upon himself to remove me from Your Majesty's Service until Your Royal Pleasure be ascertained.

Insulted

Insulted, even on the Bench, by the Attorney General of this Colony — grossly spoken of in the Public Law Office — libelled for my Conduct in the solemn Execution of my Duty as a Judge — threatened in the Public Street — falsely accused of Disloyalty — and even Intimation of Assassination held out.

I have stated these Facts to the Local Government, and applied for its Protection, *in vain*.

Convinced of the Illegality, the Oppression, and Injustice thus heaped upon me in my honest Endeavour faithfully to discharge my Duty to my Sovereign and to the Province, I am persuaded, that even the high Office of Major General Sir Peregrine Maitland, as Lieutenant Governor of this Colony, will not permit him and his Advisers to be placed beyond the Reach of British Justice, or exempt them from that Investigation which Your Majesty has ever been ready to grant, at the Solicitation of the meanest of Your Subjects.

With the utmost Veneration and Regard, I remain Your Majesty's most devotedly attached and ever faithful Servant,

(Signed) JOHN WALPOLE WILLIS.

No. 16.

COPY of a Letter from the Rev. Mr. WILLIS to Mr. R. W. HAY.

Sir,

Bath, 35, Park Street, 4th July 1828.

I TRANSMITTED to Upper Canada the Answer, dated May 19th, with which you honoured my Application to the Colonial Secretary, for a Payment in lieu of Salary to Mr. Justice Willis, on account of the Equity Situation which he left England to fill.

That the Understanding, on his Part, as to the Light in which the Matter was viewed by Mr. Secretary Horton and Lord Goderich, who was present, was correct, I think is plain, from the Sanction given him to proceed forthwith to Canada, upon the Promise that the Commission should follow him, and his Salary take place from the Day of the Conference (14th July 1827). These Circumstances Mr. Willis mentioned to me immediately after the Interview; and under these Impressions wrote the Letter of which I had the Honour to send a Copy; and set out for Liverpool, where he was induced to wait for a Week, in expectation of receiving his Commission. He sailed for Canada August 1st. His Appointment, as Judge of the King's Bench, took place in April (I think 14th).

Sir James Scarlett's Opinion having at length been received, and differing in its View of the Case so materially from what is supposed to have been expected, the Matter was referred to the Colonial Legislature, and by them left undetermined for another Year.

That my Brother would not have gone out to fill the Office of a Puisné Judge alone I can confidently state; that he went without his Equity Commission I must own I considered at the Time, and still think, a Proof of Confidence in the good Faith of Government, which I should have with Difficulty been induced to give, and would have persuaded him against. The Assurance, however, that his Salary would be paid from the Day of his Interview with Mr. Secretary Horton, was urged as a sufficient Security, and of the most substantial Nature, for the forthcoming of the Commission.

That Mr. Willis should be a Sufferer by this implicit Reliance upon the Official Authorities I do hope will not be allowed. The Office of Chief Justice of the Province is now vacant; and my Brother, from his Exertions already made to do impartial Justice, and, with Success, to allay the petty Strifes of Colonial Bickerings, and so bind the People there, too much inclined to the Principles and Practices of their American Neighbours, to the Institutions and the Love of their Mother Country, will not, I trust, under all the existing Circumstances of his Case, be passed over by the Right Honourable Secretary for the Colonies.

S E

I have

I have neither Connections nor Interest to use in his Favour. He will not, I am sure, fare the worse on that account with the present Government, on which the entire Confidence of the Country is placed.

I have the Honour to be,

Sir,

R. W. Hay, Esq.
&c. &c. &c.

Your most obedient and faithful Servant,
(Signed) W. D. WILLIS.

No. 17.

COPY of a Letter from Mr. WILLIS to His Majesty's Secretary of State for the Colonial Department.

Sir,

Liverpool, 7th Aug. 1828.

By a Letter from York, Upper Canada, which I had the Honour of addressing to Mr. Huskisson, as Secretary of State for the Colonies, on the First of last Month, I stated what I conceived to be the Effects which have resulted from the Opinion I have judicially expressed in regard to the illegal Proceedings of the Court of King's Bench of that Province. Deeply sensible as I was of the Inconvenience which must arise in consequence of the Step which my Oath as a Judge obliged me to take, I never could have imagined that a solemn and conscientious Opinion, with the Reasons on which it was founded, could have subjected me, as a Judge appointed by His Majesty, to personal Persecution, especially as a constitutional Remedy could so easily have averted much of the Evil I had foreseen.

It is now said that my *Conduct, and not my Opinion only*, has been the Subject of Consideration; and the Provincial Government, without stating to me in what Respect that Conduct was objectionable, or on what Evidence it was decided to have been so, has made my *Amoval* a PENALTY for an alleged Offence, of the Nature of which (although I have expressly requested Information from the Lieutenant Governor) I have not hitherto been furnished with any Intelligence whatever. I also *know* (for it has been seen, and the Contents are not hid from me,) that there is a *semi-official* as well as a *public official Correspondence* respecting me; but I trust I shall be officially and distinctly made acquainted with these and all other Charges and Insinuations, *public* or *private*, which may be urged against me, if any Doubt be entertained respecting the Illegality and Impropriety with which I have been treated. I must, however reluctantly, request you, in the first Instance, to procure for me an early Audience of His Majesty, to solicit, if necessary, the personal Attendance in England of the Lieutenant Governor of Upper Canada, to answer in Westminster Hall, under the British statutory Provisions, for his Oppression. I am sure no Article of his Instructions can have authorized the Condemnation of One of the King's Judges for the Exercise of that Opinion which in England is not controuled even by the Commands of the Sovereign.

I inclose Copies of an Address and a Petition having reference to these Proceedings, with the Contents of which, however, until *after they were adopted*, I was entirely unacquainted. I purpose proceeding immediately to Bath, (35, Park Street,) and hope I may be permitted to pay my Respects to you at the Colonial Office on Wednesday next, at any Hour most convenient for you to receive me. As, under existing Circumstances, I have left my Wife, Lady Mary Willis, and my Family, *alone* in Canada, and every Hour increases the Danger of the Voyage, either in case of my Return or their coming to Europe, common Humanity will, I am persuaded, urge every Dispatch on your Part in the Decision of this very unpleasant Business.

I have the Honour to remain,

With the greatest Respect,

Sir,

Your most obedient and very humble Servant,

To the Right Hon. the Secretary of State,
&c. &c. &c.

(Signed) JOHN WALPOLE WILLIS.

Inclosure, No. 1.

Address to the Honourable John Walpole Willis.

WE, the undersigned Inhabitants of Upper Canada, with Joy heard of your Arrival from the English Bar, commissioned by our most gracious Sovereign to administer Justice amongst us.

The Persecutions you have suffered, the Jealousies which have prevailed against you, and the Consummation of your Wrongs by your arbitrary Removal, have awakened our painful Attention, and disappointed our fondly-cherished Expectation of better Things.

The ignominious Treatment to which you have been exposed, however base in its Motive and unjust in its Causes, cannot but be wounding to your pure and honourable Mind; and therefore, in addition to these Consolations which you cannot fail to derive from your Consciousness of Integrity, we beg leave, with all Sincerity, to offer to you the Sympathies of the People among whom you have cast your Fortunes, and administered so impartially the Justice committed to you by our King.

It is most grateful to our Feelings, as a Pledge for your Return, that upon proceeding to England, to seek, at the Foot of the Throne, the Redress of your Wrongs, which Wrongs we feel to be seriously our own, you intend to leave your amiable and accomplished Lady and your infant Child to the Care of Heaven and the grateful Superintendence of a generous Public.

Seeing that you are abandoned by the Provincial Administration and their Dependants, we have, independent of any Arrangements which your limited Knowledge of the Country may enable you to provide, appointed, for our public Satisfaction, a Committee to watch over the Interests and insure the Protection of Lady Mary and Family, that her Ladyship may, during your Absence, the less feel the Remoteness of her Native Country and of her Noble Friends. This Committee consists of John Galt, Esquire, and Lady, and Doctor William Warren Baldwin and Lady; to whom is added Robert Baldwin, Esquire, as her Ladyship's Solicitor.

Inclosure, No. 2.

Petition to the King's most Excellent Majesty, and to the several other Branches of the Imperial and Provincial Legislatures.

WE, Your Majesty's dutiful and loyal Subjects, Inhabitants of Upper Canada' are constrained by the most painful Necessity to appeal to the Justice of Your Majesty against the Misrule of the Provincial Administration, and humbly to point out to Your Majesty the alarming Increase of our Grievances, and the Necessity of their Redress, as they become more and more inveterate, from the Patience with which we have hitherto endured them. We offer our warmest Thanks and Gratitude to Your Majesty for appointing to be a Judge over Your Canadian People the Honourable John Walpole Willis, whose private Virtues and acknowledged Learning, blended with high and uncompromising Principles, uniformly evinced in the impartial Discharge of his judicial Duties, have already endeared him to the Country as one of its greatest Blessings, and as affording to the People the most flattering Presage of a new Era in the Administration of Justice. Of this Blessing we have been unconstitutionally deprived; and Misrule has at length become so bold, and Power so indiscriminate of its Victims, as to spurn from the Judgment Seat the Honourable Mr. Justice Willis, who there presented what has long been wished for, but seldom seen, the stern and fearless Integrity and Independence of a British Judge. Such judicial Integrity and Independence are alarmingly endangered, when such a Judge, without Impeachment, and even without a Charge, can be so ignominiously removed from his high Office.

Although we entertain the fullest Confidence in Your Majesty's Desire to promote the Happiness and protect the Rights of British Subjects throughout
Your

Your ample and glorious Dominions, yet our Hopes of speedy Redress are not a little discouraged by a Knowledge that while we, on our Part, open to Your Majesty the Abuses and Oppressions growing upon us, the very Persons we accuse are pressing through other Channels, affording a more favourable Access to Your Royal Belief, those interested Misrepresentations which are designed both to promote Misrule and protect the Authors of it; for it cannot be forgotten that Misrepresentations from such Sources have already recently endangered our Civil and Religious Liberties, and cruelly vilified and traduced the fair Characters of the Dissenting Denominations of Christians in this Province. And the impending Consequences of such secret Misrepresentations are further apprehended, from the Speech of the Right Honourable William Huskisson, Your Majesty's Principal Secretary of State for the Colonies, in the Imperial House of Commons, as reported in some of the Public Prints.

Notwithstanding Defects in the Law defining our Constitution, we are nevertheless warmly attached to it, and view with just Fear every Attempt to amend it without the Intervention of our Provincial Legislature, which is the constituted Guardian of our Rights and Liberties, and which, considering the great Distance of the Imperial Legislature, can best understand our Necessities, and apply the proper Remedies. It has long been the Source of many Grievances, and of their Continuance, that the Legislative Council is formed, not of an independent Gentry taken from the Country at large, but of Executive Councillors and Placemen, the great Majority of whom are under the immediate, active, and undue Influence of the Person administering Your Majesty's Provincial Government, holding their Offices at his mere Will and Pleasure. Hence arises in a great Measure the practical Irresponsibility of Executive Councillors and other official Advisers of Your Majesty's Representative, who have hitherto with Impunity both disregarded the Laws of the Land and despised the Opinions of the Public. From the Impunity with which the greatest Abuses have hitherto existed, and the Difficulty in such a State of Things of applying an efficient Remedy, most of our Grievances have taken their Origin and Growth.

First, the Rejection by the Legislative Council of the most salutary Measures passed by large Majorities in the House of Assembly, and much desired by the People.

Secondly, the frequent Want of a Casting Voice in the Court of King's Bench, in this Province, owing to the illegal Absence of the Judges, especially of the Chief Justices, as well on distant Journeys out of the Province as on Attendances in the Legislative and Executive Councils.

Thirdly, the undue Influence which the mingled Duties of Legislative and Executive Advice have on the judicial Function.

Fourthly, the Assumption of a Power by the Executive to appropriate a large Portion of the Revenue and other Monies raised from the Sale of Land and otherwise in the Province, independent of the Will or Sanction of the Assembly.

Fifthly, the extravagant Augmentation of Salaries, Offices, and Public Expences, quite disproportionate to the State and Circumstances of the Colony.

Sixthly, the Confinement of Public Prosecutions of Offences to the sole Conduct of the Law Officers of the Crown in the Colony, embarrassing private Prosecutors in this small Community, where the Influence of Politics and Family Connections is so injuriously felt.

Sevently, the retaining in Public Offices, and the Introduction into the same, of Persons who notoriously ought to be excluded.

Eighthly, the Want of carrying into Effect that rational and constitutional Controul over Public Functionaries, especially the Advisers of Your Majesty's Representative, which our Fellow Subjects in England enjoy in that happy Country.

Ninthly, our present imperfect Jury System.

Tenthly, that Sheriffs, Coroners, and other Public Officers, hold their Offices during Pleasure, and not during good Behaviour, or otherwise, as in England.

Eleventhly, that the Supreme Judges of the Land hold their Offices during Pleasure, and are subjected to the Ignominy of an arbitrary Removal.

Wherefore

Wherefore we humbly entreat for the Interference of Your Prerogative to favour our Exertions to correct the Grievances under which we labour.

We humbly suggest that the Legislative Council should be increased in Number, of whom a small Proportion only, strictly limited by Law, to be permitted to hold or enjoy any Place of Emolument or Profit under the Government, or to be Members of the Executive Council.

Secondly, that the Judges of the Court of King's Bench be not Legislative Councillors, nor Executive Councillors, nor Privy Councillors, in any respect in the Colony.

Thirdly, that the Judges shall not be permitted to absent themselves from the Province but on the most reasonable Cause, and with Leave obtained as prescribed in the British Acts relative to Colonial Officers.

Fourthly, that the Judges be made independent as in England, holding their Offices not as at present in this Province, but during good Behaviour, to be inquired into by Impeachment alone, in the Provincial Parliament, before the Legislative Council, when that Body is so modified as to become an independent Branch of the Legislature.

Fifthly, that for some Time, at least till the Province affords an adequate Source of legal and constitutional Education, the Judges be appointed from the Bar in England.

Sixthly, that a Legislative Act be made in the Provincial Parliament to facilitate the Mode in which the present constitutional Responsibility of the Advisers of the local Government may be carried practically into Effect, not only by the Removal of these Advisers from Office when they lose the Confidence of the People, but also by Impeachment for the heavier Offences chargeable against them.

Seventhly, that our present Jury System be amended by a new Law, whereby the Jurors to be impanelled may be more equally selected from the Country, less at the mere Nomination of the Sheriff or his Officers; such new Law to extend both to Grand and Petit Jurors.

Having thus, under the Pressure of the present Crisis, hastily concentrated our most pressing Grievances, and humbly prayed for the Royal Aid of Your Majesty's Prerogative in providing appropriate Remedies, we Your Majesty's dutiful and loyal Subjects cannot omit again to bring under Your Majesty's serious Notice, as indicative of the Necessity of a Change of Men and Measures, the recent violent and unconstitutional Removal from Office of the Hon. John Walpole Willis; a public Wrong calling more and more loudly for our most earnest Remonstrance to Your Majesty, and strongly elucidating the injurious Character of the Policy pursued by the present Provincial Administration.

Such was the Apprehension of the practical bad Consequences of the King's Bench being without a Casting Voice, that previous to Easter Term last a Memorial was addressed to his Excellency, pointing out in some Respects the Failure of Justice in such a State of Things, and requesting his Excellency to suspend his Leave of Absence to the Chief Justice, whose Departure from the Province was at that Time publicly spoken of, even until after the approaching Term. His Excellency, however, did not think proper so to do, and the evil Consequences anticipated have been realized. During the Terms of Michaelmas and Hilary last past, with a full Bench, there was not fewer than Ten Cases wherein Differences in Opinion arose amongst the Judges on important Points; and in Easter Term, during which the Chief Justice was absent, the Two Puisné Judges were divided in Opinion in Six several Cases. In such a State of Things substantial Justice cannot be said to be administered. The Provincial Law wisely enacted that Your Majesty's Chief Justice of this Province, together with Two Puisné Justices, shall preside in the Court of King's Bench. And as a Diversity of Opinion has, on many important Points, unhappily prevailed among the Judges of that Court, which is the only one of superior Jurisdiction, and from which, in the vast Majority of Cases, there can be no Appeal, the Importance of maintaining that Court as organized by Law becomes the more urgent, and the Violation of that Law productive of the greater Evils.

Under these Circumstances, we feel that the Hon. Mr. Justice Willis deserves the Approbation and Confidence of all good Men, for withdrawing from the

Court House, under a conscientious Conviction in his own Breast that he could not administer Justice according to Law while the Court was not constituted as that Law required.

Sensible as we are that the Appointment of Judges esteemed by the People for their Learning, and beloved by them for their Virtues, is in every Colony so blessed the most conclusive Evidence of the Health of the great Body Politic, so do we feel that this deliberate, violent, and unconstitutional Removal of Mr. Justice Willis, depriving us of the Benefit of his honourable and conscientious Services, is a Grievance of such Magnitude as requires Your Majesty's paternal Interference; and this Evil we feel the more serious, because it furnishes the present Provincial Administration with an Opportunity of placing upon the Judgment Seat a Man labouring under those Prejudices of Family Connections and Party Feeling from which Mr. Justice Willis was necessarily and happily free — Persons, withal, very inferior to that Gentleman in Education, in Talents, and in legal Knowledge. While strongly feeling this Injury, Your Majesty will, we beseech, hear our Complaint of the Conduct of the Honourable Mr. Justice Sherwood, who, in the Absence of the Chief Justice and of Mr. Justice Willis, proceeded alone to exercise all the Powers of Your Majesty's Court of King's Bench, and yet abstained from offering any Justification for such Assumption, for the Satisfaction of the Public, although requested to give to the Bar his legal Reasons for such a Course. He had at that Time vacated his Office, by absenting himself from the Province without the Leave prescribed by Law.

We should omit a Matter of the first Importance to the happy Conduct of our Civil Affairs, did we forbear to mention to Your Majesty, with all the Delicacy becoming us, when referring to the Exercise of Your Royal Prerogative, the total Inaptitude of Military Men for Civil Rule in this Province.

The almost constant Absence of Your Majesty's Representative from the Seat of Government, where almost Daily is required his assiduous Superintendence over Public Affairs and Public Functionaries — his total Unacquaintance with the Inhabitants of the Country, with the Exception of those whose official Occupations place them about his Person, whereby he can be but ill informed of the true State of the Country, or of the Condition or Wants and Wishes of its People — the Charge of Disloyalty against those who question the Policy of the present Administration — a System of Espionage spreading from the Seat of Government over the Face of the Country — a threatened Degeneracy in the State of Society, endangering, by the insidious Operations of those morbid Causes, that Public Feeling, truly British, and yet happily alive in this Colony — the undue Influence over Electors in many Ways, but especially by the issuing of Patents granting Land, sent into the Country in profusion, to be distributed by Candidates acceptable to the present Provincial Administration — the Acceptance of Office by Members of the House of Assembly, without vacating their Seats, as is the necessary Consequence in England — and the almost mortal Violence offered to the Constitution by the Exercise of worse than Military Rule, in the Intimidation of the more dependant Members of the Legislative Council into the Views of the Administration, at the Peril of their Offices, as was exposed in the Testimony of the Honourable Wm. Dickson and the Honourable Thomas Clark, in their Evidence before a Committee of the House of Assembly during the last Session of the Provincial Parliament — wherein we Your Majesty's faithful and loyal Subjects being greatly aggrieved, most humbly, most earnestly and confidently pray Your Majesty for Redress, as far as such Redress lies within Your Majesty's constituted Power. And, as an Object filling us with peculiar Solicitude, we do most earnestly importune Your Majesty, that You will be graciously pleased to restore Mr. Justice Willis to the honourable Situation to which Your Majesty had appointed him, and thus protect Your Majesty's Royal Choice, Your faithful Judge, and us Your loyal Subjects, from the Wrongs that arbitrary Rule in the Provincial Authorities, unchecked, would assuredly inflict.

And Your Majesty's Petitioners, as in Duty bound, will ever pray.

No. 18.

COPY of a Letter from Mr. WILLIS to the Secretary of State for the Colonial Department, dated London, 13 Aug. 1828.—2 Enclosures.

Sir,

London, British Coffee House, Cockspur Street,
13th August 1828.

HAVING within these few Days returned from Upper Canada in consequence of my Removal from my Office as one of His Majesty's Judges of the King's Bench by the Lieutenant Governor of the Province, I have the Honour to inclose a Copy of the Commission anoving me, together with a Copy of the Letter by which it was accompanied, from the Secretary of his Excellency.

In considering the Statement of Major Hillier as explanatory of the Causes upon which my Removal was advised and effected, I look in vain for any adequate Reasons to justify so severe a Measure.

The Effects consequent upon any judicial Decisions cannot, I submit, form substantial Grounds of Accusation; and any Disapprobation of my Conduct, in order to its being remedied or explained, ought, if Cause existed, I imagine, to have been distinctly stated.

I have therefore most respectfully to entreat that I may be furnished with as full and explicit a Statement of the Reasons adduced for my Suspension as I can in all Justice be required to answer.

It must be obvious at what a Sacrifice of personal Convenience and Expense I have been compelled to come to England, and under what distressing private Feelings and Sense of public Imputation I must remain, until an Opportunity be afforded me of justifying my Conduct.

I feel confident that every honourable Principle, as well as common Humanity, will combine to render the consequent Investigation of this Matter as ample as I humbly hope it may be expeditious.

I have the Honour to be,

Sir,

Your most obedient and humble Servant,

The Rt. Hon. the Secretary of State
for the Colonies.

(Signed) JOHN WALPOLE WILLIS.

After August 14th, at 35, Park Street, Bath.

[The Commission and the official Notification thereof are inserted at pp. 12, 13. of the Documents published by Mr. Willis.]

No. 19.

COPY of a Letter from Mr. R. W. HAY to Mr. WILLIS.

Sir,

Downing Street, London, 20th Aug. 1828.

I AM directed by Secretary Sir George Murray to acknowledge the Receipt of your Letter dated the 13th Instant, inclosing the Copy of an Instrument issued by the Lieutenant Governor of Upper Canada, for suspending the Exercise of your Functions as one of the Judges of that Province, and requesting to be furnished with a full and explicit Statement of the Reasons adduced for your Suspension.

Sir George Murray regrets that it is not in his Power to give you all the Information which you desire, as no official Intelligence from the Lieutenant Governor, of the Fact of your Suspension, has hitherto reached this Department. Adverting, however, to the painful and embarrassing Situation in which any Uncertainty respecting the Reasons of your Suspension from Office must inevitably place you, the Secretary of State has directed me to communicate to you the most material Statement which has hitherto been received from the Lieutenant Governor of Upper Canada, in which the Propriety of your official Conduct has been called in question. This Statement, as you will perceive,

relates

relates to a Transaction in which you impute serious Misconduct to Mr. Robinson, the Attorney General of the Province. To your Charges Mr. Robinson has made a Defence, of which I inclose a Copy; and Sir George Murray will be happy to receive any Explanations which you may think it right to offer on that Subject.

As soon as the official Communication from the Lieutenant Governor respecting the Grounds of your Suspension from Office shall be received at this Department, Sir George Murray will put you in possession of the Reasons adduced by the Lieutenant Governor for that Measure; and you will easily understand that the Secretary of State cannot but feel extreme Regret that a real or supposed Necessity should have existed, at such a Period as the present, for the Measure which the Lieutenant Governor, with the Advice of his Council, has felt himself required to adopt.

John W. Willis, Esq.

I have, &c.
(Signed) R.W. HAY.

No. 20.

Copy of a Letter from Mr. Willis to the Secretary of State for the Colonial Department, dated Bath, 26th August 1828. — Five Inclosures.

Sir,

35, Park Street, Bath, 26th August 1828.

My Friend and Relative, Mr. George A. Hamilton, whose Name as Candidate for the County of Dublin, at the last Election, is probably not wholly unknown to you, will have the Honour to deliver this Letter.

The very peculiar Circumstances in which I feel myself now placed seem to render it desirable to me that a Friend should act on my Behalf, and he has kindly undertaken to transact such Business as, without any Disrespect on my Part, may be committed to him.

Although the Defence of Mr. Attorney General Robinson, which you have so obligingly furnished me with, arising, as it does, out of Transactions purely judicial, is not avowed as a Cause of my Motion by the Local Government, and as the Results of judicial Proceedings will never, I trust, form the Ground of Accusation against any Judge, and however unusual and almost undignified it may seem for a Judge to reply to any Observations on the legal Opinions he may have felt himself bound to express, yet I cannot, in justice to my Feelings, forbear availing myself of the Opportunity so kindly afforded to me here, though not in Canada, of wiping off any Reflection which, by Possibility, may seem to be cast upon my official Conduct.

As the Attorney General's Narrative of what passed in Court, with regard to the Duties of his Office and his Behaviour towards me, does not by any means accord with my Impression of the Proceedings, I have transmitted a Statement of what I have the best Reasons for believing actually to have occurred, and also of a subsequent Discussion in Easter Term, before Mr. Justice Sherwood and myself, relative to the Mode of conducting Criminal Proceedings.

I have also particularly to request your Attention to the printed Report of the Committee of the Commons House of Assembly of Upper Canada, on the same Subject, made so long ago as February last; and I have appended a printed Circular, written by the Attorney General, apparently in consequence of that Report.

I have seen but have not Copies of the Answers to that Letter by some of the principal Lawyers of the Province; I allude particularly to those of the Treasurer of the Law Society and Mr. Washburn, Two of the most extensive Practitioners in York; and they fully coincide with the Report of the House of Assembly.

Nos. 6 and 7 are Pamphlets. The Circumstances therein mentioned have been made Matter of Investigation before the Court; the one relates to the Destruction of a Printing Press; the other to a fatal Duel, particularly alluded to by the Attorney General. The rough Notes of the Trial had thereupon,
which

which I made at the Time, I have entrusted to Mr. Hamilton, who will, if necessary, submit them for your Inspection.

Adverting to the Manner in which Criminal Prosecutions in the Province have been heretofore managed, if the Attorney together with the Solicitor General are to have, as they claim, the exclusive Conduct of all Criminal Prosecutions, contrary to the Practice in England, where they are open to the Bar in general, and which, I humbly submit, ought to be the Case in Upper Canada, then I respectfully take leave to affirm they are bound to prosecute for all notorious Public Offences that may come fairly within their own Knowledge, though no Application for that Purpose be made by the Person injured, or even though he be unwilling, or perhaps afraid, to prosecute; "for although," as has been well observed, "a private Citizen may dispense with Satisfaction for a private Injury, he cannot remove the Necessity of Public Example. The Right of punishing belongs not to the Individual in particular, but to Society in general, or the Sovereign who represents that Society; and although a Man may renounce his own private Right, he cannot give up that of others."

These Principles appear to me to apply not less strongly to those who claim to have the Management of Prosecutions so expressly delegated to them, as to be exclusively entitled to Public Remuneration on their Account.

Adverting, in the next Place, to my not having interrupted the Person named Collins in his Address to the Court, I cannot but remark, that it surprises me not a little that it should be imputed to me, as Matter of Blame, by the Attorney General, that I should have permitted a Man personally to complain, in open Court, of a Suppression or Perversion of Justice.

With regard to this, I need only refer to the Practice in this Country in similar Cases; and I submit whether, when sitting to administer those Laws which are or should be open to all, I should have been warranted in stopping the Mouth of any Person demanding Justice, and more particularly when professing to make a Charge of Misconduct against an Officer who claims exclusively the Power of instituting or permitting Criminal Prosecutions. The Attorney General himself remarks, "that, perhaps, receiving the Complaint, and permitting Collins to become Prosecutor, was inevitable."

The vindictive Motives attributed to that Person, or the Pendency of Prosecutions against him for Libel, could obviously form no Bar to his Complaint being heard by the Court; more especially, as I had not at the Time any official Knowledge of any such Prosecutions being instituted, nor had there been any Arraignment or Conviction, and I was, moreover, totally unacquainted even with the Person of the Complainant, until he himself, in opening his Application, announced his Name.

With respect to the Trial for Murder, which the Attorney General seems to insinuate ought not to have taken place in consequence of the previous Acquittal of the Principal, I shall only observe, that Lord Hale says, "that if A and B be arraigned on an Indictment for Murder or Manslaughter, they may receive Judgment of Convict, though C, who struck the Blow, neither appear nor be outlawed, and even though he may have been acquitted; for all who are present aiding and abetting when a Murder is committed are Principals."

As to the Attorney General's Notice of the Penalty imposed on the convicted Rioters, I have always understood that the Amount of Punishment for Offences, (subject, of course, to the Legislative Provisions,) rested solely with the Judge. And with regard to the Proceedings against the Person indicted for Libel having been stayed by my Advice, I conceive that a Judge has the Discretion (frequently exercised) of recommending such Measures in accordance with Law as may tend to extinguish local Feuds, and to promote the Peace of Society.

In Explanation of my Motives with Reference to the Prosecution for Riot, and my recommending (though certainly I did not do so judicially, however warranted, as I expressly declared,) a Suspension of Proceedings in the Cases of alleged Libel, I may further remark that in the former, the Case of Riot, when it was previously tried as a Civil Injury, the Facts of Outrage were

brought and proved before the Public, and a Verdict recorded for the Plaintiff in that Action, and in the Presence, as I am informed, of the Attorney General; establishing the Fact of a very gross Violation of the Public Peace having been committed, of which, therefore, he could not have been ignorant.

In the latter, the Cases of Libel, from the Connexion of the alleged Libels, as it was stated by the Counsel for the Defendant, with the immediately preceding Trial for Murder, the Peace and Harmony of Society, the Restoration of which seemed so earnestly to be desired, could by no means, I apprehend, have been so effectually promoted as by the Postponement or Relinquishment of the Trial of the alleged Libels, and this Course, therefore, I ventured, though as I before said, not judicially, to recommend.

I shall offer no Comment upon the Language and Demeanour of the Attorney General, who is also a practising Attorney, and as such an Officer of the Court.

To Mr. Robinson, and every other Person in the Colony, I trust I have no other Feeling than that of Charity and Good-will, nor have any Party or Political or other Motives but those of long-cherished Veneration and Love for my Sovereign, and an earnest Desire to dispense Justice impartially to all ever actuated my Conduct.

I trust I shall not be deemed disrespectful in expressing my Surprise that the Provincial Government has not hitherto officially notified to you the Fact of my Amoval, together with such Grounds as have been alleged by Major Hillier for a Measure so severe, and so much at Variance with British Notions of the Independence of the Judicial Office.

It must be borne in Mind, that above Two Months ago, having been most unwarrantably deprived of the high Office of Judge confided to me by my gracious Sovereign, I have been and am unjustly undergoing a most severe and harassing Penalty for a supposed Offence, without my being afforded an Opportunity of answering it; and I am thus placed in a Situation in which the Justice of our Country does not permit the meanest or most guilty Individual to remain.

I have the Honour to be,

Sir,

To the Right Hon. the Secretary of State,
Colonial Department.

Your most obedient Servant,
JOHN WALPOLE WILLIS.

Should my Explanation not be deemed by His Majesty's Government sufficiently explicit, I am quite prepared to enter into the minutest Detail, taking Mr. Attorney General Robinson's Statement and Letter Sentence by Sentence.

Inclosure, No. 1.

Sir,

York, Upper Canada, 12th April 1828.

As Judge of Assize, Yesterday, I stated that the Law Officers of the Crown (who have hitherto always conducted, and who alone are paid by the Public for all Criminal Prosecutions in this Province,) were, in my Opinion, bound to prosecute all Crimes which they know have been committed, of their own Accord; but the Attorney General, certainly not in so courteous a Manner as the Bench is usually addressed in England, disclaimed that Duty, admitting, however, that he and the Solicitor General were the Public Prosecutors. I then said, the Question must be decided by the Government; and as nothing can be more necessary for the due Administration of Justice than that the Source from which all Public Prosecutions must originate should be distinctly understood, I do not think I should honestly discharge the Duties of my Office did I not respectfully submit this Matter to your Excellency's Notice.

I have the Honour to remain,

Sir,

Your Excellency's most obedient and very humble Servant,
(Signed) JOHN WALPOLE WILLIS.

To his Excellency the Lieutenant Governor,
&c. &c. &c.

Sir,

York, Upper Canada, 14th April 1828.

I AM sorry to have occasion to appeal for a Decision respecting the Duties of the Attorney General of this Province, who now repudiates (as I understand him) what he stated on Friday last, namely, that Criminal Prosecutions in this Province are, as in England, open to the Bar; and he has this Day, in open Court, further asserted that, as His Majesty's Attorney General for this Province, he is answerable for his Conduct, in his legal Capacity, not to any of His Majesty's Judges of this Colony, but only to the King's Government. If this be so, the Question is, whether the Attorney General, who is not only a Barrister, but a practising Attorney and an Officer of the Court, or the Judge who presides, is to be superior? I had occasion publicly to notice the Mildness of the Criminal Law of England, and the Administration of it there *as it now stands*, as contrasted with that which is admitted into this Province, which is what it was in England in 1792; and I now call on your Excellency to observe the Improvements since that Period, and especially those recently made by the Right Honourable the Principal Secretary of State for the Home Department.

A Sense of Duty attached to the Dignity of my Office compels me, however reluctantly, to add, that the Language of the Attorney General was such that I could only tolerate it from his being an Officer of Government, and from my Wish, on that Account, not to obstruct the Public Business. In this Controversy, I entirely disclaim all personal Feeling. I do not, nor can I ever, condescend to entertain it on any Public Measure; but the Crisis has now arrived at which it must be determined how Criminal Prosecutions here are to be conducted, and how far the Law Officers of the Crown, as practising Attornies of the Court, are amenable to the Judges of the Province.

I have the Honour to be, &c.

(Signed) JOHN WALPOLE WILLIS.

To his Excellency the Lieutenant Governor,
&c. &c. &c.
Stanford Cottage.

Inclosure, No. 2.

York, Upper Canada, Spring Assizes 1828.

ON Sunday, April 6, the Chief Justice called on me to request I would assist him in the Business of the Assize, which he intended to open next Day. I immediately offered to give him every Aid in my Power, in case Mr. Justice Sherwood, who is my Senior, should decline, or be unable to act. On Monday 7th April the Commission was opened by the Chief Justice, and on the Tuesday and Wednesday following, Mr. Justice Sherwood presided, but on the latter Day addressed a Note to me declining to proceed, and saying that the Sheriff had received his Orders to attend me the following Morning. On Tuesday, previously to going into Court, I saw and conversed with Mr. Attorney General in the Robing Room, and I think it would not have been more than respectful had he entered the Court when it opened, particularly as it was the first Time I presided in Canada as Judge of Assize. Immediately after the Court was opened a Stranger addressed me, and said, he had an Application to make to the Court, if I would permit him, not being a Lawyer, to do so. I replied, "Most certainly; step forward that the Court may hear you." He said his Name was Francis Collins, Editor of the Canadian Freeman; that he had been indicted and arrested on Suspicion of Libels; that the Attorney General had acted partially and vindictively in proceeding against him, and not prosecuting Persons who had committed the grossest Outrage on the Peace of Society, by breaking into the House of the Editor of the Colonial Advocate, destroying his Press, and throwing his Types into the Lake; and although they had a Verdict recorded against them in a Civil Action at the Suit of the Individual they had injured, and the Trial took place in the Presence of the Attorney General, these Parties had not been prosecuted by the Law Officers of the Crown. About this Time the Attorney General entered the Court, and interrupting the Applicant, begged I would direct Mr. Collins to state the

Object

Object of his Motion, and hoped I would not allow the Public Business to be interrupted by a long Speech. I said, the Object of the Motion would be explained by Mr. Collins, and directed him to proceed. The Applicant then complained, in very energetic Language, that those who were concerned in the Destruction of the Press had not been indicted; and his Application to the Court was to compel the Attorney General to do his Duty by prosecuting these Offenders; and that he should also press for a Criminal Prosecution against H. J. Boulton, Esq. Solicitor General, and James Small, Esq. for the Murder of Mr. J. Ridout, and whose printed Confession of that Officer he then held in his Hand; and that those Prosecutions had been neglected by the Attorney General on the Ground of private Connection and Friendship. I then said, your proper Course is to go before the Grand Jury, which is now sitting, and they will receive any Complaint you may think proper to make, and I will take care that the Crown Officers do their Duty. Addressing myself to the Attorney General, I said, "If you have refrained from prosecuting the Rioters, as has been stated, I think you have very much neglected your Duty." The Attorney General replied, he did not consider it to be his Duty to prosecute any Person, unless Application had been previously made to him for that Purpose; that the Party seeking to prosecute ought in the first Instance to apply to a Magistrate, or the Grand Jury; that he was not nor would be a Thief-taker, or go about the Country to hunt for Evidence; that he had been 13 Years the Public Prosecutor in the Province; that he had uniformly pursued this Practice, which was the Practice also of his Predecessors. I then said, Mr. Attorney, I think you have pursued a wrong Course, and I do not think you have done your Duty as the Public Prosecutor in the Case mentioned to the Court. Why, I asked, were you placed here as a Public Prosecutor, but to prevent and punish Public Offences? and it is your Duty, whenever a Violation of the Public Peace is proved before you, to bind over those who are able to give Testimony, and institute a Public Persecution. I asked if he did not consider that he, the Attorney General, and the Solicitor General, had the exclusive Right to conduct all Criminal Prosecutions, or whether he admitted them to be open to the Bar in genera', as in England? I understood him to reply, he conceived them to be open to the Bar. I then asked, if the Expences would be allowed by Government to any other Gentleman who might conduct Criminal Prosecutions, except the Attorney and Solicitor General. He replied no. I then remarked that I considered, in the Case now complained of, he had not done his Duty. The Attorney General then said, "I think, my Lord, I know my Duty as well as any Judge on the Bench; and, however I may differ in Opinion from your Lordship, or any other Judge of the Court, I shall continue to pursue the same Course." I then said, Then if you know your Duty, Sir, you have neglected to perform it; you have uniformly acted improperly, and as you say you will persevere in that Course, I, as a Judge of the Court of King's Bench, shall feel it my Duty to appeal to the Government to decide the Question. The Attorney General said, he was satisfied. Mr. Collins then proceeded, by saying he had more to communicate; and alluding in strong Terms of Animadversion to the Conduct of the Crown Officers, I said, I could not allow him to make any Observations calculated to asperse the Members of the Bar or the Magistracy, and desired Mr. Collins to proceed with his Charges before the Grand Jury, and I would take care that both they and the Crown Officers should do their Duty.

On the following Monday, a true Bill for the Murder and another for the Riot having been previously found by the Grand Jury, Mr. Robert Baldwin applied for Leave to conduct the Prosecution for Murder, as the private Counsel of the Party preferring the Charge; stating at the same Time, that after the Public Avowal the other Day made by the Attorney General, that Prosecutions were open to the Bar, he should not have made the Application, had not the Attorney General already prepared the Indictment on the Presentment of the Grand Jury, and proceeded in the Prosecution as a Matter of Right. I said, if the Attorney General would consent, there would be no Difficulty. The Attorney General then rose and said, that he wished to express his Sentiments publicly on this Occasion. That the Question involved Considerations of very great Importance, and he was glad of an Opportunity of doing

doing away with any Misapprehension of what had fallen from him on a former Day. That in almost all the Countries in Europe, with the Exception of England and Ireland, and in the Colonies, Prosecutions in Criminal Charges were carried on by the Public Officer; and this had been considered the most effectual Way of promoting the Ends of Justice, as it was for the Sake of Justice, and not to gratify the Feelings of Individuals, that such Prosecutions were instituted. He alluded to France, Scotland, and the United States; and in the Disputes in Upper Canada between the Hudson's Bay and North West Companies, he said, when he and the private Counsel differed as to the Amount of the Offence, he referred the Parties to the Grand Jury, and thus exonerated himself from Responsibility. He then consented to give up the Prosecution in this Case to Mr. Baldwin. On this I took Occasion to observe, that I had been accustomed to the Proceedings in the Courts in England; and although I had not much personal Experience in Criminal Practice, I was acquainted with the Manner of Proceeding, and with those who had been very much engaged in it. My Opinion was, that when the Criminal Law of England was adopted in Upper Canada, the Practice of the English Courts was also adopted. That the Criminal Law of England was at present more mild and lenient in its Provisions than the Law of the Province, and its Mildness was even surpassed by the Manner in which it was administered. I considered it to be the Duty of the Attorney General to enquire into all notorious Offences which came within his Knowledge; and though I did not expect the Public Prosecutor to become a Thief-taker, yet, when he knew of an Offence, it was his Duty not to pass it over. The Practice in this Province, as stated on a former Day by the Attorney General, did not agree with my Notions as to the Duties of that Officer; and I had laid a Statement before the Government, in order that it might be transmitted to England, where it would be decided how far I was right in expressing the Opinion I had given. The Attorney said, "he was Attorney General to His Majesty and not to me, and he would act as he believed to be right, however he might differ in Opinion from me." I then said, "If the Interests of the Crown had not been concerned, I would not have admitted any Debate on the Question; but I was sure His Majesty's Government would protect me from Insult, when, in the Exercise of my judicial Functions, I stated to any Public Officer what I conceived the Duties of that Office to be." The Attorney General, "And will also protect His Majesty's Officers in the Execution of their Duty." I desired him not to reply to the Bench.

On the Thursday following, previously to the Arraignment of the Rioters, Mr. Robert Baldwin again applied for Leave to conduct the Prosecution. The Attorney General opposed it; and I stated, that until the Question was decided by higher Authority the Practice must continue, and the Attorney General in consequence proceeded.

When the Trial for Murder ended, I said, I trusted that, with the Trial, all the Circumstances connected with the unhappy Events would, for the Peace of Society, and in compassion to the Feelings of the Individuals connected with the Parties, be for ever buried in Oblivion.

A Proposal was then made by Mr. J. Rolph, as Counsel for Mr. Collins, the Defendant in some Libel Cases which Mr. Rolph stated to be connected with the Trial that had just terminated, that the Indictments for Libel should be withdrawn. This the Attorney General refused. I afterwards took Occasion to say, begging, however, that I might not be considered as speaking judicially, that I hoped every thing would be done to promote Peace and Harmony, and allay Irritation; and that, if the Libels were not very bad, I hoped the Prosecution would not be pressed. The Attorney General asked me if I knew what they were? I said, No, indeed, I do not. He then said, Will your Lordship read them, and then say whether I ought to proceed or not. I answered, Certainly not; it is Time enough for me to become acquainted with them when they shall be legally before me. After consulting with his Clients, the Prosecutors in the Libel Cases, as the Attorney called them, Mr. J. H. Boulton and Mr. Jarvis, both materially implicated in the fatal Duel, and out of the Circumstances which attended it, I understood the alleged Libels to have arisen. The Attorney General said, after a Statement of his Consent had been publicly made by Mr. Boulton, that he (the Attorney) would consent to

withdraw all such Prosecutions for Libel as had not originated on Presentments of the Grand Jury; and those he would allow to stand over till the next Assizes, as a Security for the good Conduct of the Press. To this I replied, that I thought both he and the Solicitor General acted very leniently; and, in order to shew the Conductors of the Press the Responsibility they laboured under, I would take that Occasion of reading to them what Sir William Blackstone said on Libel. Mr. R. Baldwin then said, his Client did not like any Proceeding to be kept hanging over his Head; and as Mr. Rolph, his Leader, was absent, he could not consent to those Terms, but would rather the Business should proceed. I said, Now, don't consider me as Judge, but allow me to be your Counsel, and I will undertake to settle with Mr. Rolph for you, so that all this unhappy Business may be set at rest. The Trial of the Rioters, of whom Mr. J. P. Jarvis, the Deputy Secretary of the Province, was the Ringleader, then proceeded, and the Parties were convicted, though the Evidence, in my Opinion, was far from strong; and, if I may hazard a Conjecture, their own Admissions had great Weight with the Jury. Mr. Jarvis, it will be recollected, was concerned in the Prosecutions for Libel in consequence of Remarks on the Duel in which he had borne so conspicuous a Part. Mr. Jarvis is the Deputy Secretary of the Province. The Defendants were all young Men of most respectable Connections, and engaged in professional or mercantile Pursuits. Mr. Lyons was indeed also an Officer of Government. A large Sum had been paid in consequence of the Verdict against them in the Civil Action. I considered the Public Conviction on that Occasion as going far towards satisfying Public Justice. Imprisonment would have probably deprived them of their future Livelihood. They had suffered the Punishment of being held up to Public Reprobation by the Newspapers almost constantly from the Time the Outrage was committed, and this was urged most strongly by Mr. McCaul, their Counsel, on their Behalf. Leniency to Men of liberal Minds would, in my Opinion, be a greater Punishment, and have a better Effect than Harshness.

Under these Circumstances I ordered them to pay a Fine of Five Shillings, and be discharged; and I had, even before the Trial, suggested the Propriety of their pleading guilty, and throwing themselves upon the Mercy of the Court. Had the Attorney General permitted Mr. R. Baldwin to have conducted this Prosecution, the Government would not have been put to the Expence complained of by the Attorney General, for he expressly states that the Expences of Prosecutions are only allowed by Government when the Proceedings are conducted by the Law Officers of the Crown.

With this Trial ended my judicial Functions at that Period. Mr. Justice Sherwood having presided on the following Day, for the Purpose only, as it was imagined, of passing Sentence on the Prisoners convicted before him; but other Business and Discussions respecting the Libels arose, in which I had no Participation. I ought perhaps to have stated, that the Libels were originated by the Editor of the Colonial Advocate attributing the Crime of Murder to Mr. Jarvis, and by Mr. Jarvis publishing a Vindication of himself in a Paper appended to the Government Official Gazette.

On the last Day of Easter Term last I had Occasion to deliver my Opinion on a Motion for a new Trial, in an Action brought by George Rolph, Esq., against J. G. Simons, — Hamilton, and — Robertson, Esquires, all Persons of the highest Rank in the Province. The Case was this:—At the previous Assizes in the Gore District, Mr. Rolph brought his Action against the Defendants to recover Damages for the Injury he had sustained by being taken from his Bed in the Middle of the Night by the Defendants, who entered his House for that Purpose, and dragged him to an adjoining Field, where he was tarred and covered with Feathers taken from one of the Pillows of the Bed on which he had been sleeping. He obtained a Verdict against them, but with trifling Damages, in consequence of the alleged Abstraction of some material Witnesses, and of some other Persons refusing to give Testimony when required, on the Ground that they feared to criminate themselves by so doing. The Solicitor General was Counsel for the Defendants. In delivering my Opinion I said,—“The Solicitor General, in shewing Cause against the Rule, as I understood him, began by stating that this was an Aggression against the Public
“ Peace,

" Peace, and a fit Subject for a Criminal Prosecution. In this I entirely agree
 " with him, and I only regret that he, as the only Law Officer of the Crown
 " on the Circuit where the Offence was committed, and who, therefore, as
 " such, was entitled, according to what I am told is the present Practice, to
 " the exclusive Privilege of being employed in all Criminal Prosecutions,
 " should, by defending those who were charged with the Outrage, have possibly
 " prevented an earlier Appeal to those Laws which have been made for the
 " Protection and Peace, not only of Individuals, but of the whole Community.
 " When the Officer whose Duty it is to enforce Obedience to the Law appears
 " in a Civil Action to defend those who have transgressed it, Lord Coke's
 " Axiom, '*Oderunt peccare mali formidine pœna.*' holds good no longer; for
 " how I would ask, can those whose Conduct is defended by the Public Prose-
 " cutor stand in awe of Public Punishment for that very Conduct?"

The Solicitor General pressed to be heard in Explanation of his Conduct.
 He said, " I was retained in the Civil Action, and a Civil Action does not
 " necessarily involve a Criminal Prosecution. I could not foresee it. I was
 " retained in the Civil Suit before the Assizes, and it was no Part of my Duty
 " to hurt up whether Criminal Proceedings would take place. Such has been
 " my Practice since I held His Majesty's Commission, and such shall always
 " be my Practice while I continue to do so. I have been acting as His
 " Majesty's Solicitor General for Ten Years. If I am wrong, I suppose I shall
 " not hold that Situation much longer; and in that Case, perhaps, the shorter
 " Time the better. It is not a Part of my Duty to hunt up Cases. The
 " Public Prosecutor is known in this Province to receive pay for his Services;
 " and if I were to go about hunting up Prosecutions I should be charged with
 " doing it for the Purposes of filthy Lucre. The Plaintiff made no Attempt to
 " engage me on his Side before the Action was brought, although my Services
 " were equally within the Reach of both Parties; and the Plaintiff must have
 " known the first that he was going to bring the Action. Had I been
 " officious it might have been said that I did it to injure the Civil Action
 " which was pending, and to lessen the Damages."

I said, " When a Public Prosecutor is retained to defend the Civil Injury it
 " must deter the Person against whom he has acted from applying to him; it
 " is the natural Consequence."

Mr. Justice Sherwood.—" The Party injured had Redress without the Aid
 " of the Solicitor. He might apply to the Grand Jury, or to the Judge, or to
 " a Magistrate. I should be sorry to have it said there was no Road to Justice
 " but through the Crown Officers. The Grand Jury, if they had been applied
 " to, would have found a Bill, and the Court would see that it was properly
 " proceeded in, and the Solicitor, I am sure, would have done his Duty. If
 " he did not, the Court would have taken care that the Case did not suffer
 " from Want of his Exertion."

I said, " Undoubtedly a Party may so prefer his Complaint before the Grand
 " Jury or a Magistrate; but who is to conduct the Prosecution for him?—
 " Who is to draw the Indictment? Who is to summon the Witnesses and
 " arraign the Evidence? From the Nature of the Human Mind it cannot
 " be free from Prejudice. A Man cannot, and ought not, in the Administration
 " of Justice, be engaged on one Side To-day and on the other Side To-morrow,
 " whether his Services be rendered to a private Individual or to the Public.
 " If a Man do not, under such Circumstances, suspect himself, others will
 " suspect him."

Judge Sherwood.—" I mean to say that the Public Prosecutor was not
 bound to volunteer his Services."

I said, " But his Services should be open and unprejudiced, to be rendered
 " to the Person injured, if he held himself out as a Public Prosecutor, to the
 " Exclusion of others; and in all flagrant Cases coming to his Knowledge he
 " ought, if a Public Prosecutor, to prosecute. However, I have taken Steps
 " as far as lay in my Power to procure the Opinion of His Majesty's Govern-
 " ment on these Points, and until that is done, the Practice will, I am sure,
 " remain as it has been."

The Attorney General—" I should have hoped, until this Matter was
 " decided in England, my Learned Friend and myself would have been spared
 " these

“ these unpleasant Observations. For my own Part I cannot see any Evil to arise from the Public Prosecutor being engaged in the Civil Action for the same Offence ; yet I may safely allege I never was so situated.”
Judge Sherwood — “ I give no Opinion as to the Propriety of being engaged in the Civil Action.”

Such, then, according to the best of my Belief and Impression, is a true Statement of what has occurred upon these Subjects. The Circumstances took place in open Court, and can therefore be confirmed, or, if incorrect, contradicted by Numbers.

I therefore humbly submit this Detail to your particular Consideration.
(Signed) JOHN WALPOLE WILLIS.

Inclosure, No. 3.

Copy of a Report of the Select Committee, to whom was referred the Petition of William Forsyth ; with the Testimony of Evidence examined thereon.

[For this Document, see p. 180.]

Inclosure, No. 4.

Circular from J. W. Robinson, Attorney General, on the Subject of Public Prosecutions.

[For this Document, see p. 179.]

Inclosure, No. 5.

A Contradiction of the Libel, under the Signature of “ A Relative,” published in the *Canadian Freeman* of the 28th February 1828 ; together with a few Remarks, tracing the Origin of the unfriendly Feeling which ultimately led to the unhappy Affair to which that Libel refers. By Samuel P. Jarvis. 14th March 1828.

The Libel. — For the *Canadian Freeman*.

To the Public. — I have for a long Time intended to make known to the World the lamentable Fate of the Youth Mr. John Ridout, and the Circumstances relating to his untimely End. For Ten Years I have waited for a favourable Opportunity to bring the Matter forward. The Hour has now arrived, and I shall not let it pass by ; they have laid their own Snare, and let them be taken in their own Toils.

In a Pamphlet lately printed by the King’s Printer, entitled a “ Statement of Facts, &c.” Samuel P. Jarvis, the Destroyer of this lamented Youth, endeavours to justify his Conduct by stating, that he “ acted under a fatal Necessity which the Condition of Human Society imposes, and surrendered himself unhesitatingly to the Officers of Justice.”

In the U. E. Loyalist of the 16th Instant, himself or some one of his Friends again alludes to the same unfortunate Transaction, under the Signature of “ A Subscriber,” and makes the following Assertion : —

“ Mr. Jarvis, though unfortunate, is known to have acted an honourable and upright Part ; and his subsequent Conduct, in surrendering himself to the Officers of Justice, and enduring a long and painful Imprisonment, which ended in a Public Trial, at which he was honourably acquitted by a Jury of his Country, has reflected that *Credit upon his Character* which such Calumniators as the Editors of the *Advocate* and *Freeman* can never injure.”

I cannot suffer the foregoing to pass unnoticed, and shall therefore contradict it in every Sense of the Word, as it is well known here that a great Crime

was

was committed, and that a mock Trial followed. Thus has the Murder of a Boy served to be a Boast, and to exalt the Character of his Slayer, and to reflect that "*Credul*" upon him which (as his Friends say) no Calumniator can destroy. But Truth can destroy it; and therefore I have undertaken the painful Task of submitting the following Statement of Facts upon this melancholy Subject:—

The following is a Narrative of the Life of the late John Ridout, and of the Circumstances attending his untimely Death, at the early Age of Eighteen Years and Six Months, by a Murder committed upon him by Samuel P. Jarvis, on the Morning of the 12th July 1817.

John Ridout was born in this Town, on the 9th January 1799. When Nine Years old, his Father took him to England, and sent him, as an Out-scholar, to the Blue Coat School in London. In about Six Months after his Father's Return to this Country, he begged that he might also return Home; he did so, and went to School at Kingston, under Mr. Whitelaw.

On the breaking out of the American War, in June 1812, General Brock having taken much Notice of him, appointed him Midshipman in the Provincial Navy, and he served that Year on Lake Ontario. He passed the following Winter at Home, doing Duty here. On the Capture of this Town, in April 1813, he was taken Prisoner, but was suffered to remain on Parole for several Months. In December of that Year, One of his Brothers was appointed Deputy Assistant Commissary General, and stationed at Cornwall, in the Eastern District of this Province. As soon as he took Charge, being desirous to provide better for his Brother John than the Prospects in the Provincial Navy afforded, he applied to Commissary General Sir William Robinson for a Situation for him, and he was appointed a Commissariat Clerk in February 1814, at the Age of Fifteen Years, and served with him during the Remainder of the War. At that early Age, he was so good a Boy, and possessed such Abilities, that he was placed in Charge of a Depôt, about 25 Miles from Cornwall, where he supplied in Succession, as they were cantoned, the 5th, 9th, and 81st Regiments for about Three Months.

In June 1815, the War being ended, and many Establishments broken up, they were ordered to Quebec, where he served until August 1816. At the great Reduction of the Army about that Time, he was discharged, with a Gratuity of Six Months Pay, and a very kind and handsome Letter from the Commissary General. He then once more returned Home, with a happy Heart, beloved by all who knew him, was artieled as a Student at Law to his Brother George, and faithfully performed his Duty, as he always had done, from the Commencement of his early Public Career. But Clouds were gathering around his youthful Brow, and his beauteous Form was soon to feel the *Murderer's* Blow. He who never had a Quarrel or Dispute with any of his Companions, was soon to suffer from the malignant Vengeance of an implacable Enemy.

In the early Part of July 1817 his Brother George was conducting a Suit in the Court of King's Bench against Mr. Secretary Jarvis, and in the Course of Process it was necessary that Samuel P. Jarvis should prove the Execution of a Paper, signed by his Father, which he had witnessed. Accordingly, after calling several Times, on Saturday the 5th July John met him at the Office of the Secretary of the Province, and requested him to prove the Execution of the Paper in the Crown Office. He (Samuel P. Jarvis) became very indignant at this, abused John, and turned him out of the House. Nothing of this was known to his Brothers; but on the Wednesday following he met Samuel P. Jarvis and Mr. George Markland, walking in the Street opposite where Dr. Widmer's House was then building, and attacked him for his Conduct on Saturday, which had been so unprovoked; struck him, or both struck at the same Time, John saying that he was his Match in the open Street, although he (Jarvis) had taken Advantage of him in his Father's House, surrounded by his Clerks. During the Contest, Jarvis seized a large Stone, in order to hurl it at John's Head, but he caught his Arm: and they were separated. This Conduct, arising from the wounded Feelings of a Youth of 18, cannot be considered extraordinary or improper, when his Antagonist was Seven Years his superior in Years, and had given so much Provocation.

When his Brother T. G. Ridout heard of the Affair, and that his Brother George had gone to Jarvis and taken the whole upon himself, as it was in his Service poor John met the Insult, he considered that with respect to John it would end there, as he was only a Youth and a Student at Law, and the other 25 Years old and a Barrister of the Court. But in this he was mistaken.

On Thursday the 10th July Samuel P. Jarvis went up Yonge Street, on pretence of accompanying his Grandfather, Dr. Peters, to Lake Simcoe; but he only went as far as Dye's Tavern, 12 Miles from Town, and remained there until Friday Afternoon, when he came in to a Party at Chief Justice Powell's.

On the same Afternoon, Mr. Henry John Boulton, then 28 Years of Age, and acting Solicitor General, delivered a Challenge at Mr. Small's to John Ridout, who agreed to meet Jarvis at Elmsley's Farm, the next Morning, at Day-light; about which Time, John, accompanied by James E. Small, then a Youth of 19 Years of Age and a Half, and a Student at Law, went out to the Field. It being too early, John lay down on a Log and slept at Intervals until the Break of Day at Three o'Clock, at which Time they saw Jarvis and Boulton coming towards them. They met: the Ground was marked at Eight Paces Distance. By mistaking the Second Word (owing to a stronger Emphasis being placed upon it by J. H. Boulton,) for the Third, John fired. Perceiving his Error, he immediately ran up to Jarvis, and said, "O Jarvis, I hope I have not hurt you." His Reply was, "Go back to your Ground, d—n you."

Mr. Small here interfered, and wished the Matter settled amicably, but they would not. Mr. Small then insisted that John should not be unarmed, but allowed to reload his Pistol; that was over-ruled by Henry J. Boulton and Jarvis, and Boulton decided that he must stand his Ground and receive a Shot without returning it. John took his Ground, saying, "If it must be so, it must." He stood unarmed as he was; Jarvis fired, saying, "There, d—n you." John fell, crying, "Oh! you have killed me; it was foul Play." At that awful Moment a Clap of Thunder rent the Skies, and Lightning flashed, and the Rain came down in Torrents. After a few Minutes, he spoke, and held out his Hand, saying, "Jarvis, I forgive you." After a little while, John fainted; Henry J. Boulton approached him, and with his Foot stirred his Body — yes, put his Foot on the sacred Body of a gallant Boy, and said, "Let us go, he is dead." The Three then fled to Town, leaving the dear Youth alone in the Agonies of Death, vomiting up Blood.

I believe Mr. Small went or sent to George Playter, the Deputy Sheriff, and D. Forest, and sent them out to the Field. George Playter was the first who arrived. It was then raining, with Thunder and Lightning; he found John was then, and had been, lying in a Pool of Blood and Water. When he saw Playter, he stretched out his Hand, and said, "Is that you, Playter, where is James Small? Where is Jarvis and Boulton? Ah! it was foul Play." D. Forest then came up with a Carriage. John was put into it, and expired as they came opposite Dr. Macaulay's House, his last Words being, "I forgive him, I forgive him. Tell my dear Mother not to grieve or lament for my early Death, for I am happy; in a few Minutes I shall meet my dear Sister Sally in Heaven." Then he said, "I forgive Sam. Jarvis, I forgive him." Thus ended this heart-rending Scene.

Now for a Moment consider the Ages of the Parties, and their Standing in Society, who thus acted in this Tragedy, and it will be seen that it was not an Affair between Boys and giddy Youths, as has been indistinguishably represented to all the new Inhabitants of this Town. They stood as follows:

Samuel P. Jarvis, aged 25 Years, a Barrister at Law and Deputy Secretary of the Province.

Henry J. Boulton, 28 Years, Acting Solicitor General.

James E. Small, 19 and a Half Years, Student at Law.

Such was the Disparity.

Samuel P. Jarvis then went Home, and the Sheriff that Morning took him out of a Root Cellar, where he had concealed himself. To shew the Light in which even his own Father viewed this horrible Affair, when he saw him he said, "Oh! Sam, how could you kill that darling Boy, the Flower of his Family?" He was his Godfather.

The

The Coroner's Inquest then was held at D. Forest's Tavern, during the sitting of which Henry J. Boulton walked down the main Street, towards Forest's Hotel, cool and apparently unconcerned, and asked somebody how all this happened, who were the Parties, &c., as if he knew nothing about it. The Jury brought in a Verdict of *Murder*, as appears by the annexed Copy of their Inquest.

Copy of the Coroner's Inquest.

An Inquisition, indented and taken for our Sovereign Lord the King, at York in the County of York, and Home District of the Province of Upper Canada, the Twelfth Day of July One thousand eight hundred and seventeen, before me, Thomas Hamilton, Coroner of our said Lord the King for said District, on View of the Body of John Ridout, then and there lying dead, upon the Oath of Thomas Stoyell and fellow Jurors, good and lawful Men of said District, being duly sworn, and charged to enquire for our Sovereign Lord the King, when, where, and by what Means the said John Ridout and one Samuel P. Jarvis did disagree and for some Time did quarrel, until at length they the said John Ridout and the said Samuel P. Jarvis did challenge each other to end their Dispute by fighting; and that the said Samuel P. Jarvis, not having the Fear of God before his Eyes, but moved and seduced by the Instigation of the Devil, on the Twelfth Day of July in the Year aforesaid, with Force and Arms, in a Field commonly called Elmsley Field in the Township of York aforesaid, did make an Assault; and that the said Samuel P. Jarvis, with a certain Pistol of the Value of 10 Shillings, charged with Gunpowder and a Leaden Bullet, which he then and there held in his Right Hand, to and against the Body of him the said John Ridout, did then and there shoot off and discharge, by means whereof he the said Samuel P. Jarvis feloniously, wilfully, and of his Malice aforethought, did then and there give unto him the said John Ridout, with the Leaden Bullet aforesaid, so as aforesaid shot off and discharged out of the Pistol aforesaid, by Force of the Gunpowder aforesaid, in and upon the Right Shoulder of him the said John Ridout, One mortal Wound, penetrating the Shoulder, Neck, and Jugular Vein, from thence to the Windpipe of him the said John Ridout, of which mortal Wound he the said John Ridout then and there instantly died; and so the Jurors aforesaid, on their Oath aforesaid, do say, that the said Samuel P. Jarvis him the said John Ridout, in the Manner and Form aforesaid, feloniously, wilfully, and of his Malice aforethought, did kill and murder, against the Peace of our Lord the King, His Crown and Dignity.

And the Jurors aforesaid, upon their Oath aforesaid, do say, that James E. Small and Henry J. Boulton, both of the same Place, Gentlemen, at the Time of the doing and committing of the Murder aforesaid, feloniously were present, abetting, aiding, assisting, and maintaining the said Samuel P. Jarvis to kill and slay the said John Ridout in manner aforesaid, against the Peace of our said Lord the King, His Crown and Dignity; to which the Coroner, as well as the Jurors aforesaid, have hereto set their Hands and Seals the Day and Year above mentioned.

(Signed) THOMAS HAMILTON, Coroner.

(Signed) THOMAS STOYELL, Foreman, and others.

True Copy,
(Signed) T. Hamilton, Coroner.

Jarvis was committed to Prison; James Small fled to the United States; Henry J. Boulton remained in York, attending to his Office; and the Verdict of the Coroner's Inquest was handed over to Judge Boulton, then Attorney General, with the Evidence, in Writing. An Habeas Corpus was applied for in behalf of Jarvis; but John's Father remonstrating in strong Terms, Jarvis remained in Gaol until the October Assizes, with the Exception of the Evening of the 12th of August, when his Father died, and he was allowed to visit him.

In the meantime John's Father sent out Mr. Alexander Stewart as far as Albany, to bring in James Small to give Evidence. He came back with him, but refused to be a Witness, and was put in Gaol, where he remained until the

Court

Court was over, and was then discharged "tried, in consequence of the Grand Jury having found a Bill of Manslaughter only, notwithstanding the Coroner's Inquest had found it *Murder*. Dr. Powell, soon after Brother-in-Law to Samuel P. Jarvis, was on the Grand Jury.

A RELATIVE.

Samuel P. Jarvis.—Above is the heart-rending Detail of the Slaughter of one of the finest Youths then in Upper Canada by this hardened Desperado. It is a simple Tale of Woe, written by a Relative of the deceased, and published by his Request, to ease the Bosoms that have long throbb'd with silent Sorrow. Had Jarvis observed that Caution that would have become his Situation, and not turned out as the *Leader of a lawless Band of official Desperadoes*, this Exposure of his bloody Deed would never have appeared. But when we see him acting the Braggadochio, following up a Course that puts all Law, both Human and Divine, at Defiance — when we see palliatory Histories of his Crimes published by the Authority of the Executive Government in the official Paper — when we see him elevated to Office, and swaggering through the Streets before an insulted Community, Arm-in-Arm with Attorney Generals and Judges, instead of standing at the Bar of Justice before these Officers to atone for his high Crimes — when he and Friends have the Effrontery to endeavour to stigmatize the *Freeman* as a "Calumniator," for speaking the Truth, then we think it is high Time for the *Freeman* to put him and his Faction at Defiance, and to bring out Facts that will make them hide their Heads. Let Jarvis and Boulton now come on, and account to a Christian Community, *if they can*, for the innocent Blood they have shed. Let Henry Boulton show how it was, that he, a settled Man of Twenty-eight or Thirty — that he, the acting Solicitor General of Upper Canada — that he, the second legal Adviser of the Crown in this Colony, was so unmanly, so base, so unprincipled, in the first place, as to carry a Challenge to a Boy of Eighteen Years of Age! Let Henry Boulton show how it was that he, so void of Honour and Manliness as to allow himself to be kicked out of a Public Office without resenting it, was the first to lead to a Field of Slaughter, like a Lamb to the Shambles, an innocent Youth of Eighteen Years — to have him butchered according to the Rules and Principles of Honour! Rules and Principles of which himself appears to be so grossly ignorant and utterly regardless! Let Henry Boulton show upon what Principle of Honour he over-ruled Mr. Small, and compelled this Boy to stand *unarmed* within *Eight Paces* of his cold-blooded Destroyer, to be shot down like a Target! Let Henry Boulton, as he is a Lawyer, give a Reason or show why he should not have long since been hanged by the Neck *like a Dog*, for his Conduct. Again, let Desperado Jarvis come out, and answer for the Blood of Mr. Ridout's Child; let him show why he assaulted an unoffending Boy, much his inferior in Years and Strength, in the first Place; let him show how it was, after otherwise insulting and abusing him, he thirsted like a Tiger for his Blood, and was the first to challenge; let him show how it was, that he, presuming to call himself a "Man of Character," could use such ungentlemanly, such ruffianly Language in the Field; let him show how it was, if he had not Murder seated in his Heart, as it seems to us pictured on his Brow, that when the heedless Boy's Pistol went off without Injury, and that he ran up to him with open Arms, he did not discharge his Pistol in the Air, and close Hands with his Father's Godchild. Finally, let old Judge Boulton come out, and tell, when this Murder was committed, why he did not show that Delicacy which he exhibited in Mr. Rendal's Case; and as he conducted the Proceedings in which his Son Henry stood charged with Murder, let him shew, if he can, that there was a fair impartial Trial. If they cannot answer these Questions satisfactorily, it is but right that the Truth should come out, and that the Country should know the real Character of the Men who enjoy the Patronage and Confidence of our Colonial Government.

A Con-

A Contradiction of the Libel published in the Canadian Freeman of the 28th February 1828, under the Signature of "A Relative."

The Canadian Freeman of the 28th February I perused on the Afternoon of that Day, and on the 1st of March I addressed the following Letter to James Fitzgibbon Esquire.

[*This Letter, with Mr. Fitzgibbon's Reply, transmitting a Statement of the Circumstances which attended the Ducl, have already been given at p. 57. et seq.*]

The History of the Destruction of the Colombian Advocate Press by Officers of the Provincial Government of Upper Canada, and Law Students of the Attorney and Solicitor General, in open Day, and in Presence of the Honourable William Allan, a Police Magistrate and Collector of the Customs, and Stephen Heward Esquire, Auditor General of the Colony. By William L. Mackenzie, Editor and Proprietor. Part II.

It was at Queenston I had the News of the Destruction of my Property on the 8th June; and I instantly took such Measures as appeared to me most judicious in order to obtain Redress. Mr. Small had been retained as Attorney by my Foreman; and I lost no Time in collecting all the Testimony I could obtain bearing upon the Transaction, a Copy of which I sent down to my legal Adviser, Mr. Bidwell, at Kingston. As the Names of Messrs. Allan and Heward had been omitted in the Action for Damages, I was not enabled to offer them that conspicuous Niche on the Trial which their Merits deserved, but I did hope that the Result of that Trial would enable me to do them still more ample Justice with the Public, through the Medium of the Press; and my Anticipations have not been blasted.

The Accounts published in the Canadian Freeman, and Kingston Herald, of June last were substantially correct; I therefore make such Selections from their Columns as may serve to introduce the Statements of Individuals who saw the Outrage.

(*From the Canadian Freeman of 15th June.*)

Atrocious Outrage! Total Destruction of the Printing Office of the Colonial Advocate.—On Thursday last a Set of Men, holding high and honourable Situations under the Colonial Government in this Town—a Set of Men, not irritated by Distress, disappointed Hopes, or political Degradation, but wallowing in Ease and Comfort—basking in the Sunshine of Royal Favour—enjoying every Right and Privilege of Freemen—and cheered by the Toils of a loyal, peaceable, and industrious Population—formed themselves into a Conspiracy against the Laws of the Country—a Conspiracy against the Liberty of the Press—a Conspiracy against the Public Peace—and between the Hours of Six and Seven o'Clock in the Evening, while the great Enemy of Guilt as yet lingered above the Horizon to restrain the Arm of the ordinary Desperado, they attacked the Printing Office of the *Colonial Advocate*, broke open the Door in the Presence of several Witnesses, and demolished Press, Types, Forms, Sticks, Cases, Frames, Gallies, Stands, &c. &c., until the whole Materials, which were new and of the first Quality, exhibited nothing but one Heap of Ruins. Lest the Types might be picked up again and turned to some Advantage, large Quantities of them were carried down on the Merchant's Wharf and thrown into the Lake! All this, we are informed, was carried on in the Presence of Two Magistrates, who viewed the Work of Destruction with silent Complacency! *Two British Magistrates! O! clarum et venerabile nomen!* Two Police Magistrates of little York, it is said, stood coolly gazing on the open Violation of all Law, both human and divine, while the Son of one of them was engaged in the Work! *O! tempora! O! mores!* Where is the Majesty of *British Law*, which says "every Man's House is his Castle?" Where are the Thunders of *British Protection*, whose Peals have been heard in

the uttermost Ends of the Earth, and struck Terror into the Hearts of the most distant and most ferocious of the Children of Adam? Are they to be despised and set at nought by the official Desperadoes of *little York* alone? By the Laws of England a Man's House is his Castle, no Matter what his public or private Conduct may be; but in *little York* it seems that a Man's House is his Castle only while he crouches to official Arrogance and licks the Hand of petty Tyranny; and the Moment that the Dignity of his Nature recoils from Servility, his Castle is to be razed to the very Ground!

By this audacious Outrage the Liberty of the Press has been assailed, the Majesty of the Law offended, the Repose of private Life disturbed, the Rights of private Property violated, the Feelings of a respectable Community insulted, Public Opinion set at defiance, and a Precedent established by the very Officers of Government — Men moving in the first Circles in the Colony — which, if followed by the lower Orders, must overturn the Foundations of Civil Society. What will the enlightened People of the United States say — what will the World say — when they hear that Emissaries from the very Office of the Governor, assisted by high official Men, broke open the private House of a British Subject in open Day, in the Metropolis of a British Colony, and laid waste his Property in the Presence of Two British Magistrates? What will they say when they hear that after this nefarious Outrage had thrown the Seat of Government into one common Ferment, and that Placards on the Subject were posted up in every Corner of the Town for Two Days, the official Gazette was published, and not only was there no Proclamation issued against the Conspirators, but, behold, *it is not even noticed by the official Editor!* Does not this official Connivance speak Volumes? Does it not show that this Transaction took its Rise in no common Source, when the Plan was executed by Men in the Pay and the Confidence of the Executive, and connived at by the official Gazette? What will be said of the free and independent People of York, if they allow the fearless Sentinel of their Rights and Liberties, a Free Press, to be overpowered by main Force in their Streets, and publicly strangled in their Presence, without lifting up their united Voices against it, and calling upon the Chief Magistrate to bring the Offenders to condign Punishment? If this Outrage be permitted to pass unnoticed, whose Property, or even Life, can be said to be safe?

In unhappy Ireland, under the Administration of British Law, a Man is torn from the Bosom of his Family, severed from his Friends and from his Country, and transported for *Seven Years*, without Judge or Jury, but at the Mandate of *Two or more Magistrates*, for the simple Crime of being absent from his Dwelling between the Hours of Sun-set and Sun-rise. In *little York*, under the Administration of British Law, the private Dwelling of an Inhabitant is broken open, and his private Property destroyed, in the Presence of *Two Magistrates*; yet the Perpetrators of this foul Deed walk abroad unmolested, and enjoy high and confidential Offices of Trust and Emolument under the Colonial Government!

By the flagitious Outrage here alluded to, the People of Upper Canada are thrown into a State of Consternation and Alarm, — Consternation at the unblushing Audacity of the Conspirators, and Alarm for the Safety of their Lives and Property in a Country where such Desperadoes are in the Pay and the Confidence of the Government. Nine of the Conspirators have been identified and sworn to; and, in order to give the People a correct Idea of the Thing, it is necessary for us to state, that *Five or Six* of the *Nine* are employed in the Offices of the Governor, the Attorney General, and the Solicitor General, as Clerks and Law Students!!! What will the patriotic Doctor Lafferty say, at the next Meeting of Parliament, when the Attorney General, in the loyal "*Zeal of the Son of a U. E. Loyalist*," exclaims "that the Americans invaded our Country, ransacked our Towns, *destroyed our Property, and murdered our Wives and Children?*" We think we see the Doctor's indignant Brow lowering upon him with the following appropriate Retort: "Yes, Sir, the Americans invaded us, and destroyed our Property as "*Enemies in open War*; but *Three Emissaries*, as I am informed, from your "*Office, and in your Employment, invaded the private Abode of a Fellow-subject, and destroyed his Property, in Times of profound Peace*; yet they "*afterwards remained in your Employment, and enjoyed your Confidence.*"

What

What appears most extraordinary in this Business is that the official Gazette has been published a *Second Time* since the Outrage was committed, without ever alluding to it; and to this Circumstance, coupled with the Situations of the Conspirators, we wish particularly to direct the Public Attention.

(From the Upper Canada Kingston Herald of 20th June.)

Patrician Riot at York.

Such an Annihilation of valuable Property — such a daring Breach of the Peace, in the Face of the Government — such an Insult upon the Laws — such a Conspiracy and Outrage against the Freedom of the Press, the Palladium of Civil Rights — was never before witnessed in this Province, or any other Colony under the Protection of British Government and Law. The Riot was perpetrated with Deliberation and manifest Concert; with what the Lawyers call “Malice prepense.” The Perpetrators of it are said to be attached to or connected with, and as it were set on, and delegated from, almost all the Public Offices in York; from the Lieutenant Governor’s Office down to that of the Clerk of the Peace. It is also stated to have been committed in the Presence of Two Magistrates, who stood upon the Bank while the Rioters, among whom was a Son of one of them, were riotously carrying the Types from the Office to the Bay; and these exemplary Conservators of the Peace, one of them a Legislative Councillor, and both of them loaded with Public Offices, witnessed the Riot with apparent Satisfaction, at least without any Attempt to prevent the Violation of Law and Destruction of Property. It is so stated; but, for the Honour of the Government and the Province, we cannot but hope there is some Mistake in the Statement of so glaring and scandalous a Fact.

The Opponents of the Advocate, having the Administration of the Civil Law in their own Hands, had no Occasion to resort to Mob Law. It is a pernicious Precedent; an ill-advised and most dangerous Experiment. The Stone once “set a rolling” may roll back and crush some of those who have thus rashly put it in Motion. Mobocracy cannot be a desirable Species of Government. Let Mobs be rendered fashionable by governmental Countenance or Impunity, and no one can be sure that he will not be the next Sacrifice. If this Patrician Mob, for instance, planned and executed by Officers, Clerks, and Favourites of Government, should be justified or excused for destroying a Press friendly to the Rights of the People, under the Pretext, true or false, of provoking Personalities published by the Editor, the People in their Turn may learn to imitate the courtly Example; and a Plebeian Mob, excited by some offensive Publication, may demolish the Government Press, or the Office of one of the Magistrates who countenanced this Riot by looking on and not preventing it, when they had the Power and were bound by official Duty to do it, being commissioned and sworn to keep the Peace.

A riotous Spirit is at any Time to be deprecated, and peculiarly so at the present distressing Crisis. In the Mother Country such is the Pressure of the Times, that Thousands of labouring People, thrown out of Employment and in dread of actual Starvation, are hurried by blind Prejudices and headlong Passions to combine together and riotously destroy Power Looms and other Articles of Property belonging to the Objects of their Resentment. The Ministers, Magistrates, and Peace Officers are wisely exerting their utmost Efforts to tranquilize and restrain the suffering and excited Population. Pecuniary Distress is already felt in this Country, and is likely to increase no one can tell to what Extent. In this State of Things, and amidst the political Disputes and Agitations of the Province, it cannot be wise in the Provincial Administration to rouse the Spirit of John Bull among the People, by sanctioning the Example of a riotous Destruction of the Property of an Individual with whom the Rioters or their Instigators are offended.

Connected, as the Actors in the late Riot appear to be, with the several Departments of Government, we sincerely hope the Public Authorities will not

in Form and Words merely, but in Reality, condemn and effectually discontinue the unhappy Outrage, and thereby avert the Suspicion of Connivance and the consequent Odium which will otherwise inevitably be attached to the Government.

The Preface to these Statements hath already sufficiently explained the Beginning of this Affair. It follows that I should now say something of the Persons implicated, and such of their Friends as are under a Cloud, in the Estimation of the Country, on account of their alleged Neglect of Duty and implied Aqueiescence in the Riot.

I shall next proceed to select such Parts of the Evidence I obtained, as tend to throw a greater Degree of Light on the Operations and Intentions of the Gang, and conclude with a few brief Remarks.

1.—The Honourable WILLIAM ALLAN, a Legislative Councillor, an acting Justice of the Peace in and Treasurer of the Home District, Postmaster of the City of York, Collector of Customs at the Port of York, Inspector of Shop, Still, and Tavern Licences for the Counties of York and Simcoe, a Colonel of Militia, a Commissioner of War Losses, a Commissioner for forfeited Estates, a Commissioner to investigate Frauds in the Revenue, a Commissioner for the Erection of the Parliament Buildings, Vice President and Director of the Welland Canal Company, a Commissioner appointed to investigate Frauds in the Post Office, Treasurer to the several Societies, President of the Bank of Upper Canada, a Trustee of Chief Justice Scott's and of Colonel Smith's Estates, a great Land Owner and House Proprietor, a Police Magistrate for the Town of York, a Church-of-England Man.

2.—STEPHEN HEWARD Esquire, Father to Charles and Henry Heward, Auditor General of Land Patents, Clerk of the Peace in and for the Home District, Colonel of Militia, Secretary to the Reverend and Worshipful Corporation for *superintending and managing* the Clergy Reserves, a Church-of-England Man.

The next Eight Persons named herein are Rioters, Part of those who destroyed the Advocate Press, and were convicted by a Special Jury, in the Civil Action in the Court of King's Bench, Oct. 1826. Verdict \$2,500, and Costs.

3.—SAMUEL PETERS JARVIS Esquire (*convicted Rioter*), late Private Secretary to his Honour the Administrator of Upper Canada, Son-in-Law to his Honour the late Chief Justice of the King's Bench, Clerk of the Crown in Chancery, a Director of the Bank of Upper Canada, a Barrister at Law, a Lieutenant Colonel of Militia, a Duellist, who killed the Surveyor General's Son in the Field, when the latter was a Stripling and unwilling to fight, a Church-of-England Man.

4.—JOHN LYONS Esquire (*convicted Rioter*), a confidential Clerk in the Office of his Excellency the Lieutenant Governor (Salary \$600 a Year), Captain of Militia, Barrister at Law; since appointed by the Lieutenant Governor to the very important Trust of Register for the *Niagara District*, in the Room of the late John Powell Esquire, a Roman Catholic.

5.—HENRY SHERWOOD Esquire (*convicted Rioter*), a Student at Law in the Office of the Attorney General, and Son to the Honourable Mr. Justice Sherwood, formerly Speaker of the Assembly, late Ensign in the Fourth Leeds Militia, a *Clerk of Assize*, a Church-of-England Man.

6.—CHARLES BABY Esquire, a *convicted Rioter*, (Son to the Honourable James Baby, an Executive Councillor of Upper Canada,) Ensign in the Militia, a Student at Law in the Solicitor General's Office, a Pupii of Doctor Strachan, a Roman Catholic.

7.—PETER

7.—PETER M'DOUGALL Esquire, (*a convicted Rioter*.) Lieutenant of Militia, an extensive Merchant in York, a most intimate Friend of the Honourable James Baby, a Roman Catholic.

8.—CHARLES RICHARDSON Esquire, (*a convicted Rioter*.) Barrister at Law, (then a Student at Law with the Attorney General,) Lieutenant of Militia, a Pupil of Doctor Strachan, a Commissioner for taking Affidavits in the Court of King's Bench, Son to Judge Richardson, a Church-of-England Man.

9.—MR. JAMES KING, (*a convicted Rioter*.) Barrister at Law, late Law Student in the Solicitor General's Office, a Clerk of Assize in the King's Bench, an Ensign in the Militia, and a Commissioner for taking Affidavits in the Court of King's Bench, a Roman Catholic.

10.—MR. CHARLES HEWARD, (*a convicted Rioter*.) Son to (No. 2.) the Auditor General of Land Patents, Nephew to the Attorney General, and his Law Student, a Lieutenant of Militia, Pupil to Dr. Strachan, a Church-of-England Man.

11.—RAYMOND BABY, (in the Riot, and Evidence for the Plaintiff,) Son to the Inspector General of Canada, an Officer of Militia, a Pupil of Dr. Strachan, a Roman Catholic.

Note.—In consequence of a Reply to Veritas, in the late Kingston Herald, I have stated who were of the Church of England, and Doctor Strachan's Pupils, and have put new Appointments in Italics.

VOLUNTARY STATEMENT of THOMAS HAMILTON, Esquire, Coroner for the County of York, signed by him at York, 3d July 1826.

ABOUT Seven o'Clock in the Evening of the 8th June I saw Doctor Powell, Samuel P. Jarvis, and Peter M'Dougall, walking along Palaeæ Street. When they came opposite George Street, the Doctor turned up it, and left them; the other Two went forward in the Direction of the Advocate Office. A few Minutes afterwards I (who was standing all the while at the Corner of my own House, at the South-west Corner of the Market Place,) saw a Number of Persons, some from the Attorney General's Side of the Road, some down the Street where the Post Office is situated. They, amounting to a Dozen or Fifteen Persons, as I suppose, stopt for a Moment on the Bank in Front of the Advocate Office; they then appeared to go in towards the Office in Indian File, one after another, at a quick Step. I thought it was Sheriff's Officers, and that they had raised a Posse. The actual Facts never struck my Mind. Mr. Humphreys was with me. I soon after heard a terrible Crash, as of something falling (in that Direction). I said to Humphreys that something was wrong, and set off at a quick Pace towards the Advocate Office. I saw Three Persons come out carrying something; they ran very fast down to the Wharf, and appeared to throw their Loads into the Water. I afterwards saw the Type Boxes floating. *During this Time Colonel Allan was standing at first outside, but afterwards inside his Gate. I think he had a Child in his Arms when I arrived at the Spot. When I got near to the Place they dispersed; some of them came out, and went in again. Major Heward was standing outside Colonel Allan's Fence, talking to Allan, who was inside. If I was on my Oath, I could not have supposed it possible for any Man to have stood where Allan was, and yet been ignorant of what was going on, and that there was going on that which was not right. I walked past, in Front of Colonel Allan's, and met Mr. Macaulay coming up from under the Bank. I spoke to him. He went up to where Mr. Allan was standing with Mr. Heward. Colonel Heward, being where he was, could not but have seen what passed.* On returning I stopt at the Office; they asked me to walk in and see the Destruction; and the Sight struck me with Horror. I saw all strewed about, Desks and Forms broke to Pieces and smashed to Pieces, the Stone thrown over, the Press upset, and all like Desolation.

(Signed) THOMAS HAMILTON.

Mr. Hamilton added, that, in breaking open a Dwelling House, the Rioters did what Indians would not have done. If a Stiek is set by the Owner of a Cottage in a certain Direction, to shew he is absent, it is sacred in the Eyes of all the rest, none of whom will enter the Abode.

VOLUNTARY STATEMENT of Mr. WILLIAM MURRAY, of the Town of York,
Carpenter and Builder.

BETWEEN Six and Seven o'Clock, as I was going up to Tea from the Wharf, I saw Eight or Nine Persons standing at the Corner of the York Bank, earnestly discoursing together. I believe them to be Part of the Gang who destroyed the Advocate Office. I stopt at Tea from Twenty Minutes to Half an Hour; and on my Return towards Cooper's Wharf I (when on the Bank in Front of the Advocate Office) met Three Men coming out at the Office Gate with Three Cases of Type; Two proceeded, but the Third appeared astonished at seeing me there, stopt, and partly turned as if to go baek; at last, however, he followed his Comrades with his Load. This strange Appearance made me turn round to see where they were going. They made towards Allan's Wharf, and threw Boxes and Types into the Lake off the Wharf. The Moment I turned round to see what they were to do with the Types, I saw Colonel Allan standing in Front of his own Paling, close by the Corner; no Person was with him then, or near him; he was looking distinctly towards me and them; I took particular Notice of him. At this Moment James Baxter (an Apprentice) came out in Front of the Office, and called aloud, that Persons were tearing down the House or the Press; and asked Assistance. He requested me to assist him; but I was only One, and thought that as Colonel Allan did nothing, who was a Magistrate, I had better not interfere. James Baxter came out before they had got to the Lake with the Types. I have no Manner of Doubt in my Mind but that Colonel Allan heard James Baxter call out for Assistance, and saw the whole as well as I did. He made no Effort to quell the Riot. When the Three Men ran down over the Bank, the Types rattled in the Cases, and a good many tumbled out on the Road. I looked over the Fence inside Mr. McKenzie's Court-yard, and two or three of them were busily employed throwing the Types about the Court-yard, and even into Mr. Monro's Garden. I think that the Person who almost turned round with the Box of Type was a Son of Colonel Heward. They made a great Noise inside, knocking Things about. When the Press or Stone (as I suppose) fell, it made a great Noise. As I was coming down from Tea (as before stated), when between the York Bank and Post Office, I beheld Three Persons running round the Counting Room Corner; One of them sung out that *all was clear*, or Words to that Effect, and before I got down they were out of sight. It appears to me that, as the Roadmen had been working before the Advocate Office, and had just gone off, the Gang chose that quiet Hour, unseen to commit the Work of Destruction.

York, 3d July 1826.

(Signed) WILLIAM MURRAY.

CHARLES RIDOUT, Esquire.—I have learnt that this Gentleman, who is a Son of the Honourable Thomas Ridout, can testify on Oath that he was on the Bank at the Time of the Riot; and that Colonel Allan, the Police Magistrate, and Colonel Heward, the Clerk of the Peace and Auditor General, were On-lookers to the Outrage, and saw the whole just as well as he did; but I did not conceive it necessary to require him to give a written Statement in a Case where Proof abounded. It has been asserted that Colonel Heward cheered some of the Mob, and cried out, Well done, Boys; but that Faet must fall to the Ground for Want of Proof.

First Offer of the Rioters.

[* * Mr. Macaulay's Letters would have been published before the Trial, had not Mr. Small, my Attorney, forbid it.]

COPY of a Letter addressed by James B. Macaulay, Esquire, Agent on behalf of the Defendants, to James E. Small, Esquire, Plaintiff's Attorney.

My dear Sir,

THE *Gentlemen* prosecuted for a Trespass upon the Advocate Press, so far from entertaining a Desire to do an irreparable Injury to the Property of the Concern, went openly to the Office, without any Attempt at Concealment, and aware at the Time of the Responsibility they would incur. An Offer of Indemnity to the actual Extent of the Injury would have been tendered immediately, had less Clamour been raised, and less Exertion used to prejudice the Public Mind.

The real Cause of the Step is well known to all; it is not to be ascribed to any Malice, political Feeling, or private Animosity. *The personal Calumnies of the latter Advocates* point out sufficiently the true and only Motives that prompted it; and *I have now to offer to pay at once the full Value of the Damage occasioned to the Press and Types*, to be determined by indifferent and competent Judges selected for that Purpose. Will you inform me how far your Client is disposed to meet this Proposal?

This Advance is in conformity with the original Intention, and must not be attributed to any Desire to withdraw the Matter from the Consideration of a Jury of the Country, should your Client prefer that Course; but in that Event it is to be hoped no further Attempts will be used by him or his Friends to prejudice the Cause now pending, nor any future Complaints be made of a Reluctance or Hesitation to compensate voluntarily a Damage merely pecuniary, although provoked by repeated Assaults upon private Character and Feeling, not susceptible of any adequate Redress.

I am very truly yours,

J. E. Small, Esq.

J. B. MACAULAY.

Second Offer of the Rioters.

My dear Sir,

6th July 1826.

MY Friends do not seem inclined to make any higher Proposals than follows, and which are dictated in a Conviction that they fully meet the Justice of Mr. Mackenzie's Claim; the real Extent of which they are by no means ignorant of or unable to prove.

They will (receiving the Press and Appurtenances) be willing to pay £200 for them. This Sum is considered not only the Value of the whole Material of the Establishment, but amply sufficient to cover any Contingencies. With respect to further Compensation, there would be no Objection to add £100 more, in all £300, to end the Matter.

Or they will agree to £200, as above stated, and leave any Excess to the Decision of indifferent Persons; or they will leave the whole to indifferent and competent Referees, as at first suggested.

If your Client can meet this in any Way so as to terminate the Controversy, I shall be very glad; if not, I fear the Law must take its Course.

I am very truly yours,

J. E. Small, Esq.

(Signed) J. B. MACAULAY.

James E. Small to James B. Macaulay.

Dear Sir,

York, 7th July 1826.

I RECEIVED your Note last Evening, and am extremely sorry to find that our Endeavours to settle amicably this unfortunate Affair have proved abortive. Your Proposals cannot be listened to. Will you, therefore, as stipulated, have the Goodness to return me the Memorandum I handed you; and believe me,

Very truly yours,

The Hon. James B. Macaulay.

(Signed) JAMES E. SMALL.

York, 29th June 1826.

Dear Sir,

I RECEIVED your Note last Evening, and it is wholly impossible for me to say what the actual Damage to the Materials may be, not knowing the Quantity that has been thrown into the Lake and otherwise totally destroyed. I can only state that to which I can make Affidavit at any Time; namely, that in a few Minutes after the Outrage I visited the Office, and it struck me then, and I am still of Opinion, that the Desperadoes made their best Exertions, not to upset the Types, &c. as stated by Mr. Carey, but to *destroy every thing in the most malicious Manner*, as large Quantities of Types were dashed out of the Windows upon the Flags underneath, and, I hear, out of Forms, with their Face downwards, which was sufficient to cause certain Destruction; and from this Impression on my Mind, and the destructive Appearance which I saw that Evening, I would not, were I about to purchase, give more than something about the Value of old Type Metal for all the Letter in the Wreck.

I remain,

Yours respectfully,

FRANCIS COLLINS.

William Lyon M'Kenzie, Esq.

JAMES LUMSDEN, an Apprentice in the Office of the Colonial Advocate, (formerly apprenticed to the King's Printer, and Messenger in the Commons House of Assembly,) his voluntary Testimony respecting certain Matters which took place at the Riot. (About Eighteen Years of Age.)

I went down the Wharf to see the Martha Ogden Steam Boat go out; William Doyle was with me; and my Attention was drawn towards the Office, by observing Three Men come down to the Wharf, each with a Case of Type in his Hand, which they threw into the Lake. Mr. Richardson, the Barrister, was one; Mr. C. Heward, a Law Student with the Attorney General, was another; the third I did not know. At the Time this Outrage was going on, I saw Mr. Allan the Magistrate, and Mr. Heward the Clerk of the Peace, talking together outside of Mr. Allan's Gate they were looking towards the Office, and I believe they saw the Persons throwing the Type into the Bay, and that Colonel Heward saw his Son Charles, the Attorney General's Law Student, so employed. From the Position in which I stood I have no doubt but that these Functionaries were Witnesses of this Transaction; and they did not, to my Knowledge, make any Attempt to keep the Peace on witnessing this Outrage. When I saw the Types consigned to the Bottom of the Lake, I ran up to the Office, and met James Baxter at the Corner, who told me a Number of Men had broken open the Office, and were in destroying it. I stopt talking to him a while, and at last they came out. I noticed young Sherwood; he had a Stick; Charles Heward, James King, John Lyons, and S. P. Jarvis. The others I did not take particular Notice of. Several had Sticks. Mr. M'Kenzie's Mother was standing at the Corner of the Office, and she was greatly agitated. When they came outside the Gate, James Baxter, my Fellow-apprentice, said to me, pretty loud, "What a Shame it is!" on which young Sherwood, Son to the Honourable Judge of that Name, turned round, and threatened him, "If you say a Word I'll knock you down." They then separated. The Honourable James B. Macaulay was not visible at the Moment the Work was going on; but a few Minutes afterwards I observed him, Mr. Allan, and Mr. Heward senior, all talking together at Allan's Gate, outside. I did not see the Attorney General; only his Clerks and Friends.

York, 29th June 1826.

(Signed) JAMES LUMSDEN.

P. S. On the very Evening after the Outrage I had the following Conversation with F. Heward, Son of the Auditor General, and Brother to him who threw the Types into the Lake.

Heward.—Well, what do you think of your Office now?

Lumsden.—I think we will get Justice yet.

Heward.—I believe there is very little Justice to be got in this Country.

Lumsden.—I think you are half right.

DANIEL

DANIEL BANCROFT, formerly Apprentice to the King's Printer, and afterwards in my Office, C. French, B. Ferguson, and several other Persons, testified that, at the Time of the Riot, the Advocate Office was one of the best in the Town or Colony, as far as they knew.

WILLIAM DOYLE, Son to Michael Doyle, York, aged about Fifteen Years, stated that he did not see the Attorney General or Mr. Executive Counsellor Macaulay, either in or Witnesses to the Riot; but that "Major Allan and Colonel Heward were there, standing opposite Mr. M'Kenzie's House, at the Corner of Major Allan's, but I cannot swear that they paid particular Attention to this Matter. *I think they could not help seeing the whole, but I cannot swear to that Effect, as my Attention was more particularly engaged by the Mob.*

"York, 29th June 1826."

(Signed) "WILLIAM DOYLE"

JAMES BAXTER, then an Apprentice in the Advocate Office, aged Eighteen Years, since removed to the Office of the Upper Canada Herald.

His voluntary Testimony, subscribed on the 29th of June 1826, is as follows:

I was present when certain Persons, on the Night of the 8th Instant, broke open the Advocate Office by Force, and destroyed that Establishment. I had locked the Door not Two Minutes before, and shut up the Office. I saw a Number of Persons pass the Parlour Window; they had Sticks. I saw them enter the Courtyard. I then went round to the back Door of the Office, and found the Men busy breaking open the Office Door. A Number of them came in with Clubs or Sticks in their Hands; some had Pieces of Cordwood. I afterwards went and told Charles French to run to Simpson's, and alarm Mr. Ferguson, the Foreman. I then went to the front Door of the Office, and saw Three Men go down with Cases and Type towards the Lake; Charles Heward was one; Charles Richardson was another; Henry Howard, I think, was the Third, but I will not swear to his being the Third. I then stood and looked at those who remained destroying the Property. I saw them pull down the Press; throwing Types about; they made them fly in the Air, and through our and Mr. Monros's Garden; then Lumsden came up while they were yet in the Office. Before he came up, I told Mr. Murray to run for Assistance, which he did; but the Housebreakers had effected their Escape before he returned with Help. Mr. Allan, the Police Magistrate, stood at his Door and looked on while the young Men from the Attorney General's Office carried down the Types and threw them into the Lake. I am sure he could not help both seeing and hearing the Outrage. I should think it might have been heard almost at the Old Parliament House. The Iron Press, weighing about a Ton and a Half, made a terrible Noise in falling, as did the Imposing Stone. Allan never offered to stop the Proceedings. After the Types had been thrown into the Bay the Auditor General came up and conversed with Allan at his Gate. I did not run to them for Assistance, because I thought them but a poor Refuge in such a Case: they ought to have come and done their Duty, or what was the Use of them? Mr. Allan appeared to me to recognize the Rioters when they passed to the Attorney General's Office, they towards him, and he smiled as in return. Some of the Rioters went to the Office of His Majesty's Attorney General, and deposited their Sticks and Clubs there; James King ran up by the End of Allan's House with a large Club in his Hand; some went one Way and some another. Colonel Heward, the Worshipful Clerk of the Peace, was standing on the Bank in front of the Attorney General's Office walking backward and forward all the Time. His Son Charles (and I think Henry also) were running off with the Types, which made a Noise in the Cases; he could not help seeing them; and the Noise which the Mob made in destroying the Office he, or any one standing where he was, must have distinctly heard. I have no doubt in my Mind but that he heard and saw the whole from first to last, except that he could not see the Iron Press fall, &c. from his Position. I am perfectly satisfied that he saw his Son running down with the Types to the Lake; he made no Attempt to prevent the Outrage. He gave no Word of Command, &c.; he did not interfere, but when all was over he joined Allan at Allan's Door. When the Gang broke up the Office, and began tearing

down the Establishment, I did not run to Allan, but I called out aloud for Assistance to W. Murray, in Allan's Hearing, loud enough for Allan, or any body else at that Distance, to hear me if they were so inclined. I called to William Murray that they were tearing down the House, and requested him to go for Assistance; and he went, but returned too late.

York, 29th June 1826.

(Signed) JAMES BAXTER.

My Mother's Testimony, as to Mr. Allan's being present, is the same as the others; she saw a Man with a Child in his Arms standing before Colonel Allan's Door, but does not know that Gentleman by Sight. She saw the Office destroyed; and being 78 Years of Age, and in feeble Health, was much frightened, and her Health affected by it for a long Time after.

JAMES MACKENZIE (an Apprentice) testified as follows:—I was at Tea in my Grandmother's Room up Stairs, and heard a great Noise. I went down to the Office, where I saw Jarvis taking a Chase to the Front of the Office full of Types; he threw them down out of the Chase upon the Stones; the Quoins flew out, and the Type fell out; then Two or Three more scattered them over the Yard; and Jarvis took the Rules, bent them, and threw them away. Afterwards Captain Peter M'Dougall came out from the Printing Office and said, "I think we have done enough." Three of them carried Three Cases, and threw them into the Bay; and I afterwards went and took out the empty Cases. When the Three were returning they met Captain Peter, who said, "I think we have done enough Harm." They made a great Noise upsetting the Press. Colonel Allan was standing at his Gate, with his Child in his Arms, smiling; he could not help seeing and hearing what was passing.

30th June 1826.

(Signed) JAMES MACKENZIE.

Mr. ANDREW WILSON, Brother to the Editor of the Geneva Palladium, then Printer in the Government Office, stated as follows:—I met the Honourable J. B. Macaulay coming up (as I supposed) from the Scene of the Outrage immediately after the Affair is said to have taken place. He was opposite Mr. John Monro's Store when we passed each other, and was laughing immoderately all the Way; he held his Hands on his Face as if to conceal his Emotion. It excited my particular Attention, and I remarked to Bennet and young Kane, who were with me, to observe how pleased he was. I had heard of the Outrage before.

MARGARET BAXTER stated as follows:—While I was in the Front of the House, and the Men carrying the Boxes of Type to the Lake, I saw Colonel Allan standing outside of his own Fence, looking in at the Outrage; he was looking at the Men throwing the Type into the Lake, as was Major Heward also. He was standing at a little Distance from Colonel Allan while the Men were carrying the Types to the Lake, and afterwards he joined Allan at the Fence. I am sure they were looking on at the Perpetrators of the Outrage. I did not see them interfere to prevent the Mischief that was doing. The Men that were destroying the Office were making a terrible Noise, which was heard at a great Distance.

Margaret Baxter was then 13 Years of Age and upwards.

I intended to have summoned the Attorney General, but was persuaded by my legal Advisers not to do so. He retained the Delinquents in his Office as his Students; took care to know nothing of the Circumstances of the Riot; and I have never learnt that he found fault with "the official Rendezvous," made use of on the Occasion. A very short Time after he had Charles Richardson made a Barrister at Law, and no doubt sent him to speak and act for him in the late Public Meetings of the Inhabitants of this Town.

HENRY WILLIAM PETERSON, Printer, Markham, states as follows:—From a hasty View of the Apartment (once the *Printing Office*) of Mr. William L. McKenzie, I am of Opinion that the *Types* are worth but little more (if any thing) than *old Type Metal*; lying, all that I have seen, in as complete *Pi* (or Confusion)

Confusion) as I ever beheld in any Office. Previous to the Destruction of Mr. M'Kenzie's Office I was once in it, and believe the Apparatus was principally all new. In a Word the Destruction of his Office seems to be complete.

York, Upper Canada, 3d July 1826.

(Signed) H. W. PETERSON.

After obtaining all the Information I possibly could, I sent down a Statement of the whole to Mr. Bidwell at Kingston; and had summoned about Thirty Persons, beside Six or Seven of whose Presence I was assured if it should be found necessary.

The Special Jury.

On the 9th of October, the Defendants having demanded a Special Jury, it was struck in our Presence, and in the Presence of Messrs. Small and Macanlay, our Attornies, at the Deputy Sheriff's Office.

All Persons in the District who are assessed at £200 and upwards are liable to serve; and their Names, having been cut upon Slips of Paper and rolled up, were thrown into the Sheriff's Hat. Out of the first Forty drawn out after the Hat been shaken, Sixteen Jurors were selected, Twelve of whom were to pass upon the Case.

The Defendants and Plaintiff had each the Power of striking out a Name alternately from the Forty drawn; and we struck off Names in the following Order:—

Mr. Small, for Mr. M'Kenzie, Plaintiff, struck off—

- 1. Hon. William Allan.
- 2. Hon. Duncan Cameron.
- 3. Hon. George Crookshank.
- 4. Hon. Alex. Arbutnot.
- 5. Mr. James Rogers.
- 6. - John Carey (Observer).
- 7. Thomas Racey, Esq.
- 8. John Gamble, Esq.
- 9. W. Gamble, jun.
- 10. Mr. Isaac Welch.
- 11. - James Forsyth.
- 12. - Jacob Shunk.

Judge Macanlay, for S. P. Jarvis and Friends, Defendants, struck off—

- 1. Mr. Colin Drummond.
- 2. - Geo. W. Post.
- 3. - Lardner Bostwick.
- 4. - Peter M'Phail.
- 5. - Jordan Post, jun.
- 6. - Israel Ransom.
- 7. - John Barnhart.
- 8. - John Reesor.
- 9. - Samuel Snyder.
- 10. - Patrick M'Gan.
- 11. - William Arthurs.
- 12. - Daniel Brooke, jun.

The remaining Sixteen were summoned accordingly as Jurors by the Sheriff.

On the Day of Trial, at the Hour of Eleven, only Eleven Special Jurors were present. Three Names were then drawn from the Petty Jury List by Consent; and after Two had been struck off, the Jury was sworn, and consisted of

- Robert Rutherford, Esq., of York,
Foreman.
- Mr. James Hogg, of Milford Mills.
- Ezra Annis, of Whitby.
- David Boyer, of Markham.
- David Annis, of Whitby.
- Valentine Fisher, of Vaughan.

- Mr. Robert Johnson, of Scarborough.
- Joseph Tomlinson, of Marham.
- Peter Secor, of Scarborough.
- Edward Wright, of York.
- Joel Beman, of Yonge Street,
and
- George Shaw, of York, - 12.

On the Bench, as presiding Judge, sat Chief Justice Campbell with the *aforsaid* Hon. William Allan, and Alexander M'Donnell, Esquire, as his Associates. My Counsel were Messrs. Bidwell, Stewart, and Small; and for the Defendants stood Judges Macaulay and Hagerman. The Attorney and Solicitor General were both in Court, and the latter was accidentally made an Evidence on my Behalf. The new Court House was greatly crowded; and few Trials in the Colony have excited so much and so general an Interest in the Minds of the People.

As the Trial has been copied into five or six of the Provincial Prints, it is not necessary that I should do more than reprint some of the leading Facts, in addition to the Mass of Testimony already given, and which, if tried, will, I am assured, be found uncontrovertible.

Mr. Bidwell, to whom I am under the highest Obligations for his timely Assistance, and for the Discernment and Prudence he manifested on this trying

trying Occasion, addressed the Court and Jury in a Speech which was mentioned in Terms of Approbation by all who heard him, yea, even by those who felt his Reproof. His Language was mild, but his Arguments were forcible, and produced a deep Effect upon the Minds of the very intelligent and highly respectable Special Jury. I have Room only for a brief Extract.

“ It is needless for me, Gentlemen,” said Mr. Bidwell, “ to inform you, that this is a Case of the highest Importance; the very Circumstance of your being called upon as a Special Jury to determine it shews that the Defendants were afraid to trust it to a Petty Jury; yet to them it is not a Matter of the same Importance that it is to the Plaintiff; most of the Defendants are Men of Independence, Men of high Connexions and ample Means; but to the Plaintiff it is a Case of most serious Consideration; his Business, his Property, the very Means of supporting his Family, have been destroyed; therefore his all is at Stake in the Issue of this Trial. This Case, Gentlemen, is of the first Importance in another Point of View, inasmuch as it is the first Instance in this Province of an Attempt, by open Violence, to destroy a Printing Press; and it is to be hoped that your Verdict will be such as to prevent a similar Recurrence. Let it be seen by your Verdict that the Defendants, or any other Set of Men, are not to conspire together for the Purpose of violating the Laws of the Land, without the Risk of a heavy Responsibility. A free Press is considered, under our well-balanced Government, as One of the main Pillars of the Constitution, the chief Stay and constitutional Guardian of the Rights and Privileges of the People; it has been considered as One of the greatest Blessings under all well regulated Governments; we are all, therefore, concerned in such a Case; and an Attack upon the Press must be to all a Matter of more than ordinary Interest. But in this Case not only has the Freedom of the Press and the Majesty of the Law been insulted with a high Hand, but the greatest Privilege of an Englishman, the Privacy of his House, has been greatly violated; yes, his private House, where every British Subject is protected, by the strong Arm of the Law, free from Assault and Invasion, has been violated, and Property to a considerable Amount destroyed. Are you not bound, Gentlemen, in such a Case, to give exemplary Damages, in order to shew that no Man, however high his Rank, shall violate with Impunity these sacred Privileges? It is true the Press, with all its Blessings, is subject to some Evil; as long as human Nature and human Passions exist, there must be some Degree of Alloy in every human Blessing; some Abuse, which is, from its very Nature, inseparable from it. But if the Press be at any Time licentious, the Law of the Land is sufficient to restrain it; and if the Defendants in this Case felt any Provocation in that Way, the Law was open to them; yet I will not admit, nor can they prove, that such has been the Case. The Law is so strict with regard to licentious Publications, that Editors of Papers are liable to Punishment, even to the infamous Punishment of the Pillory, although they may be able to prove that they never knew any thing of the Publication. If then, Gentlemen, after such ample Restraint by the Law, you wish violent and illegal Measures to be resorted to; if you wish the sacred Privacy of the Dwellings of our Inhabitants to be daringly violated; if you wish to encourage the Destruction of private Property; or if you wish to ruin not only the Plaintiff but his Family, you will give your Verdict for little Damages; but if you feel, as Men sitting there ought to feel, for the Magnitude of this Outrage; if you respect the Rights of the Subject and the Liberty of the Press; if you wish to guard against the Recurrence of such disgraceful Proceedings, by placing a salutary Restraint upon all those who may be disposed to engage in them, you will stamp upon this Transaction your highest Disapprobation, by a Verdict for ample Damages. There is One Circumstance, Gentlemen, which is entitled to your particular Consideration; namely, the Character and Standing in Life of the Defendants. If they were ignorant Men, of strong Passions, unrestrained by Education and stimulated by Provocation, there would be some Apology for them; but when we consider that they move in the first Circles of Society, and, with all the Advantages of Education, chose to resort to Violence and Mob Law, the strong Arm of the Law should be raised against them. Look also to the Connexions of the
“ Defendants,

“ Defendants, and you will see how much they presumed on them in this Case.
 “ It is not my Intention to endeavour to make an Impression upon your Feelings
 “ with a View to obtain Special Damages. The Damages are limited, and
 “ your Verdict will be according to the Dictates of your Conscience; but
 “ it is your Duty to award Damages in this Case, not only for the Losses
 “ sustained by the Plaintiff, but for the Insult offered to him by the violent
 “ Attack upon his House, in the Absence of himself and Family.”

Here the Learned Gentleman quoted some English Cases on this Point, and proceeded.

“ I shall prove that this was one of the most insulting and outrageous Acts
 “ ever committed in this Colony. What, then, is to prevent the Repetition of
 “ such Acts? Ample Damages. I remember a Case where an English Jury
 “ gave £500 Damages for knocking off a Man's Hat. Here is the Example
 “ of an English Jury and English Law, where the Rights and Privileges of
 “ Englishmen are properly protected; and as you, Gentlemen, enjoy the like
 “ Rights and Privileges, I hope you will be equally disposed to protect them.
 “ But should you allow such an Outrage as the wanton Destruction of a
 “ Printing Apparatus to go unpunished, you will not only bring down Disgrace
 “ upon yourselves, but on the Country at large; and your Verdict, instead
 “ of putting a salutary Restraint upon such illegal Proceedings, will serve as
 “ a Signal for general Outrage against every Printing Press in the Country.”

The Evidence produced had its full Weight with the Jury. The Rioters employed Mr. Hagerman to speak in their Behalf, but they called no Witnesses. They denounced the Colonial Advocates from first to last, especially the latter ones, as licentious and abusive; but they neither produced the Files, nor quoted the Papers they disliked. They even condescended to beg for Opinions of my Apprentice Boys as to the Character of the Publication. The Solicitor General, Mr. H. J. Boulton, made one Remark, as an Evidence, which excited much Merriment; he said, that he “ valued Character much more than Property, and would rather that a Person would rob him of a Horse or other Property than take away his Character.” Truly he need be under very little Apprehension on that Score; his Character, such as it is, will not be very likely to cause an early Infraction of the Tenth Commandment.

It was my earnest Wish to have asked such Questions of the Witnesses as would have placed the Conduct of Messrs. Allan and Heward in its true Light; but I felt, that in an Action for Civil Damages it was best to be guided by Counsel, and they uniformly assured me that such Questions would be productive of Evil to the Suit, as Messrs. Allan and Heward were not among the Defendants.

It was likewise asserted by Mr. Hagerman, in his closing Speech, (not from any Evidence adduced, but merely because he wished, on false Premises, to give an unfair Bias to the Jury,) that I had left York with the Intention of wronging those to whom I was at that Time indebted. Nothing could be more false, groundless, or calumnious than such a Charge. Had I anticipated such Arguments, I should have acted contrary to the Advice of my Counsel, (who insisted that there had been enough of Witnesses fully to prove my Case,) and brought forward Mr. Thorburn of Queenston, Mr. M'Bride, M.P., and Mr. Tannahill of Niagara, Mr. Cawthra and Mr. Ketchum of York, and Mr. Cameron of Dundas; all of whom could and would have testified that in all the Transactions in Business in which they had known me engaged I had evinced a Determination to do right to those whom I had, even at personal Loss; and the Five first-named Gentlemen, who were well and intimately acquainted with my personal Circumstances at the Time the Press was destroyed could and would have proved that I had done *all that Man could do* to act justly towards every Man to whom I owed a Farthing. Yet I bore Mr. Hagerman's Language with Patience, for the Time for Evidence had passed away. My Health had for Three or Four Months been in the most precarious State, and much Sickness in my Family had depressed my Spirits beyond any thing I had ever felt or endured before. All is now over; I have survived the Storm, and can sit down quietly to narrate its Devastations.

During the Trial, which lasted Two Days, I felt much Anxiety, because great Expences had been incurred; and I knew that if by any Means a Verdict

diet should be delayed, or no Verdict returned, the Consequences would to me be ruinous in the extreme. I knew the Material of the Majority in the Assembly too well to expect their Interference; they fear a free Press, and that not without good Reason; and as for the Judiciary, I believe I shall not trust my Pen to describe what had better never been.

The Room in which the Jurors were confined until they should agree on their Verdict was newly plastered; the Weather was raw and unpleasant; and as some of the Jurors were for £2,000, some for other Sums from £1,500 to £750, and one Man, "George Shaw," for £150, there was small Prospect of an Agreement. Shaw, as I afterwards learned, brought into the Room with him Cases in Law, which he read to his Fellow Jurors, in order to convince them that I ought not to get the Damages I had so clearly proved; but his Logic was of no use; Public Opinion was strong and decided; and although I had not written One Line for the Press from the Time of the Riot until the Day of the Verdict, and although the Jurors were all nearly perfect Strangers to me, they determined to struggle with Cold and Fatigue, and even Sickness, rather than trample under Foot the boasted Justice of a British Jury.

They stood it out in that cold Room nearly Thirty Hours; some of them old grey-headed Men; some of them were sick; but they bore it with Patience. One of them, Mr. Jacob Bryer, a respectable and worthy German, felt himself very ill indeed, and Dr. M-Cague was sent for, who bled him, and he recovered, and stated his Determination to lay his Head upon his Great Coat and stop another Day, before he yielded against his Reason and the Evidence he had heard. Shaw (as I am informed) at last gave in; and a Verdict of \$2,500, besides Costs, was awarded in my Favour by Robert Rutherford, Esq., their worthy Foreman, and assented to by his Fellows. And here let me express a Hope, that no Injury may ever befall that honest Irishman and his Comrades, for having justly, faithfully, and courageously performed their Duty to their Country on a very trying Occasion. That Verdict re-established on a permanent Footing the Advocate Press, because it enabled me to perform my Engagements without disposing of my Real Property; and although it has several Times been my Wish to retire from the active Duties of the Press into the quiet Paths of private Life, I have had a Presentiment that I should yet be able to evince my Gratitude to the Country which in my utmost Need rescued me from Destruction and utter Ruin.

In a short Time the Amount of the Verdict was paid to Mr. Small by Mr. Macaulay, and faithfully paid over to me when received. The Judges taxed the Costs in such a Manner as only to allow £5 5s. to Mr. Bidwell, and Two Guineas to my other Counsel, although the Action was unqualified in the Annals of Canadian History. It is said they allowed Judge Hagerman £50, but of that I am not certain.

The Grand Jury in Assize Times usually consists of Persons in favour with the Local Government, without much Regard being paid to their other Qualifications; in proof of which, *one of the Rioters, a Mr. Peter M-Dougall, who can scarcely read or write, was chosen by the Sheriff to sit as Grand Juror at the last Assizes*; and other equally inconsistent Selections might be mentioned. Even Judge Campbell, as I learnt, found fault last October at seeing always the same Faces in the Grand Jury Box.

But be they what they may, they sent for me, and I, in reply to Interrogations from their Foreman, replied, that I had no Intention to prosecute the Rioters criminally; that the Verdict and Costs (about \$3,000) would come heavy on some of them, and probably operate as a Caution for the future, while the Loss of Place and a Chance of early Preferment would be a timely Warning to others.

Little was I aware that at this very Moment Colonel Fitzgibbon, one of the Magistrates of this Colony, was begging the Amount of the Verdict; and that Sir Peregrine Maitland was seeking how he could best reward loyal Riot, and put impertinent Patriotism to the Blush. I know all this now; and Canada and England too shall know it before I am done with the Party.

It was a Wonder to many that the Attorney General did not institute a Prosecution of some kind or other; but there can be no doubt now that there was a Party in the Plot not then thought of.

A Writer

A Writer in the Kingston Herald explains my Conduct very correctly, as follows :

“ The immediate Charge of prosecuting for this as well as other Offences against Law belongs to the Law Officers of the Government. Mr. M’Kenzie, the Party injured, only brought his Action to recover Damages for the aggravated Injury sustained by him. That was his proper Concern ; but he was not a prosecuting or informing Officer. He had no more Interest than any other Individual in the Punishment of the Offence ; he could not even be a Witness to prove it, having been absent when it was committed ; nor did the Public Prosecutor need any Information from him, the riotous Breach of the Peace being public, and the Witnesses well known. On this Subject, Mr. M’Kenzie conducted himself with great Propriety. He maintained his own Cause, and in so doing defended the Rights of his Fellow-subjects ; but he did not usurp the Authority of the Crown Officers, charged with and responsible for the Execution of the Laws for the Punishment of Crime and the Preservation of the Peace. If the Attorney General, knowing that his Office was the Place of Rendezvous for the Perpetrators of the most flagrant Violation of the Law that ever occurred in the Province, has indeed been their Purse-holder, to receive Money subscribed for their Relief, instead of prosecuting them by Indictment, in the Name of the King, for their wanton and notorious Offence, what Confidence can His Majesty’s Subjects at large have in his Impartiality as the Public Prosecutor ? I hope it will turn out that the *Freeman* was misinformed. Suppose the Parties had been reversed, and the Printing Office destroyed had been the Government Press, and the riotous Persons politically opposed to the Attorney General ; in such a Case, would a high-handed Riot, committed in the Face and Eyes of the Government, have been suffered to pass unpunished, in evil Example to others in like Cases to offend against the Peace of our Lord the King, His Crown and Dignity ? The Answer may be found in the well-known Story of the Farmer and Justice :— It was his Worship’s Bull that killed the Farmer’s Cow : that alters the Case.”

The Attorney General was not the Purse-holder ; he left that Department to his honourable Colleague Mr. Executive Counsellor Macanlay ; and the only Reasons I have ever heard adduced against a Criminal Prosecution are taken from Judge Hagerman’s Speech in Defence of the Outrage :—

“ It is wondered that these Gentlemen were not indicted for a Riot ; but the Attorney General would not do so, because if he had it would immediately be said that it was done with Intention to destroy their Prospect of Damages ; so that it was difficult to know how to act.”

Government Subscription Purse.

Mr. Collins, the Editor of the *Freeman*, continued from Time to Time to advert to the Means by which it was reported that the Rioters had got clear of the Damages awarded against them, and in the End obtained an Acknowledgment from Colonel Fitzgibbon which even his most sanguine Expectation had hardly anticipated. We shall here give a few Specimens of his Arguments.

“ *Outrage patronized and supported.*—We are informed upon good Authority that the Sum of £625, the Amount of Damages awarded by a Special Jury to the Proprietor of the Colonial Advocate for the Destruction of his Printing Office, has been raised by private Subscription among what is called the Ministerial Party of this Town ; and that so cheerful and general were the Contributions, that few, even among the Conspirators themselves, were called upon to advance a larger Sum than Ten Dollars ! From this Circumstance we anticipate in a short Time the total Suppression by Mob Law of every free Press in Upper Canada ; for where is the corrupt Tool of Power who would not contribute *Ten, Twenty, or Thirty* Dollars, to suppress a Machine that is his chief Terror, particularly when he can command his single Nod the Services of a Set of Bullies among his Relatives and Dependants ? £625 are paid for the Destruction of One free Press out of

“ Three

Writer

" Three in Upper Canada, by Subscriptions of *Ten Dollars* each! therefore it
 " will only require Two other Salaries from the official " Press Gang," one
 " in York and the other at Kingston, at *Ten Dollars* each, to suppress every
 " thing in the Shape of a free Press in Upper Canada!!! With these Facts
 " before us, is it not wonderful that this System has not long since been
 " acted upon, when nothing is so much to be dreaded by the Agents of Cor-
 " ruption as a free Press? Were it not for a free Press, the Ministerial Party
 " in the House of Assembly of this Colony, instead of a miserable Minority
 " of *Ten*, would command a sweeping and overwhelming Majority. Had such
 " been the Case, £3,000 in a Service of Plate would long since have been
 " the Table of Sir Peregrine Maitland, as was the Case with Governor Gore,
 " and another permanent *private Service* Fund of £2,500 a Year voted to
 " grease the Hands of old, faithful, and *bidable* Servants, all at the Expence
 " of the People of this Province. Were it not for the Press, Judge Hagerman
 " would be a Member of our Assembly, and would have voted to his Friend
 " the Attorney General *Three thousand Pounds* last Year for going to London
 " on executive Business (as he did some two or three Years ago), instead of
 " £55! that he received. Were it not for the Press, the early American
 " Settlers, who tamed the Rudeness of the Forest, and made it ' blossom like
 " the Rose,' would not only long since have been disfranchised and turned
 " out of Office, on the Call of Cathams, to make Room for himself and his
 " Friends, but probably robbed of their Property, the Reward of the Toils
 " and Hardships of many Years. Were it not for the Press, Gangs of official
 " Desperadoes might range the Streets of York, meditating Vengeance against
 " the Persons and Property of their Fellow-subjects, and put their Threats in
 " execution, without ever being presented by a Grand Jury or indicted by a
 " Crown Officer. Were it not, in fact, for the Press, a few Agents of Power might
 " sit in secret Conclave, form Schemes for their own Aggrandizement and the
 " Oppression of their Fellow-subjects, and put their Plans into Practice, to
 " the Ruin of the Country, without the People being able to know from
 " whom or whence originated their Misfortunes. Is there then a hungry
 " fawning Expectant about the Halls of Power? Is there a sleek aspiring
 " Incumbent of Office, who would grudge to pay the paltry Sum of *Thirty*
 " *Dollars* to get rid of such an Ineumbrance? We believe not. But should the
 " Desperadoes choose to economise, by coming an Hour or Two later, with
 " a little Lamp-black on their Faces, to save the *Thirty Dollars*, what Remedy
 " is there to be obtained in *little York*, where the Sum of £625 can be
 " raised in a few Hours among the natural Conservators of the Peace, at *Ten*
 " *Dollars* each, (except a few Heads of Departments, who are said to have
 " contributed an Hundred Dollars each,) to defray the Expence of a flagrant
 " Noon-day Outrage."

Such Remarks as these, added to a Hint that Sir P. Maitland's Name was at
 the Head of the Subscription List, produced from Colonel Fitzgibbon the
 following very remarkable Avowal.

To the Editor of the Canadian Freeman.

Sir,

York, 1st June 1827.

IN your Paper of Yesterday you make Allusion to me, and say that his
 Excellency's Name was at the Head of a List carried about by me in
 order to indemnify the Rioters, and pay the £625 awarded against them by
 the Jury.

*My Conduct upon that Occasion was dictated by a Sense of Duty; and I have
 not a Wish for the Concealment of any single Step I took in the Accomplishment
 of the Object I had in view, and which originated entirely and spontaneously
 with myself.*

*My only Object in publicly noticing your Assertion is, to state that, as respects
 his Excellency the Lieutenant Governor, there is no Truth at all in it. I know
 that his Excellency never contributed a Shilling, either directly or indirectly,
 towards the Fund you allude to, nor have I a single Reason to suppose that
 his Excellency ever heard a Syllable of such Contribution.*

I do not make this Declaration to defend the Character of the Lieutenant
 Governor from the Aspersions of a *Public Calumniator*, because, as far as

regards

regards his Excellency, it would be superfluous for me to do so; but being alluded to by you, and best knowing the Circumstances of the Transaction you have misrepresented, I deem it my Duty to give a Public Contradiction to your Statement; for there are many honest well-meaning Persons, little acquainted with the bold Confidence with which Falsehood is now so frequently put forward as Fact, who must naturally believe that such Statements cannot be so much at variance with the Truth as they actually are, especially as the Fabricators of those Calumnies so ingeniously mix up Fact and Falsehood, as easily to deceive the inexperienced Reader. Thus upon the well-known Fact that I interested myself to obtain Assistance for Individuals about to suffer for Conduct which I considered as the inevitable Result of the Wickedness of others, is built up the Falsehood I have now exposed. I have no doubt in my Mind but that you fabricated this Falsehood, it may be, however, that I am mistaken, and I shall readily admit that I am mistaken if you publish the Name of any respectable Person as your Author.

I request you to let me know by the Bearer if you will publish this Letter in the next Number of your Paper.

I am, Sir,

Your obedient Servant.

(Signed) JAMES FITZGIBBON.

When Colonel Fitzgibbon had thus confessed his Partnership in Guilt, he lay at the Mercy of the Editor he had insulted, who thus disposes of him:—

“ We ask the impartial Reader, did ever an official Man commit himself in such a Way? Did ever a loyal Sycophant so incautiously betray his own Secrets and expose his own Depravity? Colonel Fitzgibbon, Deputy Adjutant General, One of his Excellency’s Suite, a Magistrate of the Home District, publicly asserts, in the Face of an insulted Community, in the Face of a Verdict from an intelligent Jury, in the Face of Law and Justice, that his ‘Conduct’ in privately sneaking about among the York Officials with a Subscription List to defray the Expences of a daring Outrage, ‘was dictated by a Sense of Duty!’ and that the illegal and infamous Conduct of the Destroyers of Mr. M’Kenzie’s Property was ‘the inevitable Result of the Wickedness of others!!!’ Good and merciful Heavens! was there ever such Doctrine preached up by a British Magistrate, the Dispenser of Law, and sworn Conservator of the Public Peace, that because a little Scurrility is published in a Newspaper, ‘the inevitable Result’ is, that the House must be illegally and forcibly entered, and the Property destroyed, no Matter whether the Owner or his Creditors suffer by it! and that it is the ‘Duty’ of a Magistrate, instead of preventing the Outrage, to counteract the Intention of the Law by ‘spontaneously’ collecting Money to keep the Rioters indemnified.

“ And we must say, that in the above Letter he makes an Avowal that will for ever damn him in the Eyes of every honest Man; for either the highly respectable Jury who sat on M’Kenzie’s Case, and after a patient Hearing of the whole of the Evidence returned a Verdict against the Rioters for £625, have perjured themselves by fining Men who ought to stand indemnified, or Colonel Fitzgibbon’s Conduct as a Magistrate, in endeavouring to shield them from the Verdict, was infamous; there is no Alternative. But the Colonel says the Outrage was ‘the inevitable Result of the Wickedness of others;’ that is, that Mr. M’Kenzie called the Rioters, or their Friends, bad Names in his Paper; and that the Destruction of his Printing Office was consequently altogether unavoidable on the Part of the official Mob.

“ Again, taking the Colonel upon his own Principles, he says his ‘Conduct upon this Occasion was dictated by a Sense of Duty;’ and he has not a Wish for the Concealment of any single Step he took in the Accomplishment of the Object he had in view, which originated entirely and spontaneously with himself? If then it be a Thing of which the Colonel feels proud to avow himself the sole and spontaneous Origin; if it be no Disgrace for a Colonel of the Militia, a Deputy Adjutant General, and a Justice of the Peace, to subscribe himself and beg from others Money to defeat the Ends of Justice, and keep indemnified a Band of convicted Rioters, why should he call it

“ ‘Public Calumny’ to hint that his Excellency had his Name at the Head of

“ the List? If it be a good and laudable Thing, why not give his Excellency a Share in the Honour? If disgraceful, why ‘spontaneously’ avowed by the Colonel?”

“ With respect to his Excellency not knowing any thing of the List, nor contributing to it, we are happy to see his Excellency’s Innocence established by the Evidence of a Man without whose Knowledge it would seem that it is wholly impossible for his Excellency to do any thing! for we view the Measure, flowing ‘*spontaneously*’ as it did from the Fountain of official Corruption, to be the most unjustifiable, the most infamous, and the most assassin-like Attempt to stab the Rights of the People that has ever occurred in this Colony; a Measure which puts the Laws and the Constitution at defiance, and renders Trial by Jury a mere Mockery; a Measure which strikes at the Foundation of civilized Society, and places cultivated Man on a Level with the Savage; a Measure which leaves the weak at the Mercy of the strong; and, finally, a Measure which encourages the grossest of the human Passions, by offering to the malicious and vindictive Heart the richest, most alluring, and most direct Premium for Villainy and Outrage — *Indemnification in his Guilt!* Where, we ask, is the official petty Tyrant that fancies to himself that he has received Provocation by ‘the Wickedness of others,’ who will restrain his Arm when he has such Tools as James Fitzgibbon, the successful Pander to official Depravity, to sneak privately about from Office to Office, and beg for him an Indemnification from the Verdict of an honest Jury of the Country; and when the Outrage is too daring to be atoned for by the poverty-struck Officials of *little York*, to apply by Letter to the Brethren in the remotest Parts of the Province? But now that the Agent in this foul Conspiracy to defeat the Ends of Justice has boldly avowed the Fact, we hope the House of Assembly, the natural Guardians of the People’s Rights, will do their Duty; that they will probe the Affair to the very Bottom; and that they will let our ‘*spontaneous Calumniator*’ know, *that the Person who publicly avows that his Interference is to counteract the Intention of the Law, and defeat the Ends of Justice, was “dictated by a Sense of Duty!” is not a fit Person to fill an Office in Legislative Halls; and that they will ‘purge’ their House (as Dr. Strachan says) from such Impurity.*”

CAPTAIN LYONS.—I had discovered on several Occasions that General Maitland is extremely uneasy under personal Attacks upon his Character; and when I had allowed Weeks to elapse without perceiving in the official Paper of the Province the least Notice of the Riot, and learnt that all the Delinquents remained in Place, I soon saw through the Plan of the Ministry. His Excellency was to appear ignorant of this notorious Riot, leaving it to the Trio (Hillier, Robinson, and Macaulay) to get out of the Scrape as easily as they could. I found that his Excellency was to make one of his Pilgrimages between Queenston and York, by the Frontenac Steam Boat, and I judged he would call at the Post Office in passing. I prepared a Selection from the York, Rochester, Kingston, and Washington Newspapers; in several of which Sir Peregrine got the Credit of chief Instigator of the Press Riot, and inclosed them in a blank Cover, along with a Letter from Mr. Gourlay to J. B. Robinson, containing sundry suitable Admonitions, and directed them “Care of Sir P. Maitland on his Way to York.” This Package I sealed and sent to the Post Office; the Clerk delivered it to his Servant. In the Steam Boat he had Time to look over his Dispatches, and the Result was the Dismissal of Captain Lyons from his confidential Situation in his Office, and a brief Notice of the Riot in the next Saturday’s Gazette. This was all forced Work, however; and Captain Lyons was soon reinstated in the very responsible and lucrative Post of Register of the Niagara District, vacant by the Death of Judge Powell’s Son, and is now a Barrister in the higher Courts of our immaculate Judiciary. From one End of this Continent to the other the Press cried, “Shame on the Press Riot,” but in Canada it cried in vain. Such Services as the Rioters performed are not often soon forgot. Even Colonel Fitzgibbon met his Reward in an Appointment to the Head Clerkship of the Assembly of Upper Canada; but there will probably be *an if* or two before Installation.

During

During the Time my Press was dormant, an anonymous Writer in the Lewiston Paper (and who I ascertained beyond a Doubt to be that sycophantic Tool who told so many Untruths of Mr. Gourlay, and who now writes blackguard Nonsense by the Sheet as Vatkin Miller,) was prevailed upon by the Maitlands to undertake their Case for a Consideration. Don Quixote and his Blue Stocking termed their joint Effort "A Subscriber," and meanly attempted to dive into my personal Affairs, and do me harm with the Public at a Time when I could not reply. I despised them for this Conduct, and shall despise them to the End of the Chapter; but as "Blue" is intimate at Head Quarters, the following Extract is important, being joined with Lyons's late Elevation to the Registership:—

"In dismissing from this Office a young Man to whom he is said to have been much attached, the Lieutenant Governor certainly acted with Sternness of Justice worthy his high Character and Situation, and gave a convincing Proof (if Proof was wanting) of his Zeal in the Support of the Laws and of that Order which is necessary for the Well-being of Society."

(From the Brookville Recorder.)

FREEDOM OF THE PRESS.—It is a Position generally laid down by the unbiassed Advocates of the British Constitution, that the Freedom of the Press is the great Bulwark of the much-boasted Liberty of Britons. In this there is much Reason; for in what Country is Liberty exercised in a more extensive Degree, and where has Refinement and Prosperity risen to a greater Height, than where the benign Influence of a free and unshackled Press has found its Way? Yet it has met with severe and determined Opposition from aspiring Demagogues, and those heartless and unprincipled Men who can sit themselves down in the Midst of the Ruins of their Country, if they can but obtain a Share of her Spoil, and fatten on her Degradation. That such Men should be found is, to every true Patriot, a Matter of Regret; but that there are such, almost every Age and Country can furnish us with Examples. It is not, therefore, a Matter of Surprise that our Capital should nourish in her Bosom a Party of Men capable of assailing the most vital Interests of our Country, and make an Effort to put down, by physical Force, any Person who should have the Firmness and Temerity to hold up to View the base and under-handed Measures practised for Self-aggrandizement, reckless of the Fate of Posterity or the Feelings of the virtuous and patriotic. That such Men should be found is, indeed, not so much a Matter of Surprise; but that they should be countenanced and supported in one of the most daring Outrages ever committed on the Liberty of the Press in this Province, by Men whose Situations in Life and Connection with the Government of the Province should lead them to visit with the most marked Indignation every Violation of the Laws of our Country, must be, to every Man of Probity and Justice, a Matter of Surprise and Regret.

It is stated in a Public Paper, as coming from good Authority, that the Amount of Damages given by a Special Jury for the Destruction of the private Property of an Individual has been raised by Subscription among the Ministerial Party in the Town of York, and that so general were the Contributions, that few, even among the Perpetrators of the Outrage, were under the Necessity of paying above Ten Dollars. If this be true, where will we look for Justice and Protection, when, for a trifling Sum from those Individuals whose Conduct may be opposed to the free Exercise of personal Rights, a Subject of His Majesty may have his Property destroyed in the Face of Day, himself thrown out of Employment, and his Family exposed to Poverty and Insult? If such Things be countenanced by the opulent and powerful among us, what may we not expect from the free Exercise of Mob Law by those moving in an inferior Station? And who among us will be safe, if, following the Example set in the Capital of our Province, our Neighbours, who are not under the Influence of moral Restraint, should conduct themselves on a similar Principle?

Speaking of myself, the Editor continues, his Conduct is to be judged of by those who feel aggrieved by his Publications, whether true or false, whether expedient or inexpedient, who, in the Plenitude of their personal Powers, and

in the Confidence of their high Standing and Connections, bid defiance to all Laws. To crown this and fix a lasting Stigma on the Province, what is next done? A Sum is awarded by a Special Jury barely sufficient to cover personal Losses, which, as we should construe the Laws, was meant to operate as a salutary Lesson; but, in lieu of this, the Cheek designed to be put upon such Conduct is destroyed by the very Persons most interested in enforcing it, and who should express the utmost Abhorrence at every Attempt to render nugatory its Effects.

Is such a State of Things to be tolerated in the Capital of a British Province, and under the Eyes of His Majesty's Representative?

No. 21.

COPY of a Letter from Mr. R. W. HAY to Mr. WILLIS.

Sir,

Downing Street, London, 5th Sept. 1828.

I AM directed by Sir George Murray to acknowledge the Receipt of your Letter dated the 26th Ultimo, with its Inclosures.

With reference to that Part of your Letter in which you desire that Mr. George A. Hamilton may be permitted to act on your Behalf, and to transact such Business as may be committed to him, Sir George Murray desires me to state, that upon a Subject of this Nature he does not deem it convenient to receive any Communication which is not in Writing and signed by yourself.

With referenee to the Passage in your Letter, in which you state, that "if your Explanation should not be deemed sufficiently explicit, you are quite prepared to enter into the minutest Detail, taking Mr. Robinson's Statement and Letter Sentence by Sentence," I am to acquaint you, that you must exercise your own Discretion as to the Manner of conducting your Defence to the Charges preferred against you by the Lieutenant Governor and Executive Council of the Province of Upper Canada.

I am further directed by Sir George Murray to inform you, that he has now received from the Lieutenant Governor a Dispatch inclosing the Report of the Executive Council by which his Excellency was guided in removing you from your Office as one of the Judges of the Court of King's Bench in Upper Canada. As the Documents annexed to this Report are very numerous and of great Length, a considerable Time must elapse before a complete Transcript of them could be made in this Department for your Information. I am therefore to state, that any Person whom you may think proper to employ for the Purpose will be permitted to make a Copy of the Report and annexed Documents, for your Use. Should it not be convenient to you to avail yourself of this Offer, Copies will be prepared for you with as much Expedition as the many urgent Engagements of the Officers of this Department will allow.

I am, &c.

John W. Willis, Esq.

(Signed) R. W. HAY.

No. 22.

COPY of a Letter from Mr. WILLIS to the Secretary of State for the Colonial Department.

Sir,

35, Park Street, Bath, 6th September 1828.

I HAVE to offer my best Acknowledgments for the kind Feeling which has prompted the obliging Offer in your Communication of Yesterday, permitting me to appoint a Person to take Copies of the Report of the Executive Council of Upper Canada, and the Documents annexed to it, this Report being now stated

stated to be the Document relied upon by the late Lieutenant Governor of that Province, to justify his Removal of One of the King's Judges from Office.

Situated as I now am, I find myself in a painful Dilemma. The earliest possible Knowledge of the Accusations against me is, of course, most desirable. The Means of obtaining it, should I desire my Solicitor to engage in this Stage of the Business, and take these Copies, must of necessity be productive of very great Expence, which my being deprived of Salary, and having experienced heavy pecuniary Losses, hitherto uncompensated, and arising from Circumstances not within my Controul since I went to Upper Canada, render a very serious Consideration to me at present.

If, therefore, without a Breach of any established Regulation, the original or duplicate Documents could be entrusted to me, I would venture to solicit that they might be immediately sent to me here, pledging myself carefully to preserve and duly to return them with all reasonable Dispatch.

If this cannot be permitted, it will only remain for me to proceed to London, and forthwith personally commence the Task, as the least expensive, and, perhaps, the most respectful Mode of Proceeding.

I have to repeat my Thanks for the Consideration already shewn to me at the Colonial Office with reference to these Papers; and, requesting to be favoured with an early Answer,

I have the Honour to remain,

Sir,

Your very obedient Servant,

(Signed) JOHN WALPOLE WILLIS.

The Right Hon. the Secretary of State,
Colonial Department.

No. 23.

COPY of a Letter from Mr. R. W. HAY to Mr. WILLIS.—One Inclosure.

Downing Street, 8th September 1828.

Sir,

I AM directed by Secretary Sir George Murray to acknowledge the Receipt of your Letter of the 6th Instant, and to transmit to you the accompanying Opinion of the Attorney General of Upper Canada; being the only Paper in Duplicate connected with the Proceedings of the Executive Council of that Province in your Case which has been received at this Department.

Sir George Murray desires me to add, that Copies of the other Papers and Documents relating to your Case are in Preparation, and will be forwarded to you when ready, which may be expected towards the End of the present Week.

I am, &c.

(Signed) R. W. HAY.

John W. Willis, Esq.

No. 24.

COPY of a Letter from Mr. WILLIS to the Secretary of State for the Colonial Department.

35, Park Street, Bath, 10th Sept. 1828.

Sir,

I BEG you to accept my very sincere Thanks for the Document by Mr. Robinson, which reached me Yesterday; and perhaps as it is printed, and there is a Duplicate, I may be permitted to retain it.

I have also to express the high Sense of Obligation I feel for your kind Consideration in directing the other Papers to be copied, and sent to me at the Period you have mentioned.

I have the Honour to remain,

Sir,

Your very obedient Servant,

(Signed) JOHN WALPOLE WILLIS.

The Right Hon. the Secretary of State,
Colonial Department.

24th June 1828.

No. 25.

COPY of a Letter from Mr. R.W. HAY to Mr. WILLIS.

In Sir P. Maitland's
Dispatch of 6th July.

Sir,
Downing Street, 15th Sept. 1823.
WITH reference to my Letter of the 8th Instant, inclosing the Opinion of the Attorney General of Upper Canada, I am directed by Secretary Sir George Murray to transmit to you herewith Copies of the other Documents which have been received from the Lieutenant Governor, relative to your Removal from the Office of One of the Judges of the Court of King's Bench in Upper Canada.

I am, &c.

J. W. Willis, Esq.

(Signed) R. W. HAY.

No. 26.

COPY of a Letter from Mr. WILLIS to the Secretary of State for the Colonial Department.

Sir,
35, Park Street, Bath, 16th Sept. 1828.
I HAVE to offer you my best Acknowledgments for the official Papers relative to the late Proceedings in Upper Canada, which I received Yesterday; and to state, that I hope to have the Honour of transmitting to you my Observations upon them towards the End of this Week.

I remain, Sir, very respectfully,

Your obedient Servant,

The Right Hon. the Secretary of State,
Colonial Department.

(Signed) JOHN WALPOLE WILLIS.

No. 27.

COPY of a Letter from Mr. WILLIS to Secretary Sir GEORGE MURRAY.—
Five Inclosures.

Sir,
35, Park Street, Bath, 24th September 1828.
I HAVE the Honour herewith to transmit a Statement of my Answer to the Charges contained in the Report of the Executive Council of Upper Canada, as well as the Documents thereunto appended. I inclose also a Copy of my judicial Opinion, printed in a Canadian Newspaper. Being obliged to be my own Clerk, I have to apologize for forwarding it in such a Shape, but hope that in this printed Form it will not be less intelligible than if transcribed. I send also Copies of a Letter written by me, on Receipt of the Commission of Amotion, to Major Hillier, protesting against the Illegality of the whole Proceedings, and requesting Leave of Absence from the Colony; and of Major Hillier's Answer, in which he informs me, that under existing Circumstances, I was free to absent myself when I pleased, without Permission. I also inclose the Copy of a subsequent Letter addressed to Major Hillier, on finding that my Pay was stopped, requesting to be informed whether my Amotion from Office was to be looked upon as a Matter of Expediency or of Punishment. To this I received no other Answer, than a verbal Communication from Major Hillier, that he considered the Amoval as Matter of Expediency, and not of Punishment.

* See p. 67.

* See p. 135.

The remaining Document is a Copy of an Address received since my Arrival on England, which I transmit, as well as the other Documents, in that Spirit of Openness and Candour which has guided my Conduct throughout; begging to

to assure you, that His Majesty's Government is now in Possession of every Document, and all the Information connected with this Affair, of which I have been possessed, or can furnish.

As to the legal Opinions contained in my Statement, they must be judged of by their own Validity; to me there appears to have been nothing yet advanced which could lead me to doubt the Correctness of my judicial Declarations.

The Assertions I have made, and the Facts I have stated, I am able and willing, if required, to substantiate to the Letter. I have forborne to avail myself of many Circumstances, and much Argument, which would have given a higher Colouring to my Defence; but I have been determined to adhere strictly and rigidly to such Statements as cannot give rise to the slightest Discussion.

If I have made use of any Language or Expressions incompatible with Propriety or official Etiquette, the personal Nature of the Subject will I trust plead my Excuse.

It now remains for His Majesty's Government to come to a Decision on the whole of this Case.

I think it will be evident that the Question is not, whether I have been guilty of Misconduct, but in what Manner the flagrant Injustice inflicted on me may be redressed?

For the Courtesy with which I have been treated at the Colonial Office, I beg to return my best Acknowledgments; I shall not, I hope, be deemed presumptuous or impatient, when I say I fully rely upon your good Feeling and Sense of Justice, for a speedy Determination.

I have, &c.

Right Hon. Sir George Murray, &c.

(Signed) JOHN WALPOLE WILLIS.

Inclosure, No. 1.

Answer to the Charges contained in the Report of the Executive Council of Upper Canada.

[This Answer will be found in the Series of Official Letters and Documents published by Mr. Willis.]

The Judicial Opinion, alluded to in the above Letter, is already inserted at p. 67. of this Series.]

Inclosure, No. 2.

Sir,

York, Upper Canada, 28th June 1828.

I BEG you to inform the Lieutenant Governor that I protest against the Legality of my Suspension, particularly as it is admitted, according to your Letter of the 20th of this Month, that the Lieutenant Governor feels it to be obvious that he cannot command me to do any Act which I consider illegal.

I request Leave of Absence may be granted to me by those duly qualified, until His Majesty's Pleasure respecting my Conduct be ascertained.

I have, &c.

Major Hillier, &c. &c.

(Signed) JOHN WALPOLE WILLIS.

Inclosure, No. 3.

Sir,

The Cottage, Queenstown, 24 July 1828.

I HAVE submitted to the Lieutenant Governor your Letter of the 28th Ultimo, and am commanded by his Excellency to acquaint you, that with respect to your Removal from Office the Government of this Province is perfectly prepared to justify to His Majesty the Measures which it has unhappily been compelled to take; and I am directed to add, that his Excellency does not think it necessary to grant you Leave of Absence, as, under existing Circumstances, he considers that you are entirely at liberty to leave the Province when you please, without his Permission.

I have, &c.

Hon. J. W. Willis, &c. &c.

(Signed) G. HILLIER.

Inclosure, No. 4.

Sir,

York, Upper Canada, 8th July 1828.

I HAVE to request that you will state to the Lieutenant Governor, that as no Cause is assigned for my Removal from the Appointment which I had the Honour to receive from His Majesty, in the Warrant issued for that Purpose under the Great Seal of the Province, and being aware of the Inexpediency of assigning any Reason on such Occasions, I hope, in the most respectful Manner, that I shall not be deemed obtrusive beyond the Necessity of the Case, in requiring to be informed whether that Discharge or Removal is to be considered as a Penalty, or only as the requisite Means to create the Hiatus by which the Administration of Justice may be filled up, until my Opinion was overruled by higher Authority. In this Application, if there have been any seeming Occasion to think that in Circumstances so peculiar as those in which I have been placed under, not only the Responsibilities of a Judge's Oath, but the Penalties to which he may be subjected when acting with the King's express Commands, I may apparently have indulged Feelings of too individual a Nature to be in consistency with an official Character, I am persuaded His Majesty will make all due Allowance for the Delicacies and Difficulties of my Situation.

It is impossible for me to think, after having so minutely and considerably assigned the Reasons as to the illegal State of the Court of King's Bench, at the Commencement of last Term, that the Warrant was issued with any penal Intention; but notwithstanding it must be obvious, from the Terms of the Instrument itself and particularly as the Practice of the British Constitution afforded another Course of Proceeding, that it might be supposed that I had incurred, not only Displeasure, but the Forfeiture of my Commission; whereas the Circumstances of the Case very obviously point out, that without either Forfeiture or Penalty the Warrant might have been conceived by the Executive Council to have been the only Mode of obviating a great judicial Obstacle, to the Consequence of which no Person can be more alive than I am. I have therefore presumed to hope, that his Excellency will be pleased to state whether my Discharge from Office is to be regarded by me as on account of Contumacy, or rendered necessary by those Forms of Proceeding, which in such Cases Government finds itself constrained to adopt. I am the more particularly induced to make this Request, as his Excellency has been pleased to restrict the Receiver General from paying any Salary beyond the Date of the Commission of Amoval.

I have, &c. &c.

To Major Hillier, &c.

(Signed) JOHN WALPOLE WILLIS.

Inclosure, No. 5.

An Address of the Inhabitants of the Township of Brock, Upper Canada, to the Honourable John Walpole Willis, &c. &c.

Sir,

ALTHOUGH your late Arrival in this Province has prevented us from obtaining the Honour of an Acquaintance with you, yet we had, on hearing of the Line of Conduct you had commenced, fondly hoped to have seen His Majesty's Court of King's Bench in this Province what it ought to be, the Seat of Rectitude and strict Justice; but our pleasing Prospects, to our Regret, seem to meet with, at least, a momentary Check, by what we conceive to be an unwarrantable and illegal Stretch of the Provincial Executive, though we are not without Hopes of meeting with a speedy Redress from our beloved King.

In the meantime we believe you can rely with the utmost Confidence on having the good Wishes of the Canadian People for your Prosperity. But whatever may be the Sentiments of others, we feel we should be guilty of Ingratitude, both towards our gracious King and to yourself, were we to conceal our honest Sentiments on this momentous Occasion. Then, Sir, be assured that we consider you to have acted a fair, legal, and unbiassed Part in the Discharge of your Duty as One of His Majesty's Judges of the Court of King's Bench, and thereby merit the Approbation of all who are true Friends to the British Constitution, and wish to see our high Courts in the Purity, Justice, and true Principles of British Freedom.

Permit us to say, that as loyal Subjects of His Majesty King George the Fourth, we cannot help expressing our Desire that His Majesty will be graciously pleased to reinstate you in Office, with such Advancement as he may in His Wisdom see fit to direct.

Be pleased to present our Thanks to His Majesty for having listened at all Times to the reasonable Requests of his dutiful and loyal Subjects in Upper Canada.

Sir,

Your most obedient Servants,

Jas. Beikie.	Randal Wixon.
Mathew Pie.	Oliver Taylor.
Asa Wilson.	Webster Stevens.
Joel Wixon.	Anthony Pilkie.
Sylvester W. Sharrad.	Sampson P. Harris.
Townsend Wixon.	J. Rumerfield.
William Stevens.	Evens Feren.
David Patterson.	Samuel Bice.
Asa Wixon.	Moses C. Beatys.
William Smith.	Dan' Williams.
Robert Johnston.	John M'Laughtin.
Silas B. York.	W ^m Parliament.

Brock, 9th July 1828.

The following Inhabitants of the Township of Uxbridge join in the foregoing Address :

Amos Hilburn.	Isaiah Webb.
Jesse Broun.	Alma Hewett.
Solomon Sly.	John Warner.
John B. Planch.	John Warner, jun.
Tho' Helland.	John Hume.
Tho' Arnold.	John Pearson.
Panel Webb.	Elijah Collins.

10th July 1828.

No. 28.

COPY of a Letter from Mr. R. W. HAY to Mr. WILLIS.

Downing Street, 1st October 1828.

Sir,

I AM directed by Secretary Sir George Murray to acknowledge the Receipt of the Letters which you have addressed to this Department, dated the 26th of August and 24th Ultimo.

Adverting to the peculiar Nature of the Questions which have been brought into Discussion, in the Correspondence between the Lieutenant Governor of Upper Canada and yourself with this Department, Sir George Murray has deemed it right to transmit the whole of the Documents connected with your Removal from Office as a Judge of the Court of King's Bench of that Province, to the Lord President of the Council; and he has requested his Lordship to submit the whole Question to His Majesty in Council, for His Majesty's Decision.

I am further directed to acquaint you, that Sir George Murray will not fail to use such Means as it may be in his Power to employ for obtaining as early an Investigation of the Subject as the Practice of the Lords of the Privy Council, on Occasions of this Nature, will admit.

I am, &c.

John W. Willis, Esq.

(Signed) R. W. HAY.

No. 29.

COPY of a Letter from Mr. WILLIS to the Secretary of State for the Colonial Department.

35, Park Street, Bath, 2d October 1828.

Sir,

HAVING this Day been apprised, in a Letter from Mr. Under Secretary Hay, "that owing to the peculiar Nature of the Questions which have been brought into Discussion in the Correspondence between the Lieutenant Governor of Upper Canada and myself with the Colonial Department, the whole of the Documents connected with my Removal from Office as a Judge of the Court of King's Bench of that Province have been transmitted to the Lord President of the Council, that the whole of the Question may be submitted to His Majesty for His Majesty's Decision"—I have most respectfully to request that I may be distinctly and particularly informed if any Correspondence between the Lieutenant Governor of Upper Canada, other than that with which I have been favoured, has been so transmitted, as it is impossible that I can be either morally or legally affected by any Document which I have not been publicly apprised of, and have not had an Opportunity of answering. I further beg to be informed, if this Reference to His Majesty in Council is to be considered in the Nature of a legal Proceeding, in which it will be necessary, in this Stage of the Business, to have recourse to professional Assistance; or as a Mode which is merely rendered necessary by the ordinary Process of official Business in Cases of this Nature. I would also respectfully enquire if, in the Interim, I am to remain deprived of that Salary on the Faith of which I gave up my Profession, and, at the Expence of upwards of £2,000, went out with my Family, from whom I am now separated, to Upper Canada.

In offering my best Thanks for the Assurance of your Endeavour to obtain an early Investigation of this Matter, I venture, under the very peculiar and most distressing Circumstances in which I am now placed, to ask when, so far as relates to His Majesty's Decision, it is likely to be terminated.

I have hitherto confined myself merely to replying to the Charges that have been brought against me, without adverting to those Complaints which, on my Part, it may be hereafter necessary to lay before you.

I have the Honour to remain,

Sir,

Your very obedient Servant,

The Right Hon. the Secretary of State.
Colonial Department.

(Signed) JOHN WALPOLE WILLIS.

No. 30.

COPY of a Letter from Mr. R. W. HAY to Mr. WILLIS.

Sir,

Downing Street, 3d October 1828.

Sir George Murray has had under his Consideration your Letter of the 2d of October, and has directed me to return the following Answer.

You will be furnished by this Department with a complete Copy of every Paper which has been transmitted to the Lord President of the Council, of which Copies have not hitherto reached you ; but some Time must necessarily elapse before such Copies can be completed.

You will in due Time receive, through the proper Officer, Notice of the Proceedings which the Lords of the Privy Council may deem it right to adopt ; and their Lordships will, of course, receive such further Explanations as you may consider it necessary or proper to offer.

You will learn, by Application at the Council Office, in what Manner you are to proceed in conducting your Defence before their Lordships.

So long as you continue suspended from your Office, you will not be entitled to any of the Emoluments belonging to it.

It is impossible that Sir George Murray should undertake to predict within what Time the Discussion of this Question before the Privy Council will be brought to a Termination.

I have, &c.

(Signed) R. W. HAY.

John W. Willis, Esq.

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PART IV.

COPY of a Letter from Mr. WILLIS to the Secretary of State for the Colonial Department.

Sir,

Bath, 5th December 1828.

I HAVE now the Honour to transmit for your especial Information, and also for the Purpose of being laid before the Lords of the Council, through the Intervention of your Department, the accompanying Letter of this Date, by which I trust I have not only fully answered, but completely refuted and exposed the unfounded Allegations contained in the several Dispatches of the 6th of June, the 26th of June, the 6th of July, and that marked "Separate," of the same Date, signed by Lieutenant Governor Major General Sir P. Maitland, and forwarded to me, by your Direction, on the 13th Ultimo.

In my Letter I have referred to the inclosed Documents marked (F.) and (G.), and the Papers thereto annexed.

The first is a *correct* Statement of the Facts respecting the Establishment of a Court of equitable Jurisdiction in Upper Canada.

The other is a minute Narrative of all the Occurrences that I am aware of, in anywise concerning me, which took place during my Residence in that Province.

You will at once perceive the Propriety of immediately releasing me from that State of Degradation, Affliction, and Misery in which I have been so unjustly placed, and compelled to continue, ever since the 26th of June; for after the Explanation I have given, and which I am prepared to substantiate to the utmost, it will be manifest that I ought no longer to suffer, even though the Matter be referred to the Lords of the Council, the Courts of Law, or the Imperial Parliament.

I have the Honour to be,

Sir,

Your very obedient Servant,

(Signed) JOHN WALPOLE WILLIS.

The Rt. Hon. the Secretary of State,
Colonial Department.

REPLY to the Charges contained in the Dispatches of Major General Sir PEREGRINE MAITLAND, of the Dates of the 6th June, 26th June, and 6th July.

Sir,

Bath, 5th December 1828.

HAVING replied at some Length, on the 24th of September, to the Documents transmitted to me by your Direction on the 28th of August and the 15th of September, containing such of the Charges made against me by the Provincial Government of Upper Canada with which you then deemed it expedient I should be furnished, I have now the Honour to submit to your Notice an Answer to all such other Accusations as I am informed have already been laid before the Lords of His Majesty's Privy Council, and are now sent to me for my Observations. These Charges are contained in certain Dispatches from Lieutenant Governor Major General Sir Peregrine Maitland, dated respectively the 6th of June, the 26th of June, the 6th of July, and another also of the 6th of July, marked "Separate."

It would certainly have been much more consonant with my Feelings, had I been permitted to see and answer the whole of the Charges urged against me at once; or, that not being convenient, to have been furnished with Copies of these latter Accusations, before it was considered expedient to submit them to

the Lords of the Council, at the same Time, and together with the Charges to which I had previously replied.

I answered the preceding Charges, supposing they were all that I was expected to reply to. I answered them fully and without Reserve, under the express Understanding that you would exercise your Judgment upon the whole Question, and decide at once.

I expressed to you my Regret, in my Letter of the 7th of October (No. 83.), that my Case was to experience indefinite Delay, by being unexpectedly referred to the Privy Council, before whom the answered as well as the unanswered Charges had been laid.

I can, however, Sir, appreciate the Motives which, as it seems to me, have actuated you in thus proceeding in a Manner, at first Sight, perhaps, somewhat disingenuous.

It might well be deemed a Question, whether Accusations of so violent and personal a Nature should be allowed to go forth, through the Medium of Government, against an Officer of His Majesty; or, in kindness to the Character of the Provincial Government, be withheld altogether.

And I must now beg leave to offer my best Thanks for the Consideration you have evinced towards me, in taking the Advice of His Majesty's Privy Council, and thereby procuring me the Opportunity of replying to Documents which, from their private Nature, I could not otherwise have expected to receive; and I must therefore have continued to remain under the Imputation of Calumnies the most unfounded and malicious that were ever, perhaps, sent Home against an Officer of the Crown.

I consider the Transmission of the "Separate" Dispatch as a Mark of special Favour, and as such I beg to acknowledge it. I consider it also as the best Expression of your full Determination to do ample Justice to the Accuser, as well as the Accused.

I shall now proceed to comment upon the Dispatches and their Inclosures, in the Order of their Dates; premising, however, that should I be betrayed into any Asperity of Language or Exhibition of Feeling, which I shall endeavour as much as possible to prevent, it must be attributed to the Indignation which any honest-minded Man must experience on reading a Series of personal Invectives, such as rarely, I should hope, is received from any Gentleman in the Service of His Majesty.

If a Judge of Upper Canada can or ought to be removed under any Circumstances, otherwise than through the Intervention of the Legislature, such Removal can only be effected according to the Act of 22 Geo. 3. c. 75., by which the Governor and Council of any Colony is empowered to remove Officers for Misconduct.

Admitting, however, for the Sake of Argument, the Power of removing a Judge appointed by His Majesty to be vested otherwise than in the Legislature, that Power is clearly by the above Act given only to the Governor and Council.

Lieutenant Governor Maitland therefore informs His Majesty's Government that he shall consult his Council as to my Conduct, and take their Advice upon it.

The Report made by the Executive Council of Upper Canada on the 27th of June shews the Manner in which such Consultation was conducted.

It will naturally be expected, that in laying before the Executive Council the Reports of the Crown Lawyers, and such other Reports and Charges as contained, in the Opinion of the Lieutenant Governor, Matter of grave Consideration affecting my Character as a Public Officer, that respectful Notice at least should be taken by the Council of such Communications as the Lieutenant Governor had been pleased to submit for their Opinion. It will be expected that the Council would naturally consider whatever might be imputed to me of Blame, when by the Lieutenant Governor's Desire they had my Conduct in Review before them, and did actually come to the Conclusion that I ought to be removed from my Office.

The Dispatches, therefore, of the 6th of June and the 26th of June, or the Substance of them, and the Charges therein contained, will be noticed, if not commented upon, in any Report the Council may have furnished.

The

The Dispatches of the 6th of June and the 26th of June were written, dated at least, before the Report of the Executive Council was or could have been made; yet, on Inspection, it will be found that no Notice whatever is taken of any single Charge made by the Lieutenant Governor against me in these Two Dispatches.

The Question then arises, were those Dispatches, or the Charges contained therein, laid by the Lieutenant Governor, together with his other Charges, before the Council or not? If they were, why have not the Executive Council taken some Notice of them in their Report, however small that Notice might be? Did they by not doing so intend any Disrespect to the Lieutenant Governor; or did they consider the Charges such as they could not legally take into their Consideration? They *did not* think them available for the Purposes of Accusation, or it is presumed they would not have failed to put them into the Scale against me, when the Balance was so equally poised that it was at last turned by "the Council being left to interpose for themselves the Effect of my "judicial Opinion." Must we assume, then, the other Alternative, that these Charges contained in the Dispatches were *not* laid before the Executive Council? Now supposing, therefore, I could be removed even by the Governor and Council, I presume I could be removed only for such Reasons as the Council should think sufficient to warrant the Governor in such an Act.

But the Executive Council either have rejected the Reasons flowing from the Charges contained in these Dispatches, as inapplicable or insufficient (supposing they were submitted to their Consideration), or the Lieutenant Governor did not lay them before the Council for the same Reason.

Either Way, therefore, these Charges are not alleged in the only Mode they can be brought against me, as affording any Grounds for my Amoval.

They either *were* submitted to the Council, or they *were not*. But the Council do not notice them in the slightest Degree.

How then, Sir, can they or can they affect the Question of my Amotion? The (Public) Dispatch of the 6th of July, and its illegitimate Brother the "Separate" Dispatch of the same Date, came into Life subsequent to the Birth of the Report of the Executive Council.

Lieutenant Governor Maitland announces in the latter Document the Information, that "Mr. Willis was removed on the 26th of June," with other curious Circumstances hereafter to be noticed.

I presume his Excellency does not intend to convey the Idea that these Two latter Dispatches, written, at least dated, subsequent to my Amotion, and following the Report of the Executive Council, had any retrospective Effect upon the Judgment of the Executive Councillors in making their Report. — I mean that the Dispatches of the 6th of July, or the Charges therein made, could not have had any Effect upon the Report made on the 27th of June, or *a fortiori*, on my Amotion, which was accomplished on the 26th. In the Opinion of the Executive Council, therefore, there appeared sufficient Grounds on the 27th of June to recommend my Amotion on the 26th of June, independently of the Charges which were to be contained in the Two Dispatches of the 6th of July. Upon the whole, then, it must be evident that the Grounds and Reasons, if there be any, for my Amoval, must be sought elsewhere than from any or all of the above-named Dispatches of Sir Peregrine Maitland. They are to be found, such as they are, in the Report of the Executive Council, (made the Day after the Amotion took place,) as is expressly stated in the Separate Dispatch.

To this egregious Report I have fully replied.

It will therefore be now enquired, to what Purpose do the Charges in the Dispatches tend, my Amoval being effected without them?

The first, dated the 6th of June, is to prepare His Majesty's Government for a Measure which I have Reason to know was resolved upon as soon as I set Foot in the Province; and the Three following were manufactured in order to vilify and degrade to the utmost a Man who, they were conscious, had been illegally and unjustly dealt with — that so, when thus put out of the Pale of Sympathy and Compassion on account of his alleged Misconduct, he might appear to have no more than his Deserts, use him never so vilely.

I might,

I might therefore rest content without one further Syllable of Justification, I might leave it to the good Sense and gentlemanly Feeling of yourself, or any Member of His Majesty's Government, to judge of the mean, personal, and *ex post facto* Scandalities to which Sir Peregrine Maitland has not scrupled to affix his Name.

I feel bound, however, in Justice to my Friends, the King's Government, and my own Character, to wade through the Mire of these Dispatches, at whatever Expence of Patience and Temper; perfectly assured at the same Time, that their Substance and Tone have not escaped your Notice or Reprobation.

With regard to Lieutenant Governor Maitland's Dispatch of the 6th of June, the Documents I have already transmitted, and what is said in the accompanying Statement marked (F.), respecting the Transmission of the Chancery Documents, will at once shew how far I was inclined *improperly* "to adopt any unusual Course of Communication with His Majesty's Government," and will fully account for the Manner in which I conveyed to Lieutenant Governor Maitland my Sentiments respecting what I believe to be the necessary Constitution of the Court of King's Bench in Upper Canada. What "more natural or considerate Course" I could have adopted I have yet to learn. I applied for Information to his Excellency's Secretary, and begged to be corrected if I had committed any Sins of Informality.

It matters not what Causes existed for granting Leave of Absence to Chief Justice Campbell. If he wished for it, he was as free to procure it after One Year as at the End of Seventeen Years. There needs no Excuse nor Apology for granting it.

But such Leave, under *any* Circumstances, ought to have been granted, not only to him, but to every other Officer absenting himself from the Province, I humbly submit, according to the Statutes for that Purpose; and Provision made for the due Performance of the Duties of the Officer during his Absence.

Lieutenant Governor Maitland's "Intention to consult the Executive Council before he adopted any Measure concerning me" does not appear to have been subsequently remembered or acted upon; for without waiting for their Report, which was not and could not have been made before the 27th of June, he removes me by a Commission dated, signed, sealed, and registered on the 26th of June.

I agree with his Excellency, that "it is quite clear that the People *ought* not to have been left without the Means of having Justice administered;" therefore I submit that Provision should have been made according to the Statute for the Discharge of the Duties of the Chief Justice during his Absence, and that it was highly culpable on the Part of the Executive Government not to make such lawful Provision.

It is not quite so clear, however, "that the People *cannot* be left without having Justice properly administered;" for if my Opinion be correct, such has been obviously and wilfully the Case, and is at this Moment the Case in Upper Canada.

I refer you to my Letters, my judicial Opinion, and my Reply to the Report of the Executive Council (*vide* Reply, E. p. 7), as Evidence of the Regret I sincerely felt at the Probability of the Excitement that might arise. How much I regretted the Consequences of my judicial Opinion, or how little his Excellency regarded the Excitement created by the Alien Question, need not at present be discussed. I have not, however, been yet so long a Resident in Upper Canada as to assert what I do not feel nor think, nor to bring Charges which I cannot substantiate.

Lieutenant Governor Maitland says, "that Mr. Willis has either been unable, or unwilling, within the last few Months, to avoid making his Proceedings, either in the Civil or Criminal Court, the prominent Subject of political Discussion, and the Prettexts of Attacks from the vilest Quarters." How any Man can prevent his Public Acts becoming the Subject of public or even political Discussion, in a Country where Mens' Tongues and Eyes are free to speak and read, I have yet to learn. If, by attempting to do Justice in Cases into which Party Feuds and Petty Politics had been introduced, I have made

my

my Conduct the Subject of Discussion, I see not any Reason to be ashamed or alarmed. The next best Thing to doing Justice is to satisfy the People that Justice has been done ; and if this were an unusual Thing in the Colony, no doubt it would be talked of.

My Conduct during the Spring Assizes, and the unfortunate Criminal Proceedings which then took place, has already been made the Subject of a "Separate" Statement. Two Newspapers, generally represented to be in the Interest of the Government of Upper Canada, I believe, attributed most improper Motives to me on that Occasion. The Montreal Gazette stated, "that political Differences were the probable Cause of the late Proceedings ;" and the Montreal Courant said, "that Judge Willis seemed decidedly in "favour of the Editor of the Freeman." My political Feelings, however, will be best gathered from the following Passage of my Charge, on that Occasion, to the Jury, in the Trial for Murder. It was the first Charge of any Importance I ever delivered.

"A Stranger in your Province, and uninfluenced (as I hope I always shall be) by any personal, party, or political Feeling, I can have no other Desire than that the Ends of Justice should be completely answered."

I have already in my Statement, in reply to that of Mr. Attorney General Robinson respecting what occurred at the Assizes in April last, had Occasion to allude to the Tar and Feather Outrage. I have likewise done so in the "Narrative of Occurrences in Upper Canada," marked (G.), herewith transmitted, and to which, with the Papers thereto appended, I take leave to call your particular Attention. When, in this Tar and Feather Case, I delivered the Judgment—a Copy of which is annexed to Lieutenant Governor Maitland's Dispatch of the 6th June, and it is also correctly reported in the Observer. Newspaper of the 12th of May, which, as it likewise contains an accurate Report of a subsequent and important Discussion arising out of that Case, I have annexed to the Narrative (G.).—I alluded to the calumnious Reports that had been industriously published and circulated respecting my Conduct at the Assizes.

This Tar and Feather Case, from its Atrocity, and the Offenders remaining so long unpunished, excited most intense Interest throughout the Province. In the Conclusion of my Judgment, I said, "That I had viewed that Case, as "I hoped I should do every other that came before me, solely with reference to its intrinsic Merits. Totally devoid of all party or political Feeling, it had been, and ever would be, my earnest Desire to render to every one impartial Justice. My Conduct, however, had not been so construed; and the Slanderers and Revilers, like the venomous Reptile of the Country, although fortunately heedless of the *Rattle* by which they may be traced, had of late put forth their poisoned Tongues. But "*Justum et tenacem*," &c.

The total Want of Foundation in the Assertion that I associated myself with any Party, or with any Persons, save as mentioned in the Narrative marked (G.), which is annexed, will fully appear by that Document.

Excepting my Intimacy with Mr. Galt and Dr. Dunlop, I associated myself quite as much, or more perhaps, with the Lieutenant Governor and his Officers, as any other Persons in the Province. How respectable that Party was it is not necessary for me to say.

If, on my coming into the Province, an Expectation were entertained, by the great Body of the People, that Justice would be rendered after a Fashion somewhat new to them—that I should not take my Law from the Officers of the Court, nor forbear to declare my Opinion, when formed, to the best of my Knowledge—that I would not permit the Bench to be insulted, even by His Majesty's Attorney General—and that Causes advocated by him might sometimes fail of Success;—if there were an Idea gone abroad that an English Judge might think differently on many Points from his Brethren on the Bench in Upper Canada, and would give such Reasons as he was able for so differing—and if all this did excite "Attacks from the vilest Quarters of the grossest kind against those who were associated with him in the Administration of Justice," as well as against himself—is certainly not a Matter to be wondered at, "in a Province where the Press has been permitted to attain to a Degree of "Licentiousness not easily conceived."*

* See Mr. Attorney General Robinson's Letter and Statement as to his Conduct during the Assizes.

“ The Attacks,” says Lieutenant Governor Maitland, “ which, springing from Mr. Willis’s Comments and Proceedings in Courts of Justice,” (that is, for my Endeavour honestly to administer Justice,) “ form the principal Topics of the most contemptible Newspapers, cannot, without a Forfeiture of Self-respect, be repelled through the Medium of the Public Press, by the Gentlemen against whom they are directed.” The Truth of this I fully admit. Therefore it was, that when the libellous Comments on my Judicial Conduct appeared in the Gore Gazette of May 17th, (which I have appended to the Narrative (G.), a Newspaper admitted by the Lieutenant Governor himself to be so far at least patronized by the Local Government as to be taken in at their Office; — therefore, I say, it was that I sent that libellous Paper, edited by Captain and Adjutant Gurnett of the Gore Militia, to his Excellency, and called his Attention to its Contents; — therefore it was that, in the Correspondence on this Subject, I stated, in my Letter of the 30th of May, addressed to his Excellency’s Private Secretary, “ That my Object in sending that Paper was to draw the Attention of the Lieutenant Governor to the singular Fact of an Officer, *under the Control of Government*, being the Medium of derogatory Comment on one of the King’s Judges in the solemn Execution of his Duty.” Therefore it was that I then added, “ that it was for the Executive Government to determine whether any and what Proceedings should be instituted in a Case so contrary to Decorum, and to the Spirit and Subordination of British Government;” and therefore it is, that “ I rely, with Lieutenant Governor Maitland, that the King’s Government will see and feel the Justice of examining into the Foundations of such Attacks, and the Necessity of saving me from the painful Situation of having to sustain myself against unfounded Imputations, by *whomsoever* (even should it be his Excellency himself) suggested and countenanced, when acting in an independent and firm Discharge of my Public Duty.”

I have also appended to the Narrative (G.) the Observer Newspaper of the 5th of May, containing Extracts from the Montreal Papers I have mentioned; and the Freeman of the 8th of May on the same Subject. I have also annexed an anonymous Pacard, the Kingston Chronicle of the 28th of June, the Gore Gazette of the 5th of July, the Bathurst Independent Examiner of the 20th of August, and the Loyalist (edited by the King’s Printer) of the 2d August, which abound with very unwarrantable Remarks, in my Opinion, upon my Conduct.

I cannot avoid noticing the very extraordinary Similarity of the Phraseology, Style, and Subject of these Remarks, with those of the official Papers which have been transmitted to you from Upper Canada. That “ I have received from Lieutenant Governor Maitland, and from every Member of his Government, *every Justice*,” as he is pleased to assert, I cannot in anywise admit. The Correctness also of the Assertion that I had never been attacked when I delivered my Judgment in the Case of the Tar and Feather Outrage, will appear, not only from what I have already said both here and in my Narrative (G.), but by the Number of the Observer Newspaper of the 5th of May thereto annexed; a Paper, I believe, taken at the Government House, and the Editor of which, I understand, enjoys the Patronage of the Government.

The Motives and Circumstances which led me to prepare for Publication a Work on the Jurisprudence of Upper Canada, may be seen by the Narrative (G.), and by the Manuscript itself thereto appended.

This intended Publication was announced by Advertisement in all the Newspapers published at York, Upper Canada, and also in the Albion or British Colonial Journal, published at New York, and taken in by the Lieutenant Governor himself, as well as by very many others in the Canadas and other British Settlements. This is what is styled the “ *Foreign Paper*” in the Dispatch. “ The significant and unpromising Motto,” as it is called, was painted under my Coat of Arms on my Carriage before I left England. Any other Motto would probably have been equally obnoxious to illiterate Observation.

I can now more easily enter into the Feelings of Alarm and Horror which so “ unpromising a Motto” would create in Minds that shuddered at the opening of a Statute Book so antiquated as the 34 Geo. 3. c. 2.; and estimate the Fear that any Abatement in the Severities of the Criminal Law of Upper Canada might, by Investigation, after the Example of the Mother Country, take place.

It is not surprising that his Excellency should dread the Chance of an Act similar to the Alien Bill being necessary to secure the Property, protect the Liberty, and enforce the Laws of the Province; or that the wretched Prisoners committed to the Gaols of Upper Canada should "hope for a better State of Things," when a Second Gaol Delivery in the Course of the Year should allow them to be tried before they had altogether been rotted with Disease in the Prisons of Upper Canada; though some Inconvenience might thereby accrue to Three Judges, who have at present little to do; and to the Attorney and Solicitor General, who in such Business do little.

The Lieutenant Governor goes on to say, "I have been Ten Years in this Government, and I have received no Representations either against the Laws or the Manner in which they have been administered, and I must conclude that the People are content with both."

I can only say, that I had not taken my Seat on the Criminal Bench Ten Minutes before a very serious Complaint of Neglect in the Administration of the Laws was made before me. The Report of the Select Committee of the British House of Commons on the Civil Government of Canada, dated 22d July 1828, p. 7, states,—“Your Committee, however, are desirous of directing the Attention of Government to the *Sedition Act*, should it not be found to have expired; the *Repeal* of which appears to have *long* been an Object of the Efforts of the House of Assembly of Upper Canada.”

After this Quotation his Excellency's Observation is no Comment. I would, however, also refer to the Report of the House of Assembly of Upper Canada on the Administration of the Criminal Law, which I have already transmitted; and to the Proceedings of that House in the Case of Boulton v. Randall, which are recorded in the Journal of the last Session. It is unnecessary to adduce other numerous Instances which exist to prove the very reverse of what is stated in Lieutenant Governor Maitland's Dispatch. "Contentment," says the Lieutenant Governor, "is important to the Public Peace."

Having thus disposed of this important State Paper of the 6th of June, which abundantly shows what Encouragement there was to make any extra-official Communication to the Local Government of Upper Canada, I now proceed to that of the 26th June, the Day on which the Commission was dated, signed, sealed, and registered, removing me from the Office of Judge, to which His Majesty, and not the Lieutenant Governor, in the first Instance, (as in the Case of Messrs. Sherwood, Macaulay, and Haggerman,) was graciously pleased to appoint me.

I must, in the first place, refer you, not only to my former Statement respecting the Proceedings at the Assizes, but also to the accompanying Statement (marked F.), with reference to the Establishment of an equitable Jurisdiction in Upper Canada; and particularly to the Statement therein contained with regard to my Interview with the Lieutenant Governor on the 8th of May, and my Request on that Occasion, that he would transmit my Application for the Chief Justiceship, until a Court of Equity should be erected.

My first Complaint, as will be seen by the official Letters, respecting the Attorney General Robinson's Conduct, was on the 12th of April; my Second on the 14th of April; but it was not till after the Application I had made on the 8th of May, for the temporary Appointment to the Chief Justiceship, that any Explanation was offered by Mr. Robinson of his Conduct at the Assizes. And even when it was made to the Provincial Government, I was not considered worthy of being informed of it; although I stood in the Situation of one of the King's Judges, complaining of an Officer of my Court, and anxious to have an important Question respecting the Administration of the Criminal Law duly ascertained and settled;—a Point on which Mr. Attorney General Robinson stated the Practice differently in the Course of Two or Three Days; and which, while undetermined, must necessarily be productive of Injury and Inconvenience.

I have every Reason to believe, and with, I think, far better Means of judging than the Lieutenant Governor, that my Conduct during the Assizes was not only very generally approved of, but that that of Mr. Attorney General Robinson was as generally condemned. For how, I would ask, could the Lieutenant Governor.

Governor, who, ever since the 26th of March, with the Exception of a very few Days, constantly resided at his Cottage near Niagara, a Distance of 40 Miles, possess the same Means of Observation as a Person residing in the Capital, and one, moreover, who had been an Actor in the Business? except, indeed, through that Medium which seems to have magnified to horrible Dimensions, while it distorted all Persons and Actions whose Figures and Deeds were reflected on the Retina of his executive Vision. If, however, my Conduct was universally condemned, as the Lieutenant Governor asserts on the 26th of June, what becomes of the Assertion in his previous Dispatch of the 6th of June, "that my Conduct had, at the Time of the Judgment in the Tar and Feather Case," (nearly Three Weeks *after* the Assizes,) "*never been attacked.*" An old Proverb urges the Necessity of those who are addicted to a certain Failing having good Memories.

"My Attack," as it is called, on the Attorney General, or in other Words my Complaint of a flagrant Insult to the Bench from an Attorney of the Court, was *not* the first Remonstrance respecting the Conduct of that Officer that his Excellency has received.

Lieutenant Governor Maitland cannot have forgotten the printed Correspondence with the late Chief Justice Powell, immediately before he obtained his retiring Pension. My Wish, however, is to limit my Observations to Mr. Attorney General Robinson's Duty as a Public Prosecutor; and I will merely add, that I consider the wise and salutary Rule of the Civil Law to be that also of the Common Law. "The Officers who have the Direction of the Policy and Punishment of Crimes owe those Functions to the Public, although there be no Party to demand Justice, and although they may reap no Profit by it themselves."

Whatever may have been the Conduct of Mr. Robinson in 1819, I feel confident that it was incorrect and most improper in 1828.

That he possesses the Confidence of Lieutenant Governor Maitland I have every Reason to believe; but that he appears to possess the Confidence of the Public, as far as my Observation goes, is not the Case. His Circular to the Members of the Bar, for their Testimony to his Conduct, would seem to imply that he himself has some Doubts that the Public do not consider him totally irreproachable.

I sincerely hope the Subject of my Complaint against him may, for the Sake of the Province and the great Ends of Justice, receive the *earliest Investigation*. "I confidently anticipate the Result." I am sure His Majesty's Government will ever promote with Mercy the due and impartial Punishment of Crime, even in the remotest Quarter of the Empire; and at the same Time protect the King's Judges in endeavouring honestly to discharge their Duty, even should they err, from the Petulance and Insolence of an inferior Officer. I therefore, with Lieutenant Governor Maitland, "trust that the Sentiments of His Majesty's Government may be so unequivocally expressed on the Subject" as to set at rest a Question of vital Importance to the Criminal Jurisdiction of the Colony. The next Dispatch is that of the 6th of July, the Day on which the Address of which I sent a Copy from Liverpool, and a Petition from the Home District to His Majesty, (which, according to the official Copy I have received from the Colonial Office, appears to have 1,756 Signatures attached to it,) were agreed upon, and the former presented to me.

With reference to these Occurrences, I beg most particularly to call your Attention to the accompanying Narrative (G.), and the Numbers of the Freeman of the 10th of July and the 21st of August, thereto annexed, as affording all the Information I possess on the Subject.

This Dispatch, it must be observed, is *subsequent* to my Protest against the Legality of my Amotion, which was notified to me on the 28th of June, and the written Protest thereupon immediately sent off. (See the Letter No. 15. in the printed Papers.)

This Dispatch begins by calling your Attention to the Report of the Executive Council, dated the Twenty-seventh of June, and the annexed Documents; to all which I have long since transmitted you my Reply.

It proceeds in the following Words: "I have to acquaint you that, for the Reasons stated in the Report of the Council, I have found it necessary to
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" remove Mr. Willis from his Seat on the Bench." His Excellency should have added, by a " Commission of Amotion" dated, signed, sealed, and registered on the 26th of June, the Day before such Report was or could be made.

The Correctness of my Feeling and Judgment must be determined by the *proper Tribunal*. The Testimonial (not indeed in consequence of any Circular or Charlatantry) of 1,756 of the neighbouring Inhabitants, most of them personally unknown to me, will shew how far " since my Arrival in the Colony " I manifested a Disposition, and adopted a Course of Conduct, utterly incompatible with my Situation as a Judge."

That " I have ungratefully and wantonly insulted the Government; that my Restitution to Office would be most pernicious to the Peace of the Colony, and an Act of the most aggravating Injustice to those faithful Servants of the Crown; or that I have dishonourably laboured to excite against them the Prejudices and Hatred of the ignorant and malicious," must be determined from all the Circumstances of this Case, and not from mere unsupported Assertion. But, Sir, I deny the Charge; and I call upon my Accuser to stand forth, and, waiving the Protection of his official Character, to expose himself to that Trial which the Laws of our Country provide in the Case of private Individuals who descend to the odious Crime of Slander. Let him justify it, if he can, on the Score of Truth, and I will admit his Defence; but let not, in the meantime, the Character of one of the King's Judges,—a Character previously, I hope, not only irreproachable, but unassailed; let it not, I say, suffer from the unfounded Accusation of one who, I have shewn, has evidently committed an illegal Act, and who, by a Torrent of unworthy Vituperation, seeks to justify his most unwarrantable Oppression.

" I have hitherto considered it utterly dissonant with English Principles of Liberty to abuse or vilify any Man behind his Back, particularly one whose Position in Life precludes the Possibility of his avenging or even defending himself." This Practice may be in accordance with the Spirit of the Lieutenant Governor Maitland's Government, but it is strongly opposed to British Generosity and Justice.

And I throw from myself, upon his Excellency, the Accusation of having resorted to " any Practice whatever, for the Purpose of injuring the Government or promoting my private Views;" a Charge against me which, however, is not attempted to be supported. I have not, Sir, resorted to the Practice of executing illegally a solemn Deed for the Ruin of an Individual, and then asserting, " that I was recommended to do so," or that of myself " I did so, " in consequence of an Instrument" not then in existence. I have never permitted my Name to be affixed to Papers of such Character as I am now answering. I have not, I never will resort to such dishonourable Practices for bolstering up a public and official Charge with the Trusses of personal Malice and private Slander. I never will attempt to support *my* Conduct by such posterior Subterfuges. But will not he, who may have thus basely acted, be likely to resort to any Practice, "*however dishonourable*," to evade all such Charges as may be brought against him for Abuse of Power, " however unequivocally supported."

If Lieutenant Governor Maitland, and the Officers of his Government concerned in my most illegal and unjust Amotion, really be prepared for the fullest Investigation, let them at once step forward and take their Trial under the British Statutes for the Oppression and Injustice with which I have been treated. This I long since solicited; and again and again I reiterate the Request, "*Iterum iterumque vocabo*." I am ready, I repeat, as I have always been, " to cover my Adversaries with Shame and Confusion, or to risk the Remnant of a Life otherwise not worth preserving."

On the 25th of June I begged to be officially informed " if his Excellency had any Complaint to make respecting my Public or Official Conduct;" and he declined giving me an Answer. But why not at that Time have honestly urged any Accusation he had to bring against me; and give me an Opportunity of openly, and on the Spot, refuting it? Is it just thus privately to slander an Individual; thus secretly to accuse, without any specific Charges, one of the King's Judges? The Inquisition is not more cruel or unjust.

Why am I, as a Judge of Upper Canada, and as such not less a British Judge than those in England, why, I say, am I not to have the same Rights and Privileges? Why is Lieutenant Governor Maitland to be permitted to treat a Judge in a Manner that no English Judge was ever treated by any King of England, even while the Commissions of the English Judges ran in the same Words as those of Upper Canada? "In the Name of God," (to use the Words of an eloquent Senator, in speaking of Canada,) "let an End be put to such a System, and let us all be ruled by equal Laws."

The whole Tenor of this Dispatch, and its ("separate") Companion, the next in Order, shew such evident Marks of Fear combined with Malice, that any plain judging Man must in a Moment perceive that the Writers of them have already done the Individual therein stigmatised some unjustifiable Injury; and are driven to their Calumnies and Bravadoes to either crush altogether their Victim, or, should he survive their Attack, to leave such an Imputation upon him as utterly to blast his Fame for ever. His Excellency found, and will not perhaps deny the Fact, that he had acted illegally, and therefore foolishly. He thought, perhaps, to whistle me back, as he would his Spaniel or his Falcon.

If we are to believe that this Dispatch was written at the Time it bears Date, of which I think there will be some Reason to doubt, it purports to be concocted *after* my Protest, as I have said, was made against the Legality of the whole Proceeding; after it had been confessed (as it is admitted by the "Separate" Dispatch,) that my Amoval was only a "Matter of Expediency, not of Cruelty or of Punishment." If, then, there be Reason to surmise that his Excellency and his Advisers found they had Reason to suspect that he had taken a Step unjustifiable either in Law, Policy, or fair Dealing, does not the Complexion of the whole Correspondence warrant me in the Assertion, that this systematic and furious Attack on my *personal* Conduct was the only Refuge that presented itself to the Executive from the Consequences of their rash and malignant Attempt to get rid of me, under the Colour of a Prerogative which the King himself would not exercise. A few Days of cooler Reflection let in some Light, I apprehend, on the Subject. It was found that a desperate Leap must be taken to clear the Chasm that yawned for their own Overthrow. Take, Sir, this Master-key in your Hand, and it will unlock the Door of every "separate" Falsehood or covert Insinnuation.

It now only remains for me to answer this Dispatch, marked "Separate," and dated the 6th of July.

In regard to my Conduct, not only *almost*, but *altogether* since my Arrival in the Colony, you will find the most ample Detail in the accompanying Narrative (G).

I regret deeply that Lieutenant Governor Maitland has not ventured to state in what Respect I evinced "that Want of Discretion and those Principles" of which he now, in his "Separate" Dispatch, complains.

Had I, indeed, shewn that Want of Principle, that Want of Discretion, so strongly manifested, as to sign an illegal Instrument, and then endeavouring to shield myself from the Consequences, by stating what could not be, namely, that it was grounded on and recommended by a Report, when that Report was not then in existence; if, when Punishment for such monstrous and infatuated Guilt stared me in the Face, I had subscribed my Name to a "separate" Letter, containing Charges utterly destitute of Foundation,—Charges not even attempted to be offered to the Tribunal on whose alleged Recommendation the previous illegal Instrument of Oppression is sought to be justified,—Charges brought forward after Trial merely to shelter the guilty Prosecutor: if I had descended to any such Conduct (and even the Supposition that I could ever do so is intolerable), then indeed, but not till then, should I acknowledge, with "deep Regret," my "Want of Discretion, and of those Principles that are requisite in every Public Officer." Then should I regret that "my Want of them had escaped those personal Friends who recommended me to Office; and I should regret most of all the inevitable Injury His Majesty's Government must sustain by having taken a Person "of such a Character into its Service."

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I certainly went out to Canada with something more than the *Expectation* of being a Judge in Equity, as well as a Judge of the Court of King's Bench of that Province. The Proceedings respecting the Creation of an equitable Jurisdiction are the Subject of a distinct Report sent herewith, and marked (F.); to which, as it tends not only to confirm my Claims on His Majesty's Government, and entirely to refute the Statements of Lieutenant Governor Maitland and Mr. Attorney General Robinson on that Subject, I must especially entreat your Attention.

I was not, I admit, called upon by *my* Situation (though it was otherwise with Mr. Executive Councillor Macauley, the Judge whom my Appointment by His Majesty displaced from the Bench,) "to meddle with the local Politics;" and the accompanying Narrative (G.), and Statement with respect to the Court of Equity (F.), will fully shew how strictly I acted on that Principle. "That it was not expected of me to do so," I do *not* so readily concede; for I verily believe, if I had espoused the Cause, and supported the Views, of Mr. Attorney General Robinson, whether right or wrong, any Display of my Principles, with whatever Degree of Levity or Ostentation made, would have been most thankfully received.

I love my King, and I always have, and will express and diffuse those Sentiments of Loyalty which every Englishman must feel for our gracious Sovereign.

The Account in my Narrative of the Dinner given by the Speaker of the House of Assembly, at which I was present, shews that this Feeling is not yet wholly suppressed in Upper Canada.

My Conversation with Major Hillier respecting this Dinner, and the Loyalty then evinced, which he said he supposed was in Compliment to me, I imagine is the Levity which, in this Respect, I am accused of.

In Upper Canada there appeared to me Two Sorts of Loyalty, one to the King, and another to the Local Government; and any one who expressed his Attachment to the former, I observed, was sure to excite the Jealousy and Dislike of the latter. This has evidently been my Case, and I could easily adduce other Instances. It will be sufficient, however, to mention the Address to His Majesty on behalf of the Military Officers who served with Distinction during the late War, and were deprived of their Bounty Lands by the Local Government, without adverting to the Case of almost every Person having any Pretension to the Rank of an English Gentleman, who, during the "Ten Years which his Excellency has been in the Province," has attempted to reside in Upper Canada.

If I mistake not, there has occurred more than One Case of this Sort, that has recently been brought under the Consideration of your Department.

That I became a Subscriber to all the Newspapers published in the Town of York, under the Circumstances mentioned in the Narrative (G), I fully admit, and I did so without any Distinction as to Party or Politics, in which, as well observed by Lieutenant Governor Maitland, "I was not by my Situation called upon to meddle." These Papers are Four in Number; I have many of them by me, which I can at any Time send to you. One is published by the King's Printer, and the other Three by Printers employed by the House of Assembly. Why any Licentiousness was *ever* allowed in the Newspapers of the Province rests with the Provincial Government to explain. That I was allowed to be libelled in the solemn Discharge of my Duty, in the Gore Gazette, and in other Papers also which I have appended to the Narrative (G.), is most true. How sincere I was in my Abhorrence of such Licentiousness, my Correspondence with the Provincial Government respecting the Gore Gazette will fully prove.

That I ought not to have taken in the Papers complained of by Lieutenant Governor Maitland, I have yet to learn. I was desirous of knowing and hearing all Sides, and not to suffer myself to receive *ex parte* Statements. The Times and the Morning Chronicle, I imagine, are not altogether excluded from your Department. Many of the Judges, and most of the Bar, formerly at least, were wont to read them; nor was it to my Knowledge ever considered as indispensable to a Servant of Government that he should only subscribe to the Morning Post, the Courier, and John Bull.

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The Morning Advertiser, when containing the Letters of Junius, and the North Briton, when Party was at the highest, are said to have been read alike by the Minister of the Day and his Opponents. On the same Principle I suppose it was, that Mr. Attorney General Robinson (though he had not the Manliness to take in the proscribed Papers,) more than once requested me to leave them with him for his Perusal. Lieutenant Governor Maitland need not, I am sure, apprehend any Offence to his Delicacy or Feelings from the Compliments of a free Press.

A laconic Writer has well said, "A free Press is the Parent of much Good in a State; and even a licentious Press is a far less Evil than a Press which is enslaved; because *both Sides may* be heard in the former Case, but not in the latter." Such also, if I remember rightly, was the Opinion of Lord Kaimes.

I did, soon after my Arrival in Canada, send *all* the Papers I had received to Mr. Stephen, and for the Purpose attributed to me, namely, to shew "just what Sort of a Place I had got to." I wished him, as my Friend, to see *both Sides*; and I requested after he had read them that they might be sent to my Brother.

Lieutenant Governor Maitland complains of certain Newspapers as "slandering the Government." How cautiously then ought he, who is so sensitive of Slander, to have avoided the same Error into which he says the Editors of these Papers have fallen; for I now take upon myself to assert, that I never read in any of the Papers he has thus complained of, or any others, Slander so gross and so malignant (if Slander be, as I understand it to be defined, "uttering reproachful Falsehoods.") as that which is contained in the Dispatches now before me.

'Tis well said, however, "that Slander cannot make the Subjects of it better or worse; it may represent us in a false Light, or place a Likeness of us in a bad one, but we are still the same;—not so the Slanderer, for Calumny always makes the Calumniator worse, but the calumniated never."

With regard to the Treatment I met with in Upper Canada, and my Conduct, as well in attending the House of Assembly as in every other Instance during my Residence in that Province, I must again refer you to the Narrative (G), and to the Statement of the Proceedings respecting the Establishment of a Court of Equity (F), for every thing connected with that Business. These Documents will prove how groundless the Assertions are, "that I adopted a Line of Conduct that was unwarrantable;—that I associated with any Persons that were beneath me;—evinced a Want of Dignity and generous Feeling;—and that I yielded, or was not superior to Temptation." I have also shewn in the Narrative (G), that the Charge about my Dress (a Topic more suitable for a Tea Table than a Government Dispatch) was fully authorized by the *highest Example*.

As to my "Manner,"—if Candour and a total Absence of that "mysterious Carriage of the Body, (used in Canada as well as Europe,) to hide the Defects of the Mind," be undignified, I must plead guilty—I neither could nor would, nor ever will pursue any other Course, or assume any other Manner, than that which in my Conscience I believe to be honest and candid.

If a Governor or Deputy Governor of a Province should take upon himself to repeat as solemn and "separate" Charges, for the Purpose of covering his own Shame, and escaping the Punishment provided by the Laws for Injustice and Oppression, the wholesale Calumnies of interested Myrmidons;—if he should venture to interfere with the private Feelings, Character, or Conduct, unless corrupt, of an Officer appointed by His Majesty, you would necessarily be of Opinion, "that his Conduct throughout was highly indecent and unprovoked, utterly subversive of all Respect for his Character, and very injurious to Public Feeling. It would indeed have placed him in that Light with all respectable Men. And had not even the Extravagancy" of executing an Instrument said to be founded on another which was then known not to be in existence "have been committed, His Majesty's Government must have regretted that he had been appointed" to the Government of a Colony. (Vide Sir P. Maitland's "Separate" Dispatch.)

As well might a Military Officer be dismissed for his religious Tenets, or a Minister of the Crown be impeached for an illicit Amour, as a Judge be called in question for his private Conduct.

My Letter of the 8th of May, transmitted through the Medium of the Lieutenant Governor, soliciting the Chief Justiceship *until* a Court of Equity should be erected, and what passed at my Interview with his Excellency on that Occasion, as detailed in the Statement (F) respecting the Establishment of a Court of Equity in Upper Canada, will at once shew what Degree of Credit is due to the wicked and foolish Assertion that "I wished to defeat that Measure in "order to co-operate more effectually with those" (who are with equal Justice) styled "my Political Associates."

What I said respecting the Kindness which Lord Goderich and Mr. W. Horton had shewn to me, and my Confidence that they would not suffer me to be a Loser by any Delay in the Erection of a Court of Equity in Upper Canada, as well as the Circumstances under which it *was said*, will be fully seen in the Narrative (G).

The Business during the Assizes in April last, and the Conduct I then pursued, which I still must be permitted to believe is correct, I have already fully detailed. It will *now* be seen whether I exercised a sound Discretion. I think I did; but whether right or wrong, I protest against a v executive Magistrate interfering with the Discretion which a Judge in the Discharge of his Duty is legally empowered to exercise.

Why, I would ask, has "the wretched Libeller" in the Gore Gazette, notwithstanding my Remonstrances, been "countenanced and supported," and I hear *promoted*? "The Character and Designs of his Patrons," I might add, in the Words of Lieutenant Governor Maitland, "can no longer be questioned." The Narrative (G.) fully explains *my* Character and Designs.

It is unnecessary to repeat what I have already stated, in answer to the Public Dispatch respecting the Absence of the Chief Justice. I am happy, however, to find it admitted that Lieutenant Governor Maitland, even some Time *before* Easter Term, was apprised of the Necessity of guarding against the Evil which the Absence of the Chief Justice, without the Appointment of a proper Person competent to discharge the Duties of his Office during his Absence, necessarily produced.

I have now again to notice an undue Interference with my judicial Opinions. "Mr. Willis," says Lieutenant Governor Maitland, "found it necessary to "differ from Mr. Sherwood in most of the Judgments pronounced, though he "before spoke well of him." True, I did so; I was deceived in my Estimate of his Talent. I thought his Judgment erroneous; and I was too fastidious, at the Expence of my Conscience and my Duty, to sacrifice my Opinion.

If a Man who has been occupied in Trade, — in the Collection of Customs — in Military Duty — in Political Affairs (as a Speaker, for instance, of the Lower House), be elevated to the Bench of a Colony in which there is not more Practice in Twelve *Years* than in as many *Weeks* in Westminster Hall, is it astonishing that one regularly educated in his Profession, and who has practised, not without Success, for upwards of "Ten Years" in the Courts at Westminster, should be *likely* to view legal Questions somewhat differently from such a Gentleman as I first described? But what Right has Lieutenant Governor Maitland, or any Governor or Officer, officially to observe upon or censure the Judgments which a Man sworn to administer Law to the best of his Skill shall deliver from the Bench? The King himself would not, might not do so; how much less the Lieutenant Governor of Upper Canada!

The Lieutenant Governor says "he did not think I should have persevered" in delivering my Opinion respecting the necessary Constitution of the Court. After the very obvious Threat held out to me in the official Letter of the 4th of June, he might perhaps think, when measuring me by some Standard of his own Erection, that I would cling to Office rather than conscientiously perform my Duty in the Face of such impending Vengeance. But I had solemnly sworn, in the Presence of that very Lieutenant Governor and his Council, in the Words of the Judges' Oath, "to administer Justice to all Men, though the "King, by express Words, command the contrary;" and no earthly Power could prevent my doing so.

How Lieutenant Governor Maitland can reconcile his Conduct in this respect with the anxious Desire for the Independence of the Judges expressed in the Report of the Executive Council, I am unable to conceive.

His Excellency mentions, as a great Aggravation of my Offence, that on the Delivery of my Opinion all the Editors of the Papers were present with Note Books. Would Sir P. Maitland have ordered them out of open Court, had he been in my Situation? Does he mean to insinuate that I sent for them? Or were they there by his own Order?

The Lieutenant Governor says, "I stood up and read the Paper," that is, the Notes of my judicial Opinion, "with a good deal of Agitation." If I were agitated, it was at the Thought of the Consequences which either the Ignorance or the perverse Obstinacy of the Provincial Government was likely to bring upon the People; it was at the Weakness, not to say the Wickedness, of Men who, when warned of their Duty, had too little Sense or Feeling to do that Duty "*quocunque momento*."

So long as I remained in Court, I met with nothing but Respect and Kindness from every Member of the Bar of Upper Canada, save the Attorney General; and I must own, so far as my personal Observation goes, I am totally ignorant "of any exceptionable Proceeding" in which any Member of that Body, except the Attorney General during the Assizes, and the Solicitor General in the Tar and Feather Case, and that of Boulton and Randal, as appears by the Proceedings of the House of Assembly, has, as a Barrister of the Court, ever been concerned.

With the Proceedings of all or any of the Members of the Bar, when not in Court, I do not think it my Duty to interfere. I am convinced, however, that the Gentlemen aspersed by Lieutenant Governor Maitland will be fully able to justify their Conduct, and I make no doubt that an early Opportunity for doing so will be afforded them.

His Excellency says, "he could not hesitate to adopt the Measure recommended by the Council, of removing me in order to make Room for another Appointment." This, however, was not the Case; the Lieutenant Governor removed me from Office by a Commission dated, signed, sealed, and registered on the 26th of June; the Recommendation of the Council is not dated, and their Report could not have been made, until the 27th of June. It is plain, therefore, that the Council must have followed the Recommendation of the Lieutenant Governor, and not the Lieutenant Governor the Advice of the Council.

That Figure of Rhetoric denominated the *ὄσπερον προτερον* has been freely used in more Occasions in the Upper Canada Dispatches than the present.

But I have already fully commented upon these most illegal and unjust Proceedings.

Lieutenant Governor Maitland says, "his Objection to my Conduct goes far beyond any Imputation of Error of Judgment," including it of course, otherwise it could not go beyond it. I again therefore ask if such an unconstitutional System as this Interference of an executive Magistrate with the Opinion of a judicial Officer in the legitimate Discharge of his Duty: is to be permitted or sanctioned by His Majesty's Government?

What the Object of Lieutenant Governor Maitland was, in those Proceedings which he has deemed it proper to adopt, is not for me to declare; but it is for me to repel, with becoming Indignation, his most unwarrantable Assertion, "that my Object was to create Excitement, and that of the most mischievous Kind;" even perhaps greater than the Alien Question, I suppose.

If, Sir, I were guilty of such a Crime, it was the bounden Duty of his Excellency to have brought me to immediate Trial for so heinous an Offence, not secretly and in a "Separate" Dispatch basely to insinuate such a Charge; a Charge which even to his Council he has not dared to mention, or, if he did mention, his Council appear to have rejected with the Scorn it merited.

Thus the Lieutenant Governor, it seems, attempts "to justify," as the Letter of the 2d of July terms it, "to His Majesty's Government, the Proceedings which, unhappily, he has been constrained to adopt."

Mr. Justice Sherwood, when applied to by the Editor of the Observer Newspaper for a Copy of his Judgment in the Tar and Feather Case, immediately

gave

gave it to him; I was also applied to by the same Person for the like Purpose, and informed, that Mr. Sherwood has furnished a Copy of his Judgment; and I, of course, followed his Example in acceding to the Request.

I was also applied to for a Copy of my judicial Opinion respecting the Constitution of the Court of King's Bench the Day after I had delivered it, which I immediately gave; persuaded that as my Opinion on so important a Subject had been publicly given, it could not go forth in Print too accurately.

Had my Mind been constructed according to the "bean ideal" of Lieutenant Governor Maitland's Judges, I ought, as he asserts, "to have rejoiced at finding that my Brother Judge did not consider it incompetent for him" to hold an illegal Court, or proceed, without Warrant of Law, to decide upon Men's Lives and Properties. I cannot conceive a *more Satanic Joy*, than to see Men rushing headlong into Sin and Danger, and to receive Pleasure from the Sight. "Mr. Willis," says Lieutenant Governor Maitland, "*was removed on the 26th of June;*" and the Report recommending that Removal, and on which he says he acted, was not, and could not have been made, as in Candour he ought to have added, until the 27th of June !

Why I was removed, or why my Removal took place at the particular Period when Writs were issued for the General Election, must rest solely with Lieutenant Governor Maitland to explain.

I expressly protested against the Legality of the Measure; and I requested Leave of Absence. I also asked for my Pay, the Warrants for which had been withheld. I wished to proceed forthwith to England; and took some Pains to avoid witnessing Expressions of popular Indignation, which so extraordinary a Measure as my Removal called forth.

I have in my Reply to the Report of the Executive Council, and in my Memorial to His Majesty in Council, fully shewn that my Amoval from Office was not an Act of Necessity, in order to allow of another Appointment. It must also be evident from those Documents, that the Amoval itself was "an Act" not only "of the greatest Cruelty;" but also of the utmost Injustice, Illegality, and Oppression.

All I know of Dr. or Mr. Baldwin, or of any other Person in Upper Canada, I have stated in the Narrative (G). From what I do know of Dr. Baldwin and his Family, I must always sincerely regret that I have not known more.

I have also stated in my Narrative by what Description of Persons the Address was presented to me. A Copy of the Handbill which his Excellency inclosed to you is now in my Possession. *Three* or more of those who signed it are Members of the Provincial Parliament.

"That Accounts were circulated, full of the most shameful Falsehoods," *against me*, I readily admit. One of such printed Accounts, circulated, as I am informed, by the Bailiff of the Under Sheriff, is annexed to the Narrative (G.)

In the Elections, as will be seen by this Narrative (G), I took no Part whatever. I left York, as was well known, on Thursday the 10th of July (by Mistake I dated a Note to Mr. Robinson on the Morning of that Day as the 11th, and received his Reply, properly dated, the 10th). When I embarked, the Election for the Town of York was going forward. It was my Intention to have gone across the Lake the previous Day, but from some unexplained Cause the Steam Boat did not ply as usual.

It is not a little singular to perceive, that this "Separate" Dispatch, dated the 6th of JULY, foretells that Mr. Robinson was returned on the 11th of that Month. I did not learn the Result of this Election till after my Arrival in this Country.

My Amotion was considered so incredible, that I was asked for a Copy of the Instrument, which, as I could conceive no possible Reason to the contrary, I directed to be furnished, as I have stated in the Narrative (G).

I annex to the Narrative also Two Newspapers, containing an Account of the Meeting to which his Excellency alludes, and the subsequent Proceedings. It is all I know of the Matter, except having received Copies of the Petition and Address, after the Meeting was over. By the official Copy transmitted from the Colonial Department, the Petition then agreed to appears to have been signed by 1,756 Persons in the Home District.

In regard to the Address, it must be considered that I received it as an Individual, and not as a Judge of the Province. I had then been ignominiously, illegally, and *unlawfully* deprived of my Office. Lady Mary Willis, as appears by the Narrative (C), was more than Once grossly insulted in the Public Street, and that, too, by Persons in Connection with the Officers of Government. I was about to leave her, my infant Child, and my Sister, without Protection in a strange Land, and to proceed to England in the Hope of obtaining *speedily* that Justice which is yet delayed. "To have refused this Address" (to use the Language of Lieutenant Governor Maitland, in his Speech to the House of Assembly on the 12th of December 1826,) "thus presented to me, would have been to have adopted a Course not reconcilable to my Feelings. It deserved my warmest Acknowledgments, as conveying the Sentiments of a loyal and generous People, able to appreciate and willing to do Justice" to the Conduct of an injured Servant of their Sovereign.

I have "no Desire to interfere with the Interests" of Lieutenant Governor Maitland, or any of those concerned in my illegal and unjust Amotion, further than the great Ends of Truth and Public Justice necessarily require. I do, however, wish this Statement, and every other Statement respecting my Conduct on this and every other Ocasion, to receive the utmost Consideration and P^{ro}tection; and I wish the Iniquity with which I have been treated, and the Justice which must follow, to be for ever recorded, as a striking Example "to all others in the like Case offending."

I entertain no personal Feeling of Hostility or Resentment, even under the Affliction that well nigh overwhelms me, towards the Authors of my Wrongs. Justice, open, *speedy* Justice, is all I ask for.

Were these the first Efforts of Malice and Misrepresentation that have issued from Upper Canada, I should have been more shocked at this unjustifiable and discreditable Attempt to destroy me than I have been. But Misrepresentation, I am sorry to say, has become a System, by long continued Practice in unwarrantable Measures.

The Case of Captain Matthews, as reported in the Journals of the House of Assembly for 1826-7, and his subsequent Restoration, will serve at least for One Example; and the recent Exposure in the British Parliament, by the Committee on the Civil Government of Canada, puts beyond a Doubt the Fact, that this System has already existed to an alarming Degree. In the Words, therefore, of the Conclusion of this "Separate" Dispatch, "to suffer such a State of Things to continue, is to leave those whom the Government is bound to protect subject to a Tyranny beyond Endurance."

I will exhibit before you, as a Sort of Summary to this long, and, I fear, tedious Letter, a melancholy yet almost ludicrous View of the Absurdities into which, by the Blindness of their Anger, the Executive of Upper Canada have been betrayed.

As if the Arch-spirit of Error and Confusion had wholly possessed them, there is not an Assertion made, nor a Measure adopted, in the solemn Farce they have been enacting, that does not carry with it its own Refutation.

The first Recognizance in order to the Attack upon me is made by the Attorney General. He says, "that the Crown Lawyers alone have the Right of conducting all Criminal Prosecutions."

Yet he denies that it is his Business to prosecute flagrant Crimes that are committed at his very Door.

On another Ocasion, while admitting that the Officers of the Crown ought to prosecute Offenders, it is thought that it will greatly conduce to the Satisfaction of Public Opinion, and the Strictness of Justice, if the Attorney and Solicitor General should first have the Benefit of defending the Wrong-doers in any Civil Action brought against them for Damages!

The Attorney General deems me unfit to sit upon the Bench, because I could not understand the Nature of a Person's Application to the Court until I had heard what he had to say, and, "together with" the Lieutenant Governor, loudly blames me for the Proceedings which ensued in consequence of that Application; yet with the most consistent Ingenuousness it is admitted, "that perhaps those Proceedings were inevitable!"

I went

I went out to Canada as Equity Judge elect, "expecting my Commission to follow." When it was announced that before my Appointment could take place a Bill must pass the Provincial Legislature, my Disappointment, according to Sir P. Maitland, was so outrageous, that I set myself to prevent the Measure from being carried; *i. e.* being weary of Delay, I took the most effectual Means of making the Delay permanent! When his Excellency accuses me of purposefully throwing Obstacles in the Way of the Proceedings for establishing an Equity Court, with an Intimation that I was looking to the Chief Justiceship as affording a Post to which political Influence was attached, he must have supposed that I had heard him in Conversation agree with the Attorney General, that the Measure for a Court of Equity should be defeated by the Mode and Time in which it was brought forward by that Learned Gentleman; and arguing in his own Mind upon this Supposition, he naturally, therefore, interpreted my Application "for the Chief Justiceship *cxm.* the Equity Court should be erected," as a Request for that Office in Perpetuity; his Excellency and his Advisers having decided that the Court of Equity should never be established. His Excellency's Intention was clearly the Parent of this Accusation.

It is charged against me that I was unwilling "to prevent my Judicial Opinions being made the Subjects of public or political Discussion."

Will it be believed that the Sentence runs thus, "Mr. Willis was 'UNABLE' "or unwilling," &c.

The Statutes of Geo. 3. declare, that such Officers of Colonies as absent themselves without proper Leave thereby forfeit their Commissions. Mr. Attorney General Robinson, in his "Opinion," interprets this to mean, that no Officer shall forfeit his Commission unless he is *guilty* of having obtained Leave exactly as the Statute directs; while it is laid down as Law by Messrs. Sherwood, Robinson, and Boulton, and thought reasonable by the Lieutenant Governor, that a Canadian Chief Justice may be drinking the Waters at Bristol, and at the same Time presiding on the Bench of Upper Canada.

I complained (it is truly said) publicly in one of my Judgments, for being attacked and slandered for my judicial Conduct. Sir P. Maitland declares in one Dispatch this was not the Case, and in the next asserts that my Conduct was generally reprobated and censured!! *Utrum horum?*

I went out to Canada, and commenced my Work on the Jurisprudence of the Province, "*meliora sperans.*" His Excellency, as it appears, took effectual Care that "the Hope which comes to all came not to me." The Executive Council administered the Oath of Office to me, by which I was bound to do Justice according to Law. Having refused to hold the Court, and perform Acts contrary to the Laws (as had been the Practice), the Council "regretted exceedingly" that I did not think proper "to go on in the usual Course."

I was invited to the Speaker's Dinner. The Government Officers do not think it fashionable to go, for there "they drink such Toasts." In all the Simplicity of Appetite I attended; and on duly reporting myself the next Day to the Lieutenant Governor's Secretary, I was given to understand, that to drink the King's Health with Four Times Four Three several Times, to sing "God save the King" as often in full Canadian Chorus, His Majesty's Arms being in Transparency at both Ends of the Room, was no Effusion of Loyalty on the Part of the Speaker and the Members of the Assembly present, but merely a Compliment to —*me!*

The Lieutenant Governor complains that the Judges are vilified by the Press, which ought to be punished. I make a similar Complaint; and he thinks the Press has done very properly, and it is said has promoted the Delinquent.

The Lieutenant Governor says, I kept undignified and improper Company, that is, improper for a Judge. There is no Man's House in the Province at which I more frequently visited than that of his Excellency himself; therefore a most unfounded Charge.

The Council say, "a Judge is not answerable for the Effect of his Opinions;" refusing, therefore, to allow my Judicial Opinion upon the Constitution of the Court to have any Effect upon their Minds, "not deeming it satisfactory," (and no Wonder, because, as they say, "they were left to interpret it for themselves,") they recommend my Annull!! Thus practically illustrating the Axiom they brought down.

Lieutenant Governor Maitland says, " for the Reasons stated in the Report of the Council Mr. Willis has been removed." In another Dispatch, " Mr. Willis was removed on the 26th of June." *Credite posteri.* The Report of the Council was made on the *Twenty-seventh of June.*

I gave it as my decided Opinion, that in the Absence of One Judge, the Bench was inefficient. To remove all Doubt on the Subject, the Lieutenant Governor sends away Two.

It is lamented that the Excitement naturally expected in consequence of the Delivery of my Judicial Opinion would probably be increased, as the Writs for the Elections were then issued. To ensure so *highly desirable* an Event, the Lieutenant Governor removes me in the midst of the Canvass for the Election for York !!!

In his Progress through the Province, the Lieutenant Governor received certain laudatory Addresses; and on being called in question somewhat sharply by the House of Assembly for the Reflections on that Body; which these Addresses contained, he asserts, as he was bound to do, his undoubted Right to receive such Marks of the People's Esteem and Approbation, as distinct Proofs of *good Feeling in both Parties.* Yet his Excellency hints, that I committed something only short of Treason, by following precisely his own Example, with this Difference, that his Excellency received the Addresses in his official Capacity, while he had used all the Power he possessed to reduce me to the State of a private Individual.

The Attorney General writes to know if I wish the Printer of the Gore Gazette to be prosecuted for a Libel upon me. I request, that not the Printer only, but the Author also, of the Libels may be punished. The Attorney General replies that he does not know the Author.

The Lieutenant Governor, possessing the extraordinary Faculty of Vaticination, foresees, on the 26th of June, the precise Advice of which his Council would be delivered on the 27th, and acts accordingly. As Time grows older, the Spirit of Prophecy waxes stronger with his Excellency; for in his Dispatch of the 6th of July, he announces the Return of the Attorney General for the Town of York on the 11th by a Majority of Seventeen; and though it was not mentioned, lest it might not be credited, no doubt the Circumstance of the Steam not sailing on the 9th of July was as plainly borne in upon his Mind.

My Amoval was considered, not as an Act of Cruelty or Punishment, as I ventured to assert, but of *Expediency alone.* In Proof of this, my Pay has been stopped since the Day of my illegal Motion !!

I have now, Sir, gone through, *seriatim,* the Charges contained in the Dispatches of Lieutenant Governor Major General Sir Peregrine Maitland.

I have preferred this Method to that of a more general and concise Classification, in order that it may at once be obvious that I have not overlooked the least of them. The Task has been most painful; painful to witness so melancholy a Display of disingenuous and contracted Feeling, no less than to pursue each individual petty Insinuation among the Brakes and Crumbles of Jealousy and dwarfish Spite. To shoot Sparrows with Cannon Balls is not more laborious.

I will put it to you, Sir, to say whether there be, in the whole of these Charges, one single Accusation which has been legally, justly, or morally made good against me. I will submit to the Verdict of any Man who has but as much Learning as to enable him to read these Dispatches and Reports, with my Answers.

I am not surprised that such a Mass of Accensations, emanating from Persons holding high and honourable Stations in His Majesty's Service, should produce, in the Minds of the Members of your Department, as I feel they must have done, so strong a *prima facie* Conviction of my Folly and Guilt.

I should myself have thought, that the Quarter whence such circumstantial, well arranged, and specious Charges proceeded, afforded very strong presumptive Evidence that a Case had been made out against me. But, Sir, I trust I have shewn not only their Falsehood, but their Malignity, by fair Proofs and Arguments. Should I have failed, in your Opinion, to have accomplished

accomplished this by external Proofs, yet there is another and even more powerful Testimony to their Invalidity and Rancour,—their own internal Evidence. The lamentable Want of Memory,—the utter Defiance of Dates and Times,—the total Absence of any single Proof beyond the bare Assertion of the Writer,—and the Symptoms of Alarm exhibited lest the Proceedings should be considered illegal, and my Return secured,—shew, not merely the Folly, but the Wickedness of my Accusers.

But, Sir, it is something worse than Folly, when the high Interests of a whole People are put in jeopardy through the Weakness of an intemperate and indolent Man, worked upon by the Chicenery and Ambition of a few unprincipled Adventurers; and Deeds of unjustifiable Aggression are sought to be palliated or excused, by ransacking the very Cesspools of Society for Accusations and Calumnies of such a Staple as those presented to you from Upper Canada.

The Reasons, Sir, I think, are now obvious why such a Collection of the most false, and certainly the most foolish Charges, as perhaps were never before transmitted by any Governor, were not previously submitted for my Answer. The only Thing I cannot account for is, that they should have been laid before the Privy Council previously to my seeing them.

I must in all Honour to your high Feeling suppose, as I have stated, that you wished for their Lordships' Advice, whether such an exposure of Colonial Executive Imprudence should be permitted.

A Man whose Character and Prospects and future Interests are at stake, must be expected to feel keenly, and to speak feelingly. He *must* be expected to repel indignantly the Imputations of high and serious Charges; Charges as untrue as their Authors. He certainly will feel irritated and goaded, as with the Stings of Mosquitoes, by the Multitude of sharp, bitter, venomous little Bites, which the small Abilities and keen Malignity of his *foiled* and infuriated Enemies have inflicted upon him; while, amidst all his Pains, "he cannot choose but laugh," at the Antics and Follies which the little Insects, in their short-lived Career of puny Vengeance, are unconsciously exhibiting.

My Enemies, Sir, *are foiled*, and they feel that they are so. They anticipate their Disgrace, and are preparing for it.

I have the Honour to remain, Sir,

Your most obedient humble Servant,

JOHN WALPOLE WILLIS.

To the Right Hon. the Sec. of State,
Colonial Department.

Inclosure, No. 1.

(F.)

Statement respecting the Establishment of an Equitable Jurisdiction in Upper Canada.

Sir,

Bath, 5th December 1828.

As the Establishment of an Equitable Jurisdiction in Upper Canada is particularly mentioned in Lieutenant Governor Sir P. Maitland's Separate Dispatch, and the Report of Mr. Attorney General Robinson on that Subject inclosed therein, and the Matter is immediately connected with my Claims on His Majesty's Government, I trust I may be allowed so far to sever it from all other Circumstances, as to make Mr. Robinson's Statement on this Head the Subject of a distinct Reply.

"Circumstances," to use the Language of Mr. Attorney General Robinson in this Report, "not of a very agreeable Nature, induce me, in justice to myself, to be more particular in the Relation than would otherwise be necessary; for if you, Sir, have given Credit but to a small Portion of what you have read, it is only prudent that I should place in your Hands, for Transmission to His Majesty in Council, the Means of guarding against the Effect of Misrepresentations from other Quarters, which may do me material Injury."

Lord Bathurst's Dispatch on this Subject is dated the 9th of April 1827. It is in part as follows:—"It has occurred to me, as a Subject highly deserving

Attention,

“ Attention, whether the Judicial Office of Chancellor, under the Title of
 “ Master of the Rolls or Vice Chancellor, might not advantageously be com-
 “ mitted for the present, either to the *Chief Justice*, or to one of the inferior
 “ Judges of the Court of King’s Bench. An Arrangement of this Nature
 “ might, if necessary, form the Basis of some more systematic Arrangement in
 “ future Times. Your Excellency is aware that a similar Measure has been
 “ adopted in Nova Scotia; and that, under a recent Act of Parliament, a System
 “ very similar has been introduced into the Court of Exchequer in England.”

The Dispatch of Lord Goderich, of which I was the Bearer, is dated the
 19th of July 1827. It says, “ It has been in contemplation to make Provision
 “ for the Administration of that Part of the Law of England which in this
 “ Country is administered by the Court of Chancery; and it is intended to
 “ commit that Jurisdiction to Mr. Willis, who has practised for several Years
 “ in the Court of Equity.”

On the 17th of September 1827 I arrived in Upper Canada. On the 18th
 I delivered Lord Goderich’s Dispatch to Lieutenant Colonel Sir P. Maitland,
 to whom it was addressed, at his Cottage at Stamford, near Niagara. His
 Excellency, on that Occasion, when I spoke of the proposed Court of Equity,
 emphatically observed, “ Yes, Sir; but you have not got your Equity Court
 “ yet.” On the 28th of October I submitted a Scheme for the proposed
 Court of Equity to Lieutenant Governor Maitland, through the Medium of
 Major Hillier, his Excellency’s Private Secretary, and also to the Law Officers
 of the Crown in Upper Canada; and on the 29th of October I received a Note
 from Mr. Attorney General Robinson, in the following Words:—“ There is
 “ nothing that calls for Remark in your Prospectus, after the Conversations
 “ we have had on the Subject. As it regards the Officers, it appears to me
 “ judicious and simple, and at the same Time sufficiently comprehensive.
 “ ‘*Crescit eundo*’ must be your Motto. Experience, or rather Experiment, will
 “ probably show other Things to be wanting, which, from Time to Time, can
 “ be supplied.” On the 24th of December I communicated to the Provincial
 Government that I had been informed that an Act of the Local Legislature
 was now considered necessary by the Law Officers of the Crown in England, in
 order to create an Equity Judge in Upper Canada. This Opinion, I have the
 best Reason to know, Mr. Stephen, the Learned Counsel to the Colonial Depart-
 ment, considered erroneous, and I perfectly concur with him. It appears that
 in Nova Scotia a similar Judicial Officer was appointed by His Majesty alone,
 without the Intervention of the Legislature; and the Proceedings in that
 Province appeared to furnish an exact Precedent for Upper Canada; for it
 seems difficult to suppose that the King could do that in one Colony which
 His Majesty was unable to do in another, when both are equally regulated by
 the same Laws.

On the 27th of December I received a Note from Major Hillier, as Private
 Secretary to the Lieutenant Governor, saying, “ It might be well for me to
 “ confer with the Attorney General on the Bill to be submitted to the
 “ Legislature.” On the 29th of December the Lieutenant Governor personally
 expressed himself to me to the same Effect.

On the 2d of January I dined with Mr. Attorney General Robinson, on his
 Invitation, for the express Purpose of settling the Heads of the Bill in the
 Evening. I took with me and left at his House the Sketch of the Bill which
 he has annexed to his Report; and also that Volume of Sir William Blackstone’s
 Collection of the English Statutes which contains the Act for erecting the
 Office of Vice Chancellor of England, and the several other Acts relating to
 Courts of Equity, and various other Books and Papers on the Court of
 Chancery. I then proposed, and settled, in conjunction with Mr. Attorney
 General Robinson, the Heads of the intended Bill, offering at any Time to
 give him every Assistance in my Power. On the 14th of January 1828, Major
 Hillier, having previously informed me that the Establishment of the Court of
 Equity would be mentioned in the Speech of the Lieutenant Governor on
 opening the Provincial Parliament, stated, it was considered preferable to
 recommend it by a Message, which would accordingly be delivered as early as
 possible.

On

On the 15th of January the Local Parliament assembled; and, in consequence of an Official Notice, I attended his Excellency to the Legislative Council Chamber. On the same Day I dined at the Government House, and was introduced to the Speaker of the Lower House, who also dined there.

How far, under these Circumstances, Mr. Attorney General Robinson is warranted in stating in his Report, "that my *conditional Appointment*," as he terms it, "took its Rise from his Conversation with Mr. Stephen in 1825," when he, Mr. Attorney General Robinson, then being in England, asked that Gentleman, "if a proper Chancery Barrister could be induced to organize and preside in a Court of Equity in Upper Canada, if the Legislature would provide him an Income of £2,000 per Annum, and that the whole thing was hypothetical, and that he cannot have a Shadow of Doubt it was clearly so understood by Mr. Stephen," is not for me to say. Judging from the subsequent Proceedings, however, I should be compelled to draw a very different Conclusion. Neither is it my Business to determine how far Lord Bathurst's Dispatch, dated the 9th of April 1827, affects the Validity of Mr. Attorney General Robinson's Declaration, "that from the Period of this Conversation with Mr. Stephen in 1825," he, Mr. Robinson, never heard more of the Subject, until the Arrival of the Intelligence, in July 1827, "that Mr. Willis had been appointed a Judge of the Court of King's Bench in Upper Canada, on a *supposed Vacancy*, and with the Understanding of presiding in a Court of Equity, should it be established in the Province." But it is for me to declare, as must be evident from the foregoing Statement, that Mr. Attorney General Robinson's Assertion, "that as Mr. Willis was in daily Expectation of his Commission from England *when the Legislature met* in January last, it would have been neither proper nor considerate in him to have introduced any Measure into the Legislature respecting the proposed Court," is totally incorrect; more particularly as Major Hillier himself informed me, that on the 2d of February 1828 he was going down to the House with a Message from his Excellency on the Subject, when Mr. Peter Robinson, the Brother of the Attorney General, arrived from England, and put into his Hands a Dispatch from Mr. Secretary Huskisson on the Subject. On the 4th February I was favoured with a Copy of this Dispatch, which is dated Nov. 25, 1827; and from this Dispatch I extract the following Sentence:—"For the Principle that all Courts are Courts of the King, and that Justice is to be dispensed only by Officers commissioned by the King for that Purpose, cannot be too fully recognized, or too strictly enforced." This may perhaps explain Mr. Attorney General Robinson's Expression of a "*supposed Vacancy*" in the Court of King's Bench; for I am aware that my Appointment by His Majesty displaced a Judge commissioned by the Lieutenant Governor alone, and that my Arrival in Canada was by no means grateful to the Provincial Government.

On the 4th of February 1828 I wrote to Mr. Attorney General Robinson, for the Books and Papers respecting the Court of Chancery, which I lent him on the 2d of January; and the same Evening I received from him a Note, of which the following is an Extract: "My dear Sir,—The Books and Papers you were so good as to leave with me are at my Office; I shall be happy to meet you there, at Half past Nine or Ten To-morrow Morning; at all events I will be there at that Time to see that they are sent. Very truly yours, J. B. Robinson."

On the 5th of February I accordingly went to his Office at the Time appointed; and while there, from the Papers I had lent him, I wrote the Report I was required to furnish, in consequence of Mr. Huskisson's Dispatch. (The several Dispatches of Lord Bathurst, Lord Goderich, and Mr. Secretary Huskisson, and the Reports thereon, are annexed to the Report of Mr. Attorney General Robinson, and also accompany this Statement.) After waiting at Mr. Robinson's Office for some Time without seeing him, I walked up to the House of Assembly, where I found him, and going with him into a Committee Room, gave him the Report to peruse. When he read it, he said "he thought with me decidedly that there should be a separate Court." On this, or the following Day, I communicated my Sentiments respecting the proposed Court of Equity to Mr. J. Rolph and to Mr. Bidwell, Two eminent Members of the Bar and of the House of Assembly; who, the Chief Justice

was informed me, were frequently his Guests, and to whom I was introduced by the Receiver General, a Member of the Upper House. I conceived that it was my Duty to explain to every one a Matter of such Importance, and so little generally understood; and although the Gentlemen I have mentioned were said to be political Opponents of Mr. Attorney General Robinson, yet as this was not and could not be possibly considered a political Question, I endeavoured, if possible, to procure for it all the Support I could obtain, by convincing these Gentlemen of the Propriety of the Measure. I believe it has not been unfrequent for the highest legal Authorities in England to consult with Members of the Bar, though such Barrister be politically opposed to the Minister, respecting any Measure with reference to the Laws which such Barristers, particularly if in Parliament, may wish to introduce. I do not think Lord Eldon would have objected to consult Sir Samuel Romilly, or Lord Ten-terden Mr. Brougham or Sir James Scarlett. On the same Day, February 5th, I transmitted to the Lieutenant Governor the Opinion I was required to furnish. On the 10th of February, it appears, that of the other Judges was sent; on the 12th of February that of the Solicitor General; on the 16th of February that of the Attorney General; and on the 19th of February, his Excellency the Lieutenant Governor, in compliance with Mr. Secretary Huskisson's Direction, sent down the Message to the Legislature on the Subject. On the same Day the Attorney General moved, in the Lower House, that the Matter be taken into Consideration by a Committee of the whole House on the 21st of February, which was ordered; and at the same Time One hundred Copies of the Papers were ordered to be printed. On the 21st of February, the Attorney General again moved that the Matter be brought forward; which was negatived, as the Papers had not been printed. On March the 1st, the Papers were printed, and laid before the House. On March the 2d, another Document, which had been omitted, was ordered to be printed, and an Address was moved to the Lieutenant Governor to affix the Signature of Lord Goderich to his Dispatch of the 19th of July 1827, which had been omitted. On March the 10th, the Attorney General moved, that the Matter be brought under the Consideration of the House the following Day. On March the 11th, Notice was given that the House would be prorogued on the 25th of that Month. On March the 12th, the Parliament not having then a Fortnight to sit, the Matter was brought forward. I attended the Debate, and found that Mr. Attorney General Robinson made so many *palpable Mistakes* in stating what would be the Objects of equitable Jurisdiction, that previously to the Business coming on the following Day, I called him into the Speaker's Room, and informed him of his Errors, in order that he might correct them. His Answer, made in a very rude and abrupt Manner, was, "We don't come here, Sir, to discuss Points of Law." On March the 13th, the Matter was, for a Period at least, concluded. Mr. Attorney General Robinson's first Resolution, *viz.*, "That it was necessary to make Provision for an equitable Jurisdiction *during the present Session*," being negatived entirely; principally, I have every Reason to believe, from his pertinaciously persisting in retaining the Words "*during the present Session*." Mr. Rolph then proposed the following Resolution:—

"Resolved, That this House, although sensible of His Majesty's gracious Intentions, is already so occupied with important Measures, augmented by that Part of the Business of the last Session which was unavoidably postponed, as to render it impracticable to bestow, *during the present Session*, that mature Consideration which is due to so important a Subject in its complicated Details, as the Introduction of an equitable Jurisdiction into this Province; particularly as the Public Documents intended for the Information of the Legislature have, from the Date of their Transmission, and the inevitable Delay of printing them, come late in the Session under the Attention of the House;" which was put and carried. Mr. Rolph then proposed, that the Judges of the Colony should be put "on the same independent Footing as those in England;" which was also put and carried. In proposing this Resolution, he took Occasion to notice the Inconvenience arising from elevating Provincial Barristers to the Bench, as they were generally so connected by Kindred and Local Interest as to excite Suspicion, at least, in the Administration of Justice.

Mr. Rolph

Mr. Rolph then proposed, "That the Chief Justice should not be an Executive Councillor;" and dwelt on the Impropriety of Judges being political Characters. The Attorney General opposed the Resolution; nevertheless it was put and carried; and an Address to His Majesty, embodying these Resolutions, was then voted.

As to my Attendance at the House during the Chancery Business, and watching it throughout with almost parental Solicitude, I can only say, I considered it my Duty. Sir John Copley, when Master of the Rolls, brought forward, in the British House of Commons, the Propositions of the Chancery Commissioners, in a Manner too able ever to be forgotten; and surely there was no more Indelicacy in my being present, than in Lord Lyndhurst's making his Speech on the Subject, or in my attending the House of Assembly, than in Sir William Grant and Sir John Copley (who had Estates for Life in Mastership of the Rolls, while I, though possessing a vested Interest, had only, as it is now said, a Sort of contingent Remainder,) being most efficient Members of the British Parliament.

Mr. Attorney General Robinson states, that it was at my Suggestion a Call was made for his Details of the Measure. He really gives me more Credit than I deserve. I would, had it occurred to me, have readily made such a Suggestion; feeling, that in a Measure of such Importance to a new Colony, he ought to have been prepared with every Detail, and all the Information which could possibly be required on the Subject. An equitable Jurisdiction, if erected without ample Explanation of its Powers and Effect, could be of but very little Use. It would be something like the Court of Chivalry,—at the present Day scarcely known to exist, but for its Name.

On the 25th of March the Provincial Parliament was prorogued. On the 26th of March I addressed the following Letter to Major Hillier, as Private Secretary to the Lieutenant Governor.

Dear Sir,

York, Upper Canada, 26th March 1828.

The temporary Suspension of the Erection of an equitable Jurisdiction in this Province affords me an Opportunity (and I trust without Indelicacy) of laying before his Excellency the Lieutenant Governor some further Extracts from the Debates in the British Parliament, on the Chancery Question, as particularly applicable to the Reports of the Judges and Law Officers of this Colony, (which appear from their Dates to have been made many Days after that which I had the Honour to transmit,) and not altogether irrelevant to the subsequent Proceedings. I am the more desirous to do so, from your Intimation that the Attorney General would probably communicate with His Majesty's Government on the Subject; feeling it also my Duty, from the kind Consideration I have experienced, to transmit a Statement (which is at any Time at your Service) of every thing that has occurred respecting this Matter, from my Arrival in the Province to the present Time. A Detail of the Proceedings in the State of New York, relative to the Junction of Courts of Law and Equity, and the *vis à voce* Examination of Witnesses in the Courts of Judicature in that State, mentioned in Lord Lyndhurst's Speech, (both which Measures appear to have been recommended in this Province,) may, I should imagine, if necessary, be easily attained. I have myself the Honour of a slight personal Acquaintance with the Ex-Chancellor Kent, to whom Lord Lyndhurst has alluded. I can have no Wish to preclude this Letter receiving the same Publicity that was given to my former one on this Subject.

I have the Honour to remain,

Dear Sir,

Your very obedient Servant,

JOHN WALPOLE WILLIS.

In the Debates in the Senate of New York which are alluded to, the Proposition of erecting the Courts of Law and Equity, and abolishing written Depositions of Witnesses, were rejected.

On Wednesday the 24th of March the Lieutenant Governor left York for Stamford Cottage, near Niagara, where he usually resides. On the 27th of March I wrote to Mr Stephen, inclosing him all the Proceedings, and requested that he would lay the Papers respecting the Establishment of an equitable

equitable Jurisdiction in Upper Canada, with a Letter that accompanied them, before the Colonial Secretary, if it met with his (Mr. Stephen's) Approbation.

On Saturday the 29th of March I received a Letter from Major Hillier, saying he had sent the Papers over to the Lieutenant Governor, and that I was mistaken in supposing that the Attorney General would communicate with His Majesty's Government, for that his Report would naturally be made to the Local Government. On the 1st of April I saw Major Hillier at the Government Office on this Subject, when he said " It was perfectly right in me to communicate with the Government at Home, and he recommended " my doing so, as he considered I had a vested Interest in the Subject."

On the 16th of April Major Hillier informed me, with reference to my offer to send my Papers on the Establishment of an equitable Jurisdiction to the Lieutenant Governor, " that his Excellency felt no Desire whatever to " be acquainted with any Report to His Majesty's Government *not passing " through his Hands."*

On the 8th of May I had the Honour of an Audience of his Excellency, and requested him to transmit a Letter, which I read to him, to the Secretary of State, applying for the Office of Chief Justice in Case of a Vacancy, *until* I should be appointed Equity Judge, which was much more consonant to my Feelings; and I then informed his Excellency of all that had passed between Major Hillier and myself respecting the Transmission of the Equity Papers. His Excellency seemed to acquiesce in all I said on that Subject, and offered to transmit my Letter, if I would *merely inclose it to him.* He said, " I cannot " recommend *you*, Mr. Willis, as I must, or I have promised, to recommend " the Attorney General, for I think him the best Servant His Majesty has." I said I was too little known to his Excellency to expect, or to ask for any such Favour from him. His Excellency made no Complaint whatever respecting my Conduct in *any respect*, but on the contrary was most courteous and civil.

The Degree of Credit which, under these Circumstances, is to be attached to Mr. Attorney General Robinson's Assertion, " that the total Failure of " Support, and especially from those Persons with whom Mr. Willis had " chosen to place himself in the most confidential Communication, is too " evident, that he should say any thing about it," may be easily deduced. I must say he evidently labours under a Delusion, which, if possible, I would readily suppose was not wilful; but when I find it insinuated that I wished the Measure to fail, for the *Chance of getting* the Chief Justiceship, I feel it due to myself to declare, as must be most obvious, that his Fears on that Head have led him completely astray, and that such was *not the Case.* Lord Bathurst's Dispatch contemplates the *Union of the Chief Justiceship and the Mastership of the Rolls*; therefore such a Proceeding on my Part would have been worse than Folly. Mr. Rolph's Resolution goes to deprive the Chief Justice of political Influence; I should therefore obviously have waited quietly for the Mastership of the Rolls, to whose Appointment to the Executive Council there might not perhaps be the same Objection as that which has been already expressed with regard to the Chief Justice, had I entertained any such View. I avail myself, however, of this Opportunity to deny, in the *strongest Terms that Language will admit*, ever having interfered, or wishing to interfere, or take any Part in the local Politics of Upper Canada. I trust I have sufficiently shewn, in the foregoing Statement, that Mr. Attorney General Robinson could not possibly expect that " he should have been furnished with a more complete and well " digested System of equitable Jurisprudence," than that which he had an Opportunity, if he thought fit to have asked for it, of obtaining from me. I cannot, however, conclude without protesting against my Conduct and Character being thus arraigned and aspersed by an inferior Officer; and I trust that His Majesty's Government, to whom the true Colour of the whole Proceedings must now be obvious, will mark in a peculiar Manner their Sense of such Proceedings.

I have the Honour to be, Sir,
Your very obedient Servant,
JOHN WALPOLE WILLIS.

Inclosure, No. 2.

Copy of a Message from his Excellency the Lieutenant Governor to the House of Assembly, and Documents accompanying the same, relative to the Establishment of an equitable Jurisdiction in Upper Canada.

[*The Message and Documents accompanying the same are already printed in p. 139 — 148.*]

Inclosure, No. 3.

Letter from Mr. Chief Justice Campbell to Major Hillier.

Dear Sir,

York, 12th February 1828.

I HAVE the Honour to inclose herewith the Dispatch of His Majesty's Secretary of State, relative to the Erection of a Court of equitable Jurisdiction in this Province, and upon which his Excellency the Lieutenant Governor has requested the Opinion of the Judges, as to the most eligible Mode of carrying such Intention into effect, in the present State of the Province.

Mr. Justice Willis having, under peculiar Circumstances, given his Sentiments separately, I have now the Honour of sending herewith the Sentiments of Mr. Justice Sherwood and myself on the Subject, for the Information of his Excellency.

I am, my dear Sir,
Yours faithfully,

WILLIAM CAMPBELL.

George Hillier, Esq., Secretary.

Inclosure, No. 4.

(G.)

Narrative of Occurrences in Upper Canada.

Sir,

Bath, 5th December 1828.

UNDER the peculiar Circumstances in which I have been placed, I feel it due to myself as an Individual, as well as to those who interested themselves in obtaining for me the Appointment which I had the Honour to receive, to render to you a straight forward and simple Narrative of all such personal Occurrences as have taken place during my Residence in Upper Canada; more especially as a Knowledge of the actual Facts must materially tend to defeat those abundant Mis-statements in which I have been (as I trust it will appear) most undeservingly and ungenerously assailed.

On the 17th of September 1827 I arrived with my Family in Upper Canada.

On the 18th I delivered the Warrant issued by His Majesty for my Appointment as a Judge of the Court of King's Bench of Upper Canada, Lord Goderich's Dispatch, and some private Letters of which I was the Bearer, to Lieutenant Governor Sir Peregrine and Lady Sarah Maitland, at Stamford Cottage near Niagara. I had, on that Occasion, the Honour of being invited to dine with his Excellency. In referring, during the Evening, to the Subject of the Equity Court, I was certainly rather surprised at an Expression which fell from Sir Peregrine Maitland, and not less so at the Tone in which it was uttered. "Yes, Sir," said his Excellency; "but you have not got your Court " of Equity yet." The Words made some Impression at the Time, and subsequent Events have tended to throw further Light upon their Meaning.

On the 20th of September we arrived at York. I had previously written from England, requesting Mr. Attorney General Robinson to procure a House or Lodging, for our temporary Accommodation. Major Hillier, the private Secretary of the Lieutenant Governor, engaged Apartments for us at a small Public House in the Town.

On the Day of our Arrival, the Chief Justice sent his Carriage for us, and invited us to Dinner; when we were informed that he was going to England, and that his House might be obtained at a Rent of £200 per Annum. In London, or Bath, a Third of that Sum would be more than sufficient for the Rent of such a House; a similar Sum was never before, I believe, asked for any House of that, or any other Description, furnished as it was, in the Province of Upper Canada. At the Table of the Chief Justice I that Day met Major Hillier and Captain Maitland, Aides-du-Camp to the Lieutenant Governor.

On the 2d of October, Mr. Galt, Superintendent of the Canada Company, a Gentleman of very considerable literary Celebrity, called upon us, and wrote a most obliging Note, offering the Use of his House at Burlington. The Inhabitants of York waited upon us in great Numbers, at the little Public House, almost overwhelming us with Civilities, which were all acknowledged and returned in due Time. The different Newspapers published in the Town (Four in Number) were sent to me; and wishing to avoid every Party Distinction, and to hear what passed on all Sides, I became a Subscriber to each of them. The Terms are £1 for a Twelvemonth, to be paid in advance. With the same View, I also became a Subscriber to the Reading Room, or News Room, which I only visited Twice during my Residence at York, once in Company with Major Hillier and Colonel Fitzgibbon, and once afterwards, to copy an Extract from a Paper, and each Time for not more than a few Minutes. I believe John Bull, the Times, and the other English Morning and Evening Papers were taken in there. Major Hillier, Mr. Attorney General Robinson, and in fact all the Government Officers, are Subscribers.

On the 3d of October Mr. Galt drank Tea with us.

On the 6th of October Colonel Givins and a Mr. Forster dined with us. Mr. Forster is the Son of an eminent Solicitor in London. He had not been very long in the Province, having only a short Time before left the East India Company's Service, in which he was a Military Officer. He stated himself to be connected with Sir P. Maitland's Family.

About this Time the Assizes were held for the Home District, and a Boy was capitally convicted, and sentenced to Death, for killing a Cow. This, according to Mr. Secretary Peel's Amendment of the Criminal Law of England, is now only a transportable Offence. The Criminal Law of Upper Canada is that of England as it stood on the 17th of September 1792.

I took occasion, shortly after this occurred, to give Mr. Peel's Acts, which I brought from England with me, to Mr. Attorney General Robinson, and suggested to him the Propriety of assimilating the Criminal Law of Upper Canada altogether to that of England, or at least giving the Province the Benefit of Mr. Secretary Peel's Improvements.

About this Period, I also suggested to Mr. Robinson the Utility of a Savings Bank, particularly for the Benefit of the Emigrants on their first Arrival; no Interests on their Deposits being allowed by the Bank of Upper Canada. To this, however, he seemed very much averse; and I at length discovered, that any Proposition that did not originate with himself was not generally attended with his Approbation.

I amused myself with obtaining such Information as I was able respecting the Manners and Habits of the People, and by occasionally walking out on the Shores of the Lake with my Gun.

On one of these Occasions I met a young Man of rather prepossessing Appearance, who I afterwards discovered to be Mr. Henry Sherwood, the Son of my fellow Puisné Judge. I found he was the Attorney General's Pupil, and was about to be entered at one of the Inns of Court in England. I therefore took an Interest in him, and endeavoured to point out to him the Course he should pursue in his legal Studies, and offered to give him any Instruction in my Power, particularly in equitable Proceedings, which are utterly unknown in Upper Canada. Twice afterwards I went out shooting with this young Man, whom Accident has thus first thrown in my Way; and once I well remember meeting the Attorney General, and asking him to permit Mr. Henry Sherwood to go with me to the Island, a Place in the Neighbourhood abounding with Wild Ducks, which I wished to visit. I mention these Circumstances thus minutely, from the very extraordinary subsequent Conduct of this Person.

On

On the 9th of October I dined with the Mess of the 68th Regiment, at the Garrison.

On the 10th the Lieutenant Governor came to York, and left it the next Day.

On the 17th Mr. Thompson, a young Englishman in the Employ of the Canada Company, who had accompanied us on our Journey from New York, and a Mr. Cawdell, then Deputy Clerk of the Crown, formerly an Officer in the 100th Regiment, introduced to me by my Friend Mr. Wilkinson the Special Pleader, spent the Evening with us.

On the 19th of October I rode out with my Sister and Mr. Solicitor General Boulton, who lent me a Horse.

On the 20th of October Mr. Galt and Mr. Thompson dined with us. I here purposely omit all Mention of Conversations and Proceedings respecting the Establishment of an equitable Jurisdiction, as they are fully detailed in the Statement (F.)

On the 20th of October, I rather think, though I am not positive as to the Day, I took the Oaths before the Lieutenant Governor and Council, as a Judge of the Court of King's Bench. On that Day also Mr. Galt and Mr. Thompson dined with us. On the 24th of October, Mr. Cawdell dined with us. On the 1st of November Mr. Thompson, and on the 2d of November Major and Mrs. Hillier, also dined with us.

On the 5th of November, Michaelmas Term, according to the Provincial Statute, began; and I took my Seat on the Bench *together with* the Chief Justice and the other Puisné Justice, as a Judge of the Court of King's Bench. There was more Business during this Term than usual; and as the Court, in general, did not open till Twelve o'Clock, its Sittings were continued rather late in the Evening. I was almost entirely occupied during the Term with judicial Business.

On the 11th of November Mr. Forster dined with us. About this Time the Lieutenant Governor and his Family arrived at York from Stamford Cottage, near Niagara, where they usually reside; and on the Day after their Arrival I called, in company with Mr. Justice Sherwood, on the Lieutenant Governor.

On the 13th of November I dined with Mr. Attorney General Robinson, to meet the Gentlemen of the Bar; and there, for the first and only Time, I dined in company with W. W. Baldwin, Esq., the Treasurer of the Law Society, and Senior Member of the Bar. Dr. Baldwin, as he called himself, from having taken the Degree of a Doctor of Physic at Edinburgh, and formerly, I believe, practising Medicine, has always struck me as one of the best educated and most sensible Men in the Province. He is a Man of very extensive Property in the Neighbourhood of York, and his Connections are highly respectable. One of his Sons, Mr. Robert Baldwin, who I also met on that Occasion, is, in my Opinion, one of the most able and industrious young Men at the Bar of Upper Canada. Dr. Baldwin's Brother and Neighbour is Captain Augustus Baldwin of the Royal Navy, an Officer, I believe, of distinguished Merit. In private Life no Family can be more respectable; and I may add, as it is a sort of Badge in Upper Canada, I have observed them to be regular and constant Attendants at Church.

I was also invited to dine on the same Day with the Chief Justice.

On the 19th of November, the last Day of Michaelmas Term, according to the Statute of Upper Canada, Judgment was given in Two Cases. In the First I differed with both my Brother Judges. The Case was this. A Man had sent Cloth to a Tailor to make him a Coat and Trowsers. The Tailor did so; but out of his Employer's Cloth he also made a Coat and Trowsers for another Person, who admitted this to be the Case. The unlucky Owner of the Cloth, on this Discovery, went to a Magistrate, who issued a Warrant against the Tailor, and bound him over to appear at the Sessions, and answer the Charge. The Prosecutor, however, was not forthcoming at the Trial; and the Tailor brought an Action against him for a malicious Prosecution, and recovered £2 Damages. The Defendan^t (the Owner of the Cloth) moved for a New Trial; and contrary to the Opinion of my Brother Judges, I held, "That although " there must be a felonious Intent to constitute a Felony, and notwithstanding " the Conversion of the Cloth might not amount perhaps to a Felony, yet " without

“ without deciding that Point, as the Tailor had committed an Act not warranted by the Purpose for which the Cloth was delivered into his Charge, “ the Distinction as to whether the Act amounted to a Felony or not was so “ nice, that an ordinary Person could not be supposed to be acquainted with “ it; and therefore, in my Opinion, there was no Ground for the Action.” I reprobated bringing such a miserable Case into Court at all. I have been more particular in mentioning this Case, because it was the first in which I gave any Judgment that was not quite of course; and because also it may be taken as an Example of the Causes in which even the Law Officers of the Crown in Upper Canada (who, as well as all other legal Practitioners, are both Attornies and Barristers,) do not scruple to engage.

The other Cause, in which I did not coincide with One of my Brethren on the Bench, was the following:—

The Question was, how far an Action on a Rule of Court under which interlocutory Costs are claimed could be sustained before the Taxation of such Costs? I held it could not. Mr. Justice Sherwood concurred with me, but the Chief Justice dissented.

On the 20th of November, Major Winniett, Captain Maitland, Captain Donald McDonald, the Honourable Robert Boyle, Mr. Flint, and the Attorney General, dined with us.

On the 22d of November I dined with Mr. Solicitor General Boulton.

On the 25th Mr. Walpole of the Engineers dined with us. On the 27th of November, the Chief Justice, Judge Boulton, the Solicitor General, Mr. Dunn, the Receiver General, Colonel Givins, and Mr. Thompson, dined with us. Mr. Justice Sherwood excused himself on the Ground of Illness.

On the 28th of November Lady Mary and Mrs. Willis called on Lady Sarah Maitland at the Government House, having been informed by Major Hillier that it was usual for Strangers always to do so in the *first* Instance.

On the 29th of November Mr. Forster dined with us.

On the 30th of November a Meeting was held of the Society for the Relief of Strangers in Distress, at which the Lieutenant Governor presided. I was then elected a Vice President. I *conversed* with his Excellency, and proposed to him the Establishment of a Dispensary and a Savings' Bank. With regard to the former, he said he would give Forty Pounds' worth of Drugs, which he had got from England, and intended as a Present for the Hospital had it been made effective. With regard to the Savings' Bank, he said he highly approved of it, and would feel much obliged by my taking up the Business. His Excellency and Major Hillier left the Meeting shortly before me, and called on my Family; and one or other of them then said, “ They had “ left me very happy, *speechifying away* ;” when, in point of fact, I made no Speech whatever; and when asked to do so, and to propose a Measure by the Attorney General, I said, “ Oh, no; I never speak unless I am paid for it. “ Make the Proposition, and I will get up and say I second it.” I mention this to shew the Degree of Accuracy which has been observed in the most trifling Representations connected with me.

On the same Day, Lady Sarah Maitland and Mrs. Hillier also called on the Ladies of my Family. On this, St. Andrew's Day, I dined at the Garrison with Captain Donald McDonald, and took Major Hillier with me in my Carriage.

About this Time, having much Leisure (for the Judges only sit in Term about Eight Weeks in the Year), I interested myself a good deal about the National School. The Master of that Establishment, receives a Salary of £100 per Annum at least. I found the Children in a State of almost brutal Ignorance. Not more than Six at the most could say the whole of the Catechism; and but very few of the others could say the Lord's Prayer, the Creed, or the Commandments. I was shortly afterwards made a Trustee of this Establishment, of the Neglect whereof I complained to Major Hillier.

The Lieutenant Governor was the Patron, and Colonel Wells, Mr. Ridout, the Surveyor General, and Mr. Attorney General Robinson, the Trustees.

I procured the Re-establishment of the Sunday School, and had the Satisfaction of bringing upwards of Sixty Children to Church. The venerable Archdeacon Strachan and other Inhabitants afterwards took upon themselves the

Management

Management of the Sunday School; and I perceived that further Interference on my Part would only be deemed obtrusive. There were not *Ten Children* in Church the Sunday Morning before I left York.

About this Period, but I have not a Memorandum of the particular Days, I walked out Twice with the Attorney General; and I remember particularly informing him, that I intended to classify and arrange the Provincial Statutes, as Sir William Evans had done those of England; and he seemed to approve very much of the Measure. He said, "he had been appointed by the House of Assembly one of a Committee to revise the Statutes, but had not had Time to attend to it." Arehdeacon Strachan, Mr. Solicitor General Boulton, and Major Hillier called on me one Morning about this Period, and asked me to walk with them to look for a Scite for the intended College. I accompanied them accordingly. We called for the Attorney General at his Office; and in the Course of the Walk the Arehdeacon proposed that we should subscribe for an Organ for the Church. I had much Conversation with Major Hillier and the Attorney General on this and other Occasions, respecting the intended equitable Jurisdiction, and the Commission, which I then daily expected to receive from England. Major Hillier always urged me to write to His Majesty's Government, and to all my Friends, to obtain my Commission as soon as possible. I said the Attorney General of England, then Sir James Scarlett, had, as it seemed to me, unnecessarily delayed the Business; that we formerly had had a Fraeas, and I was not sure whether the Remembrance of this Affair rendered him less anxious to expedite my Business. I related the Circumstance which took place in Guildhall, in the Case of Ravenja, the Columbian Minister, v. Mackintosh, for false Imprisonment, before the present Chief Justice of the King's Bench. Major Hillier said, "the Attorney General of England had had a Case from the Province in the Bottom of his Bag for some Years; and that the Provincial Government were still unable to obtain it." I frequently, and on that Occasion also, I think, mentioned, both to Major Hillier and the Attorney General, how kind His Majesty's Government, and especially Lord Goderich and Mr. Horton, had been, particularly in promising that I should receive my Pay notwithstanding the Delay of my Commission; and that I was sure, from the Consideration that I had received, that I should not be permitted to be a Loser, in case any thing should occur to prevent my Commission being speedily perfected; but that I should get the Chief Justiceship, or something equivalent to my Court of Equity, *until* it was created; at the same Time expressing my comparative Dislike to Common Law, having always been accustomed to practise in Courts of Equity.

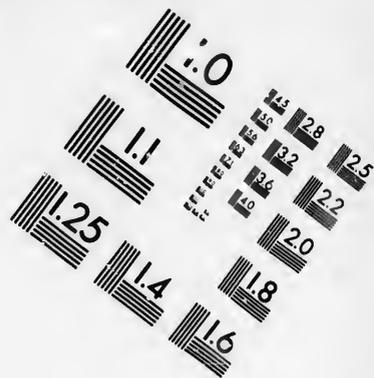
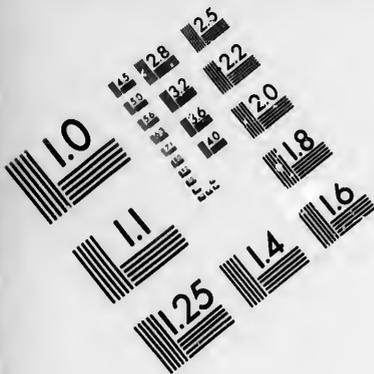
On the 1st of December Mr. Forster dined with us. On the 6th I dined, with Two of the Ladies of my Family, with Lieutenant Governor and Lady Sarah Maitland.

On the 7th, my Child's Birth-day, Lady Mary Willis gave a little Dance in a long Room attached to the Public House, where we were still compelled to remain, to all those who had called on us, without any Reference to Party, or the various private Feuds subsisting among the Inhabitants, which by this Step we hoped in some Measure to be the Means of healing.

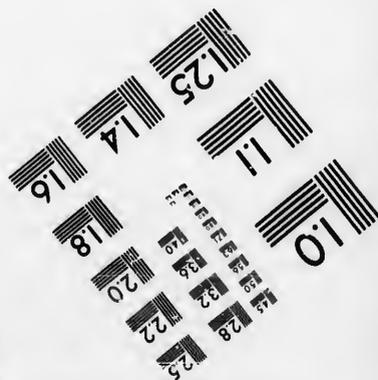
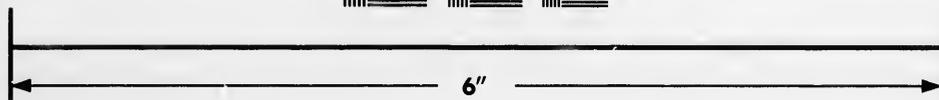
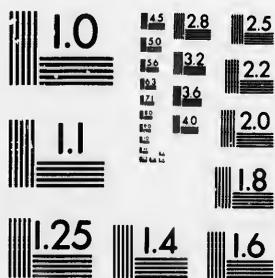
On the 8th of December a Meeting was held of the Members of the Society for promoting Christian Knowledge. I happened, as a Member of the Parent Society, to have the last Reports; and I sent them to the Lieutenant Governor, who presided. It appeared at the Meeting, that although there had been many Subscribers in Upper Canada long since, that nothing had ever been transmitted to the Parent Society, and that the Funds, as I understood, still remained in the Hands of the Gentleman who collected them. No Report whatever seems to have been made of any Distribution of Books; or any thing whatever neglected, which could tend to promote the Objects of the Society. I said to the Lieutenant Governor, "that I thought a Parochial lending Library would be extremely beneficial;" he said, "he thought so too;" but as no one else seemed of the same Opinion with us, the Matter dropped.

On the same Day my Wife and myself dined at Mr. Dunn's, the Receiver General, and took Mrs. Hillier with us in our Carriage. On the 13th of December we went to an Evening Party at Lady Sarah Maitland's.





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On the 15th of December Mr. Galt dined with us. Some Misrepresentations respecting this Gentleman appear to have existed, and he asked my Advice, as a Friend, respecting them. In order to do away with all Misunderstanding, I took upon myself to call upon Major Hillier, and explain certain Matters which he, the Attorney General, Archdeacon Strachan, and the Lieutenant Governor, ARE WELL ACQUAINTED WITH; and I had the Satisfaction of being able (at least apparently) to promote that Harmony which had well nigh been seriously interrupted. Major Hillier expressed himself *extremely obliged*, and particularly for an Explanation he received, through my Intervention, for which he said he should *never forget Mr. Galt's kindness*.

On the 17th of December Mr. Foster dined with us. On the 19th I dined, with Two of the Ladies of my Family, at Mr. Justice Sherwood's.

On the 20th we went to an Evening Party at Lady Sarah Maitland's. On the 22d the Lieutenant Governor called on us. On the 27th Mr. Forster dined with us.

On the 31st of December we were all at a Christmas Fancy Ball given by Mr. Galt, in the Room of the Public House we lodged in, to the Children and Adults of the Place. A Day or Two before this Time, I think, Hilary Term commenced, according to the Canadian Statute.

On the 2d of January 1828, as I have already mentioned in my Statement respecting the Court of Equity, I dined with the Attorney General.

On the 4th of January (my Birth-day) Major Hillier, Mr. Galt, Major Winniett, and Mr. Forster dined with us.

On the 8th of January (I think) I dined at the Government House; my Wife and Sister accompanied me, and we there met Mr. and Mrs. Robert Baldwin.

On the 14th of January we went to a Ball given by Mr. Dunn. Major Hillier told me that Evening that my Chancery Business would be recommended to the Legislature by a Message, not by the Speech.

On the 15th of January the Parliament was opened, and I dined at the Government House, and was there introduced to the Speaker of the House of Assembly.

On the 16th of January (I think) my Wife and I dined with the Chief Justice. I was also asked on that Day to meet the Lieutenant Governor at Dinner at the Garrison; and I had likewise another Invitation on the same Day to dine at Dr. Baldwin's. I *think* this was a Day or Two after the Close of Hilary Term; on the last Day of which, in Six or Seven Judgments which were given in Cases (with One Exception) of some Importance, I differed from both my Brother Judges, I believe, in that One Case only. The Case was *this*:

An Action was brought for Slander, alleged to be imputed by the following Words: "If you do not be quiet, I will mention a Thing that will disgrace you and the whole Family for ever; your Father had on a Pair of Trowsers at John M'Favish's Raising," (that is, raising or building a wooden House, at which all the Neighbours generally assist each other,) "with their Name upon them, which was seen by myself and Twelve other Persons." I said in my Judgment, that I did not think these Words necessarily imputed a Felony; and that *that* Construction of them which was *not* defamatory should therefore be applied to them, and I allowed the Demurrer.

The Parties were Two labouring Scotchmen, I believe. I reprobated the Practice of bringing such Actions into Court. The Attorney General was in support of the Action; and the Chief Justice and Mr. Justice Sherwood gave Judgment in favour of it; thus permitting the Suit to proceed. In Five or Six other Cases, Mr. Justice Sherwood differed from the Chief Justice and myself; his Opinion was therefore of course over-ruled. Before this Time I wished to think, and from the Attention he seemed to pay to Business actually worked myself up into the Belief, which I frequently expressed, that Mr. Justice Sherwood was a *hard-headed* sensible Man; but I became convinced, that though right in the former Conjecture yet so far as legal Knowledge or Abilities were concerned, I was mistaken in the latter Part of my Conclusion.

On the 19th of January I went up to Burlington, a Distance of about 30 Miles, with my Wife and Child, on a Visit to Mr. Galt. Business required the

the Presence of that Gentleman at Guelph the Day but one after we arrived there, and he could not return 'till about Two Days before we came back to York. While at Burlington, I became known to Mr. and Mrs. Kerr; the latter is a Squaw, and the Daughter of John Brandt, the celebrated Indian War Chief.

On the 28th of January we returned from Burlington to York.

On the 29th of January I called on Major Hillier at the Government Office, to enquire if any thing had been done respecting the Chancery Business. So fearful had Major Hillier been that this should come on during my Visit to Burlington, that on mentioning my Intention to go thither, he said, "in case the Matter should be brought forward, he would keep a Man and Horse ready to dispatch to me at a Moment's Warning." On the 29th of January Major Hillier informed me that the Message was in Preparation; and that he had received Papers which he had written for from Halifax, Nova Scotia, respecting the Court of Chancery there, but he had lent them to the Attorney General, and would write for them. He scarcely began his Note, before the Attorney General entered the Office, on his Way to the House of Assembly, and said, "If I would walk with him he would give me the Papers, which he wished me to see, but they were left at his own House." The Attorney General's House is not far from what was intended to be an Hospital, but which the Provincial Parliament now occupy. I therefore accompanied Mr. Robinson to the House of Assembly, and I then entered it for the first Time, and heard a Debate on printing a Petition, in a Matter which I remembered to have heard before in the Court of King's Bench. The Attorney General opposed the Measure, but it was carried. We then left the House together; and he said, "I think you must have had enough of the Debates, and that you will not go again." I replied, "that I certainly was not enamoured with the Proceedings." I again spoke to the Attorney General respecting the Criminal Law, and the Propriety of availing ourselves of Mr. Secretary Peel's Amendments; but he objected, seemingly not approving of any Alteration, at least for the present. He then gave me the Papers respecting the Court of Equity in Nova Scotia.

I was frequently in the habit of going to the Gaol as an official Visitor, and the Prisoners had often applied to me for Work. I considered it would be very beneficial if an Act were passed similar to the English Statute, for enabling the Judges and Magistrates to sentence to Hard Labour, as well as Fine and Imprisonment. The Price of Labour in Upper Canada is very exorbitant. Having copied almost the whole of the British Statute, I sent it to Major Hillier, as Private Secretary to his Excellency, with a Request that he would submit it for Consideration. He afterwards told me *that the Attorney General did not approve of the Measure.* I was also most anxious to get an Act for establishing a Savings' Bank, particularly after the Conversation which had taken place with his Excellency on the Subject. I wrote to the British Consul at New York for the Rules of the Savings' Bank established in that City, and sent them to the Lieutenant Governor. Having frequent Occasion to visit the Parliamentary Library kept in the Hospital, where the Two Houses sit, I had much Conversation with Mr. Sullivan, the Librarian, on the Subject of the Savings' Bank, having recommended that Gentleman to Major Hillier as Secretary, in case such an Institution could be established. I got from the Library One or Two Volumes of the Edinburgh Review, containing Articles on the Subject of Savings' Banks, which I sent to his Excellency.

This Library was a great Source of Attraction; and to get at it I was necessarily compelled to go through the Lobbies of both Houses of Parliament.

The Kindness of the Speaker of the Lower House in inviting me to his Room, and making me acquainted with the different Members, and the Information I received from him and many others respecting the State of Education, Religion, and the Customs and Agriculture of the Country, induced me to become a very frequent Visitor, more particularly as I wished to be on the Spot when the Chancery Question should be brought forward, and I might be wanted. I had also a further Object: as the Hospital had been occupied by the Legislature, to the Exclusion of the numerous poor Objects for whom it

was

was originally intended, and the Funds of the Society for the Relief of Strangers in Distress were not, as Dr. Strachan informed me, very flourishing, I was anxious to obtain something by way of Rent from the Legislature for the Use of this Hospital, that the Poor might in some Measure be indemnified for the Loss of a comfortable Building, by the Support such a Fund would afford to a Dispensary which I succeeded in getting established.

With these Views, and these alone, did I make my Visits to the Hospital. I was necessarily present at various Times, while thus waiting, at the Debates of the House. So far, however, from mixing myself up with Politics or Party, that upon the only Party Question I heard of, that, namely, respecting the Arrest of Colonels Givins and Coffin, I retreated as quietly as possible from the Hospital, being preceded in my Flight, about a Minute's Interval, by the Lieutenant Governor himself, who almost ran from a Corner of the Street, where I had observed him watching the Result of the hostile Embassy of the Serjeant at Arms.

Mr. Galt came to York the same Day we returned from Burlington. During my Visit at his House, I had conceived a Plan for establishing Branches of the Bank of England in the Colonies, particularly in Upper Canada. I communicated this to Major Hillier, for the Information of the Government, and also to Mr. Galt, who took up the Measure so far as to go into Detail, and send his Ideas on the Subject to some of his Friends in England.

I had previously suggested to Major Hillier an Idea I entertained, that it would be very beneficial to the Colony if Baronets were created by His Majesty, under the 31st Geo. 3. c. 31., as those of Nova Scotia were made by Charles I.; and I remember personally mentioning this to the Lieutenant Governor, after Major Hillier had warmly approved of the Measure, and his Excellency abruptly answering, "Then, Sir, you wish to create an Aristocracy." I replied, I thought it would be the best Thing possible in such a Country.

At this Time Mr. Galt nearly lost his Sight, from Inflammation in his Eyes, and I became his constant Visitor at the Inn where he lodged.

One Day, between the 29th of January and the 4th of February, I accidentally went into the House of Assembly, and heard a very impressive Speech by Mr. Rolph against Imprisonment for Debt, and the Attorney General's Answer. I then offered to lend the Attorney General Sir Wm. Evans's Observations on the Insolvent Acts, but he declined the Offer. I subsequently lent the Book to Mr. Rolph, who, though the Arguments militated against his own Position, was very much pleased with them. There is no Bankrupt or Insolvent Law in Upper Canada.

I was, as I have already stated in another Document, introduced to Mr. Rolph and Mr. Bidwell by the Receiver General. The Chief Justice had borne ample Testimony to me of the Merits of these Gentlemen, who are in the habit of being his Guests, and the Guests of other Legislative Councillors, although they are *politically opposed*, as it is said, not to the Government, but to the Folly of the Attorney General. Mr. Bidwell gave me much valuable Information respecting the Prison Discipline in the State of New York, and expressed himself as being anxious to introduce a Scheme for a *well-regulated* Penitentiary or House of Correction in Upper Canada.

Between the 6th of February and March 15th I went occasionally to the House of Assembly, to ascertain if any thing were doing respecting the proposed Court of Equity; and on one Occasion I heard a very animated Debate on an Address to the King respecting the Alien Bill. I never heard more affectionate Attachment expressed than by those who were opposed by the Attorney General, and who, as it appeared by the Debate, had been stigmatized as factious and disloyal Subjects by the Provincial Government. On that Occasion the Solicitor General and the Rev. Dr. Phillips were sitting near me in the House. Many of the Officers of the Garrison, who frequently attended, were also present.

On the 7th of February I was at the last Ball given by Lady Sarah Maitland during the Season. On this Day we removed from the little Inn, and got into our House.

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On the 12th of February I wrote to request the Honour of the Lieutenant Governor and Lady Sarah Maitland's Company at Dinner on the 26th of February; and on the 13th of February I received a Note from Sir Peregrine and Lady Sarah Maitland, stating their Regret that they could not have the Honour of waiting on Mr. and Lady Mary Willis at Dinner on that Day. On the 14th of February I went with a Part of my Family to a Ball given by the Officers of the 68th Regiment at the Garrison. After the Ball, my Wife was for a considerable Period *very much indisposed*, and consequently we neither accepted nor gave Invitations.

About this Time Dr. Dunlop, the Warden of the Forests of the Canada Company, arrived at York, in consequence of Mr. Galt's Illness.

It was about this Period also that I went up to Toronto on a Visit to the Rev. Mr. M'Grath. I there met Lieutenant Colonel Adamson, a British Officer of much Distinction, at whose House I dined on the following Day, Sunday. I observed at Church a lamentable Want of Prayer Books, and informed Mr. M'Grath of the Terms on which the Society for Promoting Christian Knowledge distribute their Books. There were not Twenty Prayer Books among a Hundred People. After Church we rode to the Indian Village on the Credit River, and examined their School. The Teachers expressed a great Wish for Prayer Books and Testaments, which the Indian Children read admirably; and I afterwards sent a small Supply to Mr. M'Grath for his Congregation, and to Mr. Jones, the Indian, for his People.

The Indians, though in fact Methodists, attend Mr. M'Grath's Church, the Church of England, and allow him to preach in their Chapel.

The Indians were anxious to have a Forge and a Carpenter's Shop established at their Village, and to learn how to make their own Implements of Husbandry. I mentioned these Circumstances to Major Hillier and the Lieutenant Governor; and also urged the Propriety of furnishing them with Books, particularly Prayer Books and Bibles. His Excellency's Answer was, "That he himself was shortly going to the Credit; and as to the Books, the Society could not afford to let them have any." I replied, "The Parent Society in England, of which I was a Member, had voted £500 in Books for the intended College, and that I was sure it would not be less liberal where Books were so much wanted." When I arrived in the Province, I had Letters of Introduction to Colonel Givins, Major Hillier's Father-in-Law. I was informed that it was in my Power to appoint a Clerk of Assize to go with me on the Circuit, and that the Situation was worth £200 per Annum. This Office, through Major Hillier, I offered to his Brother-in-Law, Mr. James Givins, then a Student, and now a Barrister; and the Offer was at the Time thankfully accepted. Mr. Justice Sherwood proposed to me some Time afterwards to take his Son with me on the Eastern Circuit, which he said I should go; and that he would take Mr. Givins with him. Mr. Justice Sherwood said, "his Son had served an Ejectment for him, and he merely wished him to go with me to prove it." To this I at once assented. I afterwards heard that Mr. Sherwood was interested in Property sold, or attempted to be sold, in the notorious Cause of Boulton v. Randall; and on the 1st of March I wrote to Mr. Justice Sherwood, and said, as it might be *suspected* that I should not do Justice in the Trial of a Cause of so much Importance, if I took his Son with me as Clerk of Assize, merely for the Sake of his being a Witness, I must decline allowing him to accompany me. I consulted Major Hillier on the Subject, who highly approved of the Course I had taken.

On February 19th, and up to March the 25th, I occasionally went to the Hospital to watch the Chancery Business; and I then heard some of the Debates respecting a Loan of £10,000 to the Proprietor of the Marmora Iron Works, — on the Highway Bill, — on the Receiver General's Poundage, — on the Separation of Prince Edward's Island from the District to which it is now attached, — and the Debates on the Chancery Business, and the Independence of the Judges. These, to the best of my Recollection and Belief, are all the Matters I ever heard discussed in the House of Assembly in Upper Canada. I was examined by a Committee of the Lower House respecting the Criminal Law. I was informed that a Bill had passed in the Lower House, although

opposed by the Attorney General, making me Chancellor for the Trial in Equity of the Cause of Boulton v. Randall. I was also informed that the Resolution which I annex, as given me by Mr. Wilkinson, (a Half-pay Officer of the Line,) who moved it in the House of Assembly, I believe, for granting £100 for the last Four Years, for the Use of the Hospital, in order that the Poor might not suffer, had been passed. I shewed this Resolution, after it had passed, to the Lieutenant Governor, but he has not thought proper to confirm it, and the Poor continue the Sufferers, without the Benefit of their Hospital; while the Legislative Body, occupying it to their Exclusion, are not permitted by the Lieutenant Governor to make any Recompence or Allowance for its Use. Before I conclude the Narrative of all I know of the Parliamentary Proceedings in Upper Canada, I must mention the Speaker's Dinner, to which, on the 7th of March, I went by Invitation.

In addition to most of the Members of the Lower House, I met on that Occasion the Hon. Mr. Dunn, the Hon. Mr. Clark, and the Hon. Mr. Dixon, Legislative Councillors, Captain D. McDonald, and the Two Mr. Reids, of the 68th Regiment, Doctor Dunlop, &c. &c. &c. A Number of loyal and patriotic Toasts were drank. The King with Four times Four was twice, or even thrice, repeated; the Lieutenant Governor Three times Three; and God save the King as often sung in full Canadian Chorus. On the Health of the Judges being drank, I said, "Unconnected as I am, and always hope to be, with all party and political Feeling, I should deem myself unworthy of the Situation I held, were I to interfere in Politics. Unconnected also by Local or Family Interest in the Province, I hoped I should be able to administer Justice without even the Suspicion of Bias or Partiality."

On asking Major Hillier the following Morning why he was not at the Speaker's Dinner, he said, "He was there once, but he did not like the Toasts they drank." "Why," I replied, laughing, "could you wish for any thing more loyal than the King's Arms in Transparency at both Ends of the Room, the King's Health twice or thrice drank, the Lieutenant Governor with Three times Three, and God save the King repeated more than once or twice in full Chorons." "The Loyalty," he replied, "I suppose was all in compliment to you." I answered, "That I thought it was the spontaneous Effusion of their own good Feeling."

In consequence of my Wife's Illness, and a sudden and severe Attack, I requested Dr. Dunlop to visit her. Mr. Galt left York for the United States about the Middle of February, and Dr. Dunlop was left alone. His Kindness and Attention, his excellent Understanding and good Nature, rendered him a most welcome and constant Guest; and I had almost the daily Pleasure of his Company until about the Beginning of May, when he left York. On the 23d of March I visited Colonels Givins and Coffins in the Gaol. They were committed by the Speaker of the House of Assembly for a Contempt. For Excuse they said "they were prevented attending the Speaker's Summons by Command of his Excellency."

On the 25th of March I attended the Lieutenant Governor, in compliance with an official Notice, at the Legislative Council Chamber, when Parliament was prorogued. I also attended on the previous Occasion of his assenting to the Alien Bill, but I forget the exact Day on which it took place.

On the 26th of March the Lieutenant Governor and his Family crossed the Lake for their usual Place of Residence, Stamford Cottage, near Niagara.

About the 6th of April the Chief Justice called upon me, to ask if I would help him with the Business of the Spring Assize. I have already furnished a separate Statement of what then occurred, in reply to what Mr. Attorney General Robinson has thought to offer in Vindication of his Conduct on that Occasion. I have also, in the Statement of the Proceedings respecting the Court of Equity, entered with some Minuteness into the Circumstances respecting my Interview with the Lieutenant Governor on the 8th of May. To the Request I made on that Occasion, I attribute much of the Evil that has since befallen me. I should here, however, state, that on the 18th of April, the Day after the Assizes were ended, Mr. Rolph and Dr. Dunlop dined with us; Mr. Rolph had recently arrived in York from his Residence, which is at a considerable Distance, to attend the Assizes.

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Shortly after the Assizes Easter Term commenced, and in consequence of the Absence of the Chief Justice, Mr. Justice Sherwood and myself alone presided. I have already stated, in another Document, that we differed in Opinion in almost every Case in which, on the last Day of Easter Term (May the 3d, I think), we delivered our Opinions. Although in my Charge to the Jury in that unfortunate Business, in which the Trial for Murder originated, I had distinctly stated that I was "a Stranger in the Province, and uninfluenced, as I hoped I always should be, by any personal, party, or political Feeling;" yet (as will appear by the Observer Newspaper of the 5th of May, which is annexed,) the Montreal Gazette had stated, "that political Differences were the Cause of the Proceedings;" and the Montreal Courant, in alluding to what took place at the Assizes, had asserted, "that Judge Willis seemed decidedly on the Side of the Editor of the Freeman." I have appended also the Number of the Freeman, dated the 8th of May, as it contains some Remarks on this Subject. A Petition to displace me from my Office was also, as I was credibly informed, circulated among the Bar at Kingston and in the Neighbourhood, about this Time, by the Friends of the Attorney General. The Barristers, however, as I have also been informed, rejected it with Indignation. Therefore, when in giving Judgment in a Case of as gross an Outrage as ever was committed in a civilized Country, although the Sufferer was the Brother of the Attorney General's great political Rival, I ventured fearlessly to state my Sentiments; and I also took Occasion, at the Conclusion of my Judgment, again publicly to repeat, "That totally devoid of all personal, all party, and all political Feeling, it had been and ever would be my earnest Desire to render to every one impartial Justice." The Editor of the Observer Newspaper applied to me for a Copy of this Judgment, stating that Mr. Justice Sherwood had complied with a similar Application. I therefore, without Hesitation, assented to this Request; and I annex the Number of the Paper (that of 12th May) in which my Judgment, and a subsequent Discussion as to Criminal Prosecutions, and the Suppression of Affidavits by the Solicitor General, is very correctly stated. By this Paper also it is manifest, that previously to this Judgment being delivered I had also been attacked in the Kingston Chronicle for my Conduct at the Assizes, a Paper notoriously in the Interest of the Government of Upper Canada; that is, a Paper which does not scruple to publish, whether true or false, whatever it conceives may be pleasing to Mr. Attorney General Robinson.

When I had delivered my judicial Opinion respecting the necessary Constitution of the Court of King's Bench in Upper Canada, the Editor of the Observer again applied to me for a Copy of my Public Judgment. I therefore sent to him, as I had done formerly, a Copy of my Notes, deeming it most advisable that a Public Judgment, if published at all, should be given to the World as correctly as possible.

I had been, as may have been collected, contemplating a Work on the Laws of the Province. I imagined that I could not be more usefully or properly employed. This Work was advertized as preparing for Publication, and I affixed to the Title my own Motto, "*Meliora sperans*;" a Motto not assumed for the Occasion, as the Bill of Houlditch, the Coach-maker in Long Aere, for painting it on my Carriage, before I left England, sufficiently proves.

Through the Medium of the Post Office I received a Newspaper called the Gore Gazette, dated the 17th of May, which I now transmit, and to which I solicit your particular Attention. The Editor is personally implicated in the Tar and Feather Outrage. This Paper I transmitted to the Lieutenant Governor with the following Letter.

Sir,

York, Upper Canada, 22d May 1828.

I beg most respectfully to call your Excellency's Attention to the inclosed Paper, which appears to have been published by Captain and Adjutant Gurnett, of the Gore Militia.

I have the Honour to remain,
Your very obedient Servant,

Maj. Gen. Sir P. Maitland, K.C.B.
Sc. &c. &c.

JOHN WALPOLE WILLIS.

About

About this Time Mr. and Mrs. Dunn, Major Winnett, the Honourable Mr. Baby, a Legislative and Executive Councillor, Colonel Adamson, Mr. Emsley, Lieutenant Strachan, and Lieutenant Huey, 68th Regiment, dined with us.

On the 30th of May Mr. Galt dined with us ; on the same Day I received the following Letter with reference to the Publication in the Gore Gazette.

Sir,

Fort George, 29th May 1828.

I am commanded by his Excellency the Lieutenant Governor to acknowledge the Receipt of your Letter of the 22d Instant, with a Newspaper inclosed, which I am commanded to return, and to state, that if you regard the Contents of that Paper as libellous, and desire the *Printer* should be prosecuted, it is only necessary you should communicate your Wish, and furnish the necessary Information, to His Majesty's Attorney General, who will adopt whatever Measures his Duty requires. If, in soliciting his Excellency's Attention to this Paper, you had any other Object, I am desired to request it may be stated.

I have the Honour to be,

Your most obedient Servant,

G. HILLIER.

To this Letter I immediately returned the following Answer :—

Sir,

York, Upper Canada, 30th May 1828.

In answer to your Letter of the 29th Ultimo, I can only state, it has been so long established that a Judge cannot deliver an extra-judicial Opinion on a Subject like the present with Propriety, that it is impossible in my Situation to consult the Attorney General on the Affair in question.

My Object was merely to draw the Attention of the Lieutenant Governor to the singular Circumstance of an Officer under the Controul of Government being the Medium of derogatory Comment on one of the King's Judges in the solemn Discharge of his Duty. It is for the Executive Government to determine, whether any and what Proceedings should be instituted in a Case so contrary to Decorum, and so repugnant to the Spirit and Subordination of British Government.

I remain, Sir, your obedient Servant,

Major Hillier, &c. &c.

JOHN WALPOLE WILLIS.

I was a good deal engaged, indeed almost entirely occupied, since the End of Easter Term, in investigating the Powers and Constitution of the Court of King's Bench. My intended Publication, the MS. of which, so far as it goes, I annex, (*begging it may be returned,*) also occupied much of my Time and Attention, and I very rarely went out, unless in Company with one or other of the Members of my Family.

The Correspondence and Proceedings respecting the necessary Constitution of the Court of King's Bench in Upper Canada have been already very fully detailed elsewhere.

On the 2d of June Commodore Barry came to Ycrk in the Bull Frog Schooner ; I immediately called upon him at the Government House, and invited him to dine with us the following Day. He excused himself as being engaged to return to Niagara.

On the 3d of June the Lieutenant Governor came over from Stamford to York, to review the 68th Regiment, I believe. The next Day Colonel Coffin and Commodore Barry called on me.

On the 4th of June, when riding out with my Wife and Sister, we met the Receiver General Mr. Dunn, who said, " Your Court of Chancery now " only waits for you to begin." I said, " If that be all, I will begin directly."

The Day was principally remarkable for the Number of drunken People that were about the Streets. It was a Militia training Day, and I believe a general Holiday. A set of strolling Players had been for some Time performing in York. I own I rejoiced at this Circumstance, as I thought it might tend to keep the People from the Public Houses and political Discussions, to which they seem to resort for Want of all other Amusement. Some young Men, a few Nights before, were suspected of breaking the Windows of a small Public House, kept by a Man named Scanlan, who had several Irish Labourers as

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Lodgers. Mr. Henry Sherwood (the eldest Son of Mr. Justice, and the Attorney General's Pupil), whom I have already mentioned, was, I have been informed, seized by a Man named Knowlan, who lodged with Scanlan. Mr. W. Campbell, a Barrister, the Grandson of the Chief Justice, was *said* to be implicated in breaking the Windows; but I ascertained from a Gentleman who was at the Theatre, that Mr. Campbell was in the Play House at that Time

A few Days afterwards Seanlan came to me to complain of Sherwood, Campbell, and others; and I desired Scanlan to go and make his Complaint to a Magistrate, and I learnt that he afterwards did so. I told Mr. William Campbell, whom I met in the Street, that I had been informed *he* was in the Play House when the Affray took place, and I did *not* believe that he had any thing to do with it; but I urged him to be particularly cautious, especially during his Grandfather's Absence, and to clear himself, even by prosecuting the Parties falsely accusing him, if necessary, from all unjust Imputations.

On the Night of the 4th of June Knowlan was deliberately shot when coming out of the Theatre by a young Man named French. Knowlan expired the following Day; and French, and Two others, a Waiter at a Tavern and a Journeyman Shoemaker, were committed to Gaol on the Coroner's Inquest. I was officially applied to, to know if I would bail them on a *Habeas Corpus*, but I refused.

Seanlan, at whose House Knowlan lodged, after having complained to the Magistrates against those he suspected of breaking his Windows, very suddenly left the Province, and was not heard of when I came away.

I have been informed that Mr. H. Sherwood declared at the Steam Boat Tavern, "If they could not get rid of Judge Willis in one way, they would in another." The Declaration was said to have been made to an American, who mentioned it to a young Man named Oates. I have more than once been cautioned to be on my Guard against Assassination.

On the 5th of June I received and answered a Letter from Major Hillier on the Subject of the Gore Gazette. These Letters, and such others as relate to the Insults I have received, and to the base Assertions which publicly imputed Disloyalty to me, emanating from young Men in the Office of the Attorney General, have been transmitted to you from Upper Canada, not only through the Government Office, but in Duplicate by myself. My Letter of the 25th of June, inclosing these and other Documents of a personal Character, does not appear in the List of those Letters which, with their Inclosures, have been transmitted to the Lords of the Council.

On the 9th of June Mr. Galt came to York, and dined with us on that and the following Day.

On the 13th of June Dr. Baldwin called on me; and Mr. Thompson dined with us.

On the 14th of June there were Races at the Garrison, which we did not attend.

On the 16th of June, the First Day of Trinity Term in Upper Canada, I delivered my judicial Opinion, and left the Court, awaiting his Excellency's Commands. The Circumstances connected with this Business have already been amply detailed elsewhere.

On the 16th of June there was an Amateur Play, which we declined attending. A *Fracas* is said to have occurred among the *Gentlemen* present, who, as Major Winniett informed us, came to *Blows*.

On the 18th of June the Lieutenant Governor came over to York; and on the same Day the Solicitor General, as it is said, returned from the State of New York. On this Day I was publicly insulted in the open Street by Mr. Henry Sherwood, in the Manner described in my Letter of this Date to Major Hillier, a Copy of which must have reached your Department. I must also call your Attention to the Letters of the 21st and 23d of June, on the same Subject.

On the 24th of June, in consequence of Mr. Henry Sherwood's Insult, which took place, in part, in the Presence of my Wife, her Fears urged her to call on the Lieutenant Governor, then in York, to complain of it, and also of an open Insult, in the Public Street, offered to her and my Mother, when in their Carriage, by Mr. Forster, who it seems had previously asserted that he

declined associating with me *on account of my Politics*, a Subject on which he said he had *frequently conversed with Sir Peregrine Maitland*, with whose Family Mr. Forster says he is connected. Sir P. Maitland denies ever having had any such Conversation; but still he refused to see Forster in the Presence of any of my Family on the Matter. Sir P. Maitland fully admitted to Lady Mary Willis that I had never been guilty of the slightest Disrespect towards him. He also admitted that the Gore Gazette was taken in at the Government Office. He further said, he hoped that there was no Danger of Assassination; and that he had given my Letters to the Attorney General, which was all he could do. His Excellency likewise added, "*That except by Letters, and meeting in Parties, he knew but little of Mr. Willis; but he never considered that Mr. Willis had in any Manner failed in Respect.*" I extract these Remarks from Memoranda made by my Wife immediately after the Interview.

Mr. Henry Sherwood's Conduct was, however, not only permitted to remain unnoticed, but he is continued in the Service of Government, and in the Employ of Mr. Attorney General Robinson.

In order to put beyond a Doubt what the Lieutenant Governor had said on the preceding Day, Lady Mary Willis on the 25th of June wrote a Note to his Excellency, "requesting he would do her the Favour to state, if there were any thing in the *public or private* Conduct of her Husband which had given any Cause for the Disapprobation of his Excellency, as she understood from the Conversation of the preceding Day that General Maitland had no Ground whatever for any such Feeling, and she only repeated the Question to prevent the Possibility of Mistake."

In answer to this Note Sir P. Maitland stated, "That he had been much misapprehended, as he had no Intention of entering into Mr. Willis's *Public* Conduct." In reply, Lady Mary Willis wrote to say, "That her Impression was *decidedly different* from that of General Maitland; and as he seemed to insinuate that *there was* Ground of Public Complaint against Mr. Willis, she would feel greatly obliged to him to furnish her with the Substance of those Charges, to enable her to take the necessary Measures in England respecting them." This his Excellency objected to answer, on the Ground that any Request for Information should be made by me, through the official Channel; I therefore immediately wrote the following official Note to Major Hillier.

Sir,

York, 25th June 1828.

I have to solicit, in the most respectful Manner, that I may be immediately informed if his Excellency the Lieutenant Governor has any and what Complaint to make respecting my public or official Conduct.

I have the Honour to be,

Sir,
Your obedient Servant,
JOHN WALPOLE WILLIS.

Major Hillier, Private Secretary, &c. &c.

To this Letter I received an Answer on the same Day, from which I subjoin the following Extract.

Sir,

Government Office, 25th June 1828.

I have submitted your Letter of this Date to the Lieutenant Governor, and am directed to observe to you, that whenever his Excellency may deem it proper to animadvert on the Conduct of any Officer of this Colony, he will choose his own Time and use the *proper Channel* for that Purpose.

G. HILLIER.

On the 26th of June, without my receiving previous Notice of any Accusation that was or could be urged against me, and totally unconscious how I had offended the Provincial Government, except by the honest and fearless Discharge of my bounden Duties, a Commission moving me from Office was dated, signed, sealed, and registered, as it now appears. The Report of the Executive Council, on which this Measure is said to have been founded, bears date the 27th of June, the Day AFTER the Commission is dated, signed, sealed, and registered as aforesaid. The official Notification of this Amotion is also dated the 27th of June.

On the 28th of June both these Documents, namely the Amotion and the official Notification, were delivered to me by Mr. Duncan Cameron, the Acting Secretary of the Province; when I personally, as well as by a Letter of that Date, addressed to the Private Secretary of the Lieutenant Governor, protested against the Legality of this Proceeding. I also requested Leave of Absence to be granted to me by those duly qualified.

To this latter Application, on the 4th of July, I received an official Answer, dated the 2d of July, stating, "that I was at liberty to leave the Province when I pleased, without Permission."

On the same Day I wrote to request "that I might receive the necessary Warrants for my Pay."

About this Time my Amotion became a Topic of general Interest. It was considered a Thing so incredible, that I was asked for a Sight and a Copy of the Instrument; a Request which I had no Reason nor Wish to refuse.

On the 6th of July, a Gentleman of the Bar, then acting as Deputy Clerk of the Crown, called on me to say he was deputed to ask if I would then receive an Address; to which I consented; and a *very numerous* Body of the *most opulent* and respectable Persons in the Town of York and the Neighbourhood, including some in the Employ of Government, and *many Members* of the Provincial Parliament, waited upon me, and presented me with the Address, a Copy of which I transmitted from Liverpool.

I answered it by saying, "Canada, as well as every Man to do his Duty. I had endeavoured to be Sovereign and to His Subjects. I was grateful for the Attention of the King, and I was sure the King would do me Justice. The unquietness and Anxiety expressed for my Family prevented me saying more."

The Assemblage, which was exceedingly numerous, gave Four Cheers for the King, and Three for me, and then dispersed in the most orderly Manner. What is most remarkable, I did not observe one drunken Person that Day about the Streets.

In the Evening, and some Time after the Meeting had dispersed, I received the Warrants for my Pay up to the 26th of June.

I was solicited to represent the County of Lincoln in the Provincial Parliament. It was also intimated to me, that if I would allow myself to be put in Nomination for the Town of York, in opposition to the Attorney General, I should be returned. I declined both Offers, saying, as I had frequently repeated, "That in my Opinion a Judge should never interfere in Politics." I have now found how unwise it was in me to make this Declaration so absolutely. "A Judge, I ought to have said, should never interfere in Politics, *but when it suits the Purposes of the Local Government*; that is, if he consult his own Interest, and not the Public Good."

I have already, in my Memorial to His Majesty in Council, stated the Circumstances which detained me in York from this Time till Thursday the 10th of July.

A large Body of the People wished to accompany me to the Steam Boat, but I particularly requested to be permitted to depart quietly, especially as the Election was then going forward.

On the Morning of the 10th of July I received the following Letter from Mr. J. B. Robinson, although he must have known that it was my Intention to have left York, if possible, the Day before.

Sir,

York, 10th July 1828.

In the Reply given by you to my Letter respecting a Publication in the Gore Gazette, you state it was the Author and not the Printer of the Publication that you desire to prosecute; but you have not informed me who the Author is, or what Evidence can be adduced.

The Hon. J. W. Willis.

Your obedient Servant,

JNO. B. ROBINSON.

To which I returned the following Answer:—

Sir,

York, Upper Canada, 11th July (*Mistake for 10th*) 1828.

With reference to the Publication in the Gore Gazette, I said, "I of course considered my Name as a Judge would be used in any Proceeding the Executive

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"captive Government might determine to institute for the Punishment, not only of the Printer, but more particularly of the Author;"— including both. You, probably, are quite as well acquainted with the Author as I am; I can furnish no Evidence on the Subject. I must own I am very much astonished at a Doubt ever occurring where the Language is so obvious.

I remain, Sir,

Your obedient Servant,

JOHN WALPOLE WILLIS.

J. B. Robinson, Esq., &c.

To which I received the following Reply:—

Sir,

York, Upper Canada, 10th July 1828.

I have this Moment received your Answer to my Note of this Morning, to which I need only reply, that it is quite consistent with your other Communications.

I am, Sir,

Your obedient Servant,

JNO. B. ROBINSON.

The Hon. J. W. Willis.

I also append hereto a Placard circulated a few Days before I left York, by a Man, as I am credibly informed, named Ninderhill, the Bailiff of John Hollister, the Under Sheriff, who said he found them in the Court House.

I also append a Number of the Kingston Chronicle, dated the 28th of June, another Number of the Gore Gazette, dated the 5th of July, and a Number of the Bathurst Independent Examiner, dated the 20th of August, and a Number of the Loyalist, edited by the King's Printer, and the Organ of the Provincial Government, of the 2d of August. I have received these Two last Papers since I left the Province.

I have omitted to state that Mr. Walpole, Mr. Rt. Buchanan, Son of the British Consul at New York, Mr. Carr, Mr. Brandt, Mr. Jones, the Rev. Mr. McGrath and his Children, have also dined with me; and Mr. and Mrs. Robt. Baldwin, and Mr. Rolph, Mr. and Mrs. Washburn, and Mr. and Mrs. Clark, have once, or twice at the most, drank Tea with us, during my Residence in the Province; and that I also dined once, and drank Tea once or twice, with Mr. and Mrs. Washburn.

The Evening after the Address was presented to me, I was informed that a Petition had been agreed upon; an official Copy of one of which, transmitted for Presentation to His Majesty, signed by 1,756 Persons, has lately been forwarded to me from the Colonial Department.

In that Spirit of Candour which I hope ever has and ever will characterize all my Proceedings, I append a Number of the Freeman of the 10th of July, and another of the 21st of August last, with reference to this Petition.

I do not think, except in Court, that I ever conversed with Dr. Baldwin or Mr. Rolph a Dozen Times in my Life; or with Mr. Bidwell, or any other Person politically opposed to Mr. Robinson, (for I never heard of any Opposition to the Government,) Half as often.

I had almost forgotten to mention, that on all ordinary Occasions I usually wore a Black Velvet Coat and Waistcoat. The first Time I saw the Chief Justice he had on a Black Kalimanco or Camlet Jacket, which I have seen him wear even on the Bench. I have met the Lieutenant Governor frequently walking through the Streets with an Olive-coloured square-cut Velveten Jacket and Waistcoat; and a few Days before I left York I beheld Mr. Justice Sherwood in a Grass-green Cloth Jacket with White Metal Buttons. I merely mention these "Extravagancies" to shew that my Dress was neither improper or extraordinary.

With the Exceptions noticed in this plain Journal of Events, my Time was spent in the Bosom of my Family. I have to apologise for the Prolixity of this Detail, and indeed for even submitting it to you; but the Charges against me are of such a Nature as to make Circumstances otherwise trifling in themselves apparently of Importance.

I have the Honour to be, Sir,

Your most obedient Servant,

JOHN WALPOLE WILLIS.

The Right Hon, the Secretary of State,
Colonial Department.

Inclosure, No. 5.

Resolution of the House of Assembly respecting Rent for the Hospital.

RESOLVED, That it is necessary, in order that the Occupation of the Building may not occasion Inconvenience to the Charitable Institution for whose Use it was intended, that the Sum of £100 annually be granted to the Trustees of the Hospital, for the Use thereof; the Payment to commence from the Date of its Possession by the Legislature.

Inclosure, No. 6.

Extract from the Observer Newspaper, (U. C.) 5th May 1809

SOME of the Lower Canada Editors fancy, from the Bills of Indulgent that were found during the late Assizes, and the Altercation that occurred between Judge Willis and the Attorney General upon a Point of Practice, that we are on the Verge of Rebellion! But their Apprehension is rank Nonsense; there is no Danger of Commotion in this Province. Indeed the Majority of the Inhabitants are so wedded to British Principles, that all the Wealth of Rothschild could not sever them from happy England.

We, as Spectators, were highly delighted at the Altercation in Court, because the Purity of the Bench and the Independence of the Bar were arrayed one against the other; and we cannot but applaud the Judge and the Attorney General for their dignified Language. There was nothing of the Village Lawyer in the Proceeding—nothing of the coarse, disgusting, Billingsgate, parliamentary Bully—nothing of that base Hypocrisy that we see exhibited in the Tragedy of the Forty Thieves every Winter in this Capital! No; the Scene was grand as well as novel in this Part of the World, and we were edified.

The Montreal Gazette mentions political Differences as the probable Cause of the late Proceedings; and the Courant states that Judge Willis seemed decidedly on the Side of the Editor of the Freeman; but their Statements are false. Vile Incendiaries, and not political Differences, were the Cause of the Proceedings; and instead of the Judge having been decidedly on the Side of the Editor, the Result shows that he has done more, by pursuing a proper Course, to expose the Duplicity of the Advocate, and wipe away that Odium which he had fastened upon the Government and the goose-brained Party that enriched him, than could be effected by all those connected with the Government during their Lives.

Since the upsetting of the Advocate Press, or rather since the enriching of the Editor, but few Weeks have passed by without an infamous Tirade appearing in the Columns of his Paper upon this Subject against the Government and those concerned in the Outrage, and Persons who knew nothing whatever of the Transaction. The Editor, in order to gull the Electors, flooded this District with Plans, Bulletins, and Pamphlets, all relating to the Outrage. He announced that he was a Martyr to the Cause of the People; that a lawless Banditti, sanctioned by the Government and the Attorney General, had destroyed his Property; that the Persons concerned were by the Influence of the Government screened from Punishment, and that his Loss was irreparable! Well, an Appeal was made to Judge Willis; the Party was arraigned; and to our Astonishment the Martyr was compelled to acknowledge, when sworn, that the Property destroyed, and for which he had received \$2,500, was not worth 50!!!

It also appeared, that neither the Attorney General nor any Member of the Government knew any thing of the Matter until the Deed was done; and for this necessary Exposure the Party prosecuted, the Government, and even the Country, ought to thank the Judge.

The Trial has closed the Mouth of Mr. McKenzie on this Subject; his Designs, his Hypocrisy, his Defamation of Character, and his Losses, are now laid before the Public; and they, no doubt, will decide upon them.

The Object of Law is not Punishment, but Harmony and Peace; the Perfection of it is the same; and from what took place in our Presence we are satisfied that the Judge and the Attorney have that sacred Object in View.

As the Courant's Remarks may induce Strangers to believe that the Judge has a political Bias, we give the following, being Part of his Address to the Jury:—

“ A Stranger in your Province, and uninfluenced (as I hope I always shall be) by any personal, party, or political Feeling, I can have no other Desire than that the Ends of Justice should be completely answered.”

Inclosure, No. 7.

Extracts from the Canadian Freeman, 8th May 1828.

Tar and Feather Outrage.

LAST Week, on Motion for a New Trial, this Case was argued before Judges Willis and Sherwood, in the Court of King's Bench. We have taken down the Proceedings, and will lay them before the Public as soon as possible. The Solicitor General, Advocate for the Rioters, argued against the granting of a New Trial, on Tuesday, for several Hours, and threw out more Plummery than we ever heard in a Court of Justice in the Course of our Lives—such Stuff, we think, as would not be listened to in England. After leading the Judge of Nisi Prius (Macaulay) into Error at Hamilton, he contended before the Court of King's Bench at York, that his Clients ought not to suffer a Second Trial from any Error on the Part of the Judge! He argued that a Man not regularly subpoenaed might be in Court, under the Eye of the Judge, and refuse to give Evidence, yet the Court had not the Power to commit him!!! We suppose such Doctrine was never heard in a Court of Justice before; yet Mr. Boulton pledged his Honour and his Professional Character upon it; and to his Professional Knowledge Judge Macaulay said, in open Court, he then bowed with Respect, as being superior to his own, and was still of the same Opinion! How well qualified for a Seat on the Bench Mr. Macaulay must be, according to his own Confession! Dr. Baldwin followed the Solicitor in favour of the Motion for a New Trial. He stigmatized the *Tar and Feather* Rioters as a “ chosen Band of Ruffians;” and said, the “ Impudence” of little Adjutant Gurnett, in the Court House, at the Trial, was most intolerable. He regretted that Messrs. McNabb and Chewitt, who stood accused, belonged to his Profession, as he viewed this to be one of the grossest Outrages that ever stained the Annals of any Country. The Doctor spoke with Energy and Boldness, and was followed on the same Side by his Son, Robert Baldwin, Esq. The Judges did not give their Decisions till Saturday last, when Judge Willis decided in favour of a New Trial, and Judge Sherwood against it. It will be recollected that we expressed a favourable Opinion of Judge Sherwood on his being called to the King's Bench. We then thought he possessed Coolness and Impartiality; hut from his Decision in this Case, and from the many other Decisions in which, in the Course of a few Terms, we believe he has differed oftener from his Brother Judges than did Lord Mansfield in the whole Course of his Life, we must confess that our Opinion of him has undergone a very material Change. We really cannot see upon what Grounds Judge Sherwood could refuse a New Trial in this Case. As the Light begins to break in upon this Outrage, its Features become daily more hideous, and we think it is the Duty, not only of Judges, but of every Man in Society, to be aiding and abetting Mr. Rolph in bringing to condign and suitable Punishment the Monsters, whoever they may be, that could be guilty of such cold-blooded and audacious Villainy. It seems by the Judge's Notes, that, together with the Outrage against his Person, a Robbery of Feathers was committed on Mr. G. Rolph. What would be the Consequence of such a Crime in Ireland before Lord Norbury? We hesitate not to say, that it would be punished by Death or Transportation. An Appeal, we understand, is to be made to his Excellency in

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Council, and we will then have an Opportunity of seeing whether Sir Peregrine Maitland, who has promoted many of the Rioters, is, as Chief Magistrate in this Colony, disposed to check or encourage Vice and Immorality of the grossest Description.

Judge Willis.

A Man warned is half armed. This is an old Adage which struck us forcibly when Judge Willis was coming to this Colony; and as he bore a high Character at Home, and that we expected this Colony to reap great Advantage from his Appointment, we felt it a Duty we owed to the Learned Judge himself, and to the People who were to have the Benefit of his Services, to caution him against an official Faetion, who have long lorded over the People of this Country, and persecuted their best Friends. We cited the Case of Judge Thorpe, and other eminent Men, who have fallen Victims to their Malice; and if we are not mistaken, Judge Willis has already had ample Proofs of the Justice and Propriety of the Remarks we then made. If we are not mistaken and misinformed too, as vile a Conspiracy is now at work to ruin him as ever was afloat in the Colony. Judge Willis, by strict Justice and Impartiality, has endeared himself to the People; and that is sufficient Cause for the Enemies of the People to destroy him, if they can. But Judge Willis has nothing to fear; he has arrived in Upper Canada at a Time when the People and their Press have gained signal Advantages over the Power of Corruption; and should the Attempt be made against him, both the People and their Press will do him Justice. The Editor of the Montreal Courant, in alluding to what occurred in our Court at the last Assizes, says, "Judge Willis seems decidedly on the Side of Mr. Collins." Judge Willis never spoke to Mr. Collins in his Life, except in the open Court, and could have no Bias in his Favour. But Judge Willis, being on the Side of Justice, was led, from the honest Conviction of his Mind, to do what he did; and in his Address to the Jury, he explains himself in these Words: "A Stranger in your Province, and uninfluenced (as I hope I shall always be) by any personal, party, or political Feeling, I can have no other Desire than that the Ends of Justice should be completely answered." Accordingly, in the Outrage for the Destruction of the *Advocate* Press, in which Mr. Collins was the Prosecutor, Judge Willis, after the Parties were convicted, fined them only *One Dollar* each. Some People were displeased with this also, and thought that the Rioters ought to have been more severely punished. But Judge Willis, finding that Mr. W. Lyon McKenzie, who had received \$2,500 Damages in a Civil Action against the Parties, swore on this Trial that he did not lose more than \$50 worth of his Materials, said to the Rioters, that, as he considered the Ends of Justice had already been amply satisfied, he would only fine them in *One Dollar* each. This was all very proper, and the Prosecutor was perfectly satisfied with it.

Mr. Carey, of the York Observer, in allusion to the Altercation which took place between the Attorney General and Judge Willis in Court, says, "that he viewed it as a Struggle between the Purity of the Bench and the Independence of the Bar," and "applauds the Judge and the Attorney General for their dignified Language." Now we applaud the Judge because his Language and Conduct was dignified; but is the *Freeman* going to applaud the Attorney General for having the Insolence to tell the Judge that he knew his Duty as well as any Judge on the Bench? Is this what Mr. Carey calls "dignified Language?" Was there ever such vulgar Insolence before offered by a start-up Pettifogger to a Judge on the King's Bench? What would become of this *little* York Attorney if he dared to use such Insolence to a Judge in England? Would he not be immediately stript of his Gown and committed? No wonder that our *little* Attorney General so often threw out his Insolence to the popular Members of our Assembly, when he dared to reply in such a Way to a Judge on the King's Bench of the high Standing of Judge Willis. If he did not well know the Temper and Disposition of Sir Peregrine, he would never presume so far. But we hope Sir Peregrine will see that he has got enough of the Attorney and his Preceptor the venerable Archdeacon, and that he will dismiss them both, in toto, from his Councils. If not, we think the People of Upper Canada ought to take a broad constitutional Stand against the Administration of Sir Peregrine,

Peregrine, and petition the Home Government for his immediate Recall; for so long as he retains such Advisers, we consider it wholly impossible that the Colony can prosper as it would do under a wise and liberal Administration. The People of Lower Canada have long suffered in this Way; but they at least took a firm Stand, and have succeeded in removing an Administration that was odious in their Sight. Let the People of Upper Canada follow their Example; let Sir Peregrine go to the East with his Friend Dalhousie, and bring the Rev. Doctor Strachan and John B. Robinson with him if he please. There will be many a dry Cheek in Upper Canada after them when they take their Departure.

We publish in this Number Two important Transactions which have occurred in Upper Canada. 1st. The Proceedings of the House of Assembly, by which they established, that its Power to make effectual Enquiries into Subjects affecting the Public Interests shall not depend on the Will of any other Authority, and therefore, that they will enforce Attendance before their Committees of any and every Person holding any Public Offices or Stations, without applying to the Executive for Permission. The Officers to whom this Rule has been applied, and who were imprisoned for Non-compliance, threaten an Action; but the Country must feel, that if this Power is not supported, their Representatives would be unable to make any Investigations which the Executive might be disposed to render abortive. 2d. The Instance which Judge Willis has exhibited of a noble Independence and Firmness of the Bench. The Attorney General, little accustomed to such Controul, lost himself in some Degree, and proved by his very Temper and Impatience the Necessity which long Indulgence had created for the Controul which he will be taught to feel. Such Conduct on the Bench will do more Service to the State than a Hundred Indictments. Judge Willis, we doubt not, already understands how much the Happiness and Peace of the Province depends on having Public Officers unswayed by any Party Feelings or Provincial Antipathies and Rancours. He is a Gentleman well connected in England, and we trust will turn the Experience he has already received to the Advantage of the Provinces. *Can. Spectator.*

Inclosure, No. 8.

Extract from the Observer (U. C.), 12th May 1828.

King's Bench, Upper Canada.—Final Judgment of the Court in the Tar and Feather Outrage.

George Rolph, Esq., Plaintiff; T. G. Simons, ——— Hamilton, and ——— Robertson, Esqrs., Defendants.

Mr. Robert Baldwin, in reply to the Solicitor General, said the Plaintiff was entitled to a Reply. It is admitted that the Solicitor General urged to the Jury *alleged Facts* in his Defence, and called no Witnesses to prove those Facts; in the last Edition of Archbold's Practice it is said, that in such a Case there is the Right of Reply; which was refused the Plaintiff at this Trial. It is reasonable, if the Defendant calls *Witnesses* to prove alleged Facts, the Plaintiff may call *Witnesses* to disprove them; and if the Defendant only possess those alleged Facts *in a Speech*, the Plaintiff should be allowed to repel those Facts in the same Way, viz., by a Speech. Regularly the Defendant should not by his Counsel declaim upon alleged Facts in his Defence, which Facts he knows he cannot prove; and if he will take that Course, the only Check upon it is the Right of Reply.

The next Ground is the Loss of Testimony. Andrew Stevens was subpoenaed, but he refused even to be sworn. He refused on the Ground that he could not give any Evidence but what would criminate himself. But how do we know it to be true? Every Witness should be sworn; and when the Question is put, the Judge will decide whether the Question ought to be answered. A Witness often states on Oath, from misunderstanding the Matter, that he is interested, and on that Ground claims Exemption from giving Evidence; but the Interest so averred, even under Oath, is not taken for granted; the particular

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ular Facts are sworn to, and the Court decides whether in Law it is an Interest which exempts. 9 East, 484. So in the present Case Stevens should have been sworn; and the Court, who is supposed to be more disinterested, decides whether the Question shall be answered or not. Were it otherwise, mere Falsehood would enable any Man to withhold from another that to which every one is entitled by all Law, both human and divine, in the Testimony of his Neighbour. But when the same Witness is sworn, his Oath, by imposing a greater Sense of Duty and Fear of Punishment, compels him to disclose all that he is not, under the Protection of the Court, privileged to conceal. Under a different Rule, a Witness, not over scrupulous, might defeat an Action of Contract by refusing to be sworn, upon hinting the Existence of Fraud, and that he might criminate himself. It is a Rule, bad upon the Face of it, that every Man, good or bad, shall himself decide whether he will or will not be a Witness.

In this Case the Witness put forward a base Excuse for a base Purpose. He did not avail himself of the Protection of the Law or of the Court, to avoid the Disclosure of his Guilt; but he openly confessed his Guilt, in order to shelter from his Evidence his Accomplices in the desperate Outrage. In the Case mentioned by the Sol. General in Corrington's N. P. C., Chief Justice Best ruled, "That as the Witness, after a Caution, had voluntarily answered a Question criminating himself, he had forfeited the Protection of the Court, and must disclose all he knew, however much against himself." So, in this Case, the Mischief was done by the voluntary Admission; and he cannot lawfully prostitute such an Admission to the wicked Object of suppressing the Truth, covering the Villainy of others, or prejudicing a judicial Inquiry. To think so, a Man must be destitute of the moral Sense.

He might have identified the Handkerchief, or the Piece of a Blauket, or the Tar Brush and Tub, left on the Premises, or he may have heard in confidential Conversations the Admissions of the Defendant Robertson, as well as of the others; but, as a Confident of the Trespassers, he might assume Exemption, in the Language so impudently addressed by one of the Witnesses, George Gurnett, to the Judge. [I cannot easily forget it.] "My Lord, I have a Duty to perform superior to and independent of all personal Considerations, which makes it impossible for me to give Evidence upon this Trial." In 3 T. R. 27, 37. Lord Kenyon observes, "that a Witness who is competent to answer any Question ought not to be rejected generally." We must, therefore, see whether he might not in this Trial be examined to some Points important to the Case.

To give Testimony is a Public Duty, alike in civilized and uncivilized Life. The Law abhors Concealment. A Father *must* give Evidence against the *Son*, the Physician against his Patient; and the Court will aid the Restoration of Competency to a Witness. 3 T. R. 27. Dougl. 134. 2 T. R. Walton v. Shelly. And it is palpably against Common Law, Reason, and Justice, that a Witness should not be sworn to tell all that he ought to reveal. His Oath is the highest Pledge that he will do so; and the Plaintiff had a Right to it, as in the Case, 8 East, 77, where the Party interested in the Evidence of a Witness was allowed to insist upon the Production of the Record, though he admitted himself convicted of Felony.

The next Question is, Had the Judge the Power to commit? It would be idle to say that the Court, which had the Power to inquire into Truth by Witnesses duly sworn, had not the Power to compel the Witnesses to be sworn. The Court would be subjected to the Witnesses, and not the Witnesses to the Court. There cannot be a legal Duty from the Witnesses to the Court, without the Means of enforcing it. The Necessity of the Case requires a summary Proceeding; and that Necessity makes it Law: Justice could not be administered without it. The Solicitor General says, "bring your Action against the Witness. Here is a Form in 9 East." But I answer, in that Case I must call a Witness, who may also refuse to be sworn; and if I sue him, the Witness in that Suit might also require to be sued, and so on without End. The Punishment must be summary; for the Delay and Expence of leaving it for a Motion of Attachment in the King's Bench would defeat the Ends of Justice, which,

by Magna Charta, " shall not be sold too dear nor delayed too long." In 1 T. R. 653. a Magistrate committed a Pauper, for refusing to be examined as to his Settlement, for 13 Days. Upon Motion for an Attachment, all the Judges said, " that the Right to take the Examination of the Pauper implied the Right to commit for his Refusal. It would otherwise be a Shadow of Power." The Judge at Nisi Prius must have the same Right for the same Reason.

As the Judge had the Right, it was his Duty to exercise it. The Power would be useless if not exercised when required for the Ends of Public Justice. It is not to be denied, or applied either arbitrarily or partially. The Plaintiff has the same Right to call upon the Judge to commit such a Witness, as the Judge has to call upon the Witness to be sworn; for both are necessary to do Justice. The Case in Cowper, 846, is in point, to shew both the Power and the Duty. Lord Mansfield says, " Here the Attorney was present in Court, and refuses to be sworn, from corrupt Motives avowed by himself. An Attorney has no Privilege to refuse to give Evidence of collateral Facts. I think Mr. Serjeant Sayer, who tried the Cause, would have been warranted in committing this Man; but he has taken the more prudent Method of leaving the Matter to this Court." But it would be a strange Sort of Prudence never to exercise such a Power; and the Prudence of the Judge ought not to sacrifice the Interests of the Suitor. Had the Judge exercised his Power, the Plaintiff would have had ample Testimony and a fuller Scope of Justice; Robertson might have been convicted; the Damages would have been larger. But as the Judge forbore in his Court to compel the Witness, and as the Judge in so doing assured both the Parties and the Jury that the Plaintiff would find a Remedy in this Court, he may justly expect to receive it. The Solicitor General says, " the Plaintiff should have elected to be nonsuited." This can scarcely apply, when by common Consent a Verdict is taken, with such a Public Pledge from a Judge. The Dilemma of the Plaintiff was not from his own Fault. The Solicitor General at the Trial interfered with the Witness, and counselled him not to be sworn, and with Tears assured the Judge on his Honour that he had not the Power to commit him for Refusal. The Learned Judge was overpowered, and out of Respect to the great Learning of the Solicitor General refused by Commitment to oblige the Witness to give his Evidence. There are Cases in the Books where the adverse Attorney, having tampered with the Plaintiff's Witnesses, has not been allowed to avail himself of his own Wrong in opposing a new Trial. The Case in 3 Salk. was a Motion by one of Three Defendants, and not by a Plaintiff; and so are all the other Cases mentioned.

The Plaintiff has not proceeded against the Witnesses for Contempt, because the necessary Affidavits are in the Hands of the Solicitor General, the Public Prosecutor. The Question is rather, Why he has not proceeded against the Offenders for seducing the subpoenaed Witnesses to leave the Court? Such a Challenge from him, when the Prosecution and the Means are in his own Hands, is as extraordinary as his Delay in prosecuting and bringing the Matter before the Court.

Deprived of such Witnesses, the Plaintiff had recourse to others in the Court, who refused to be sworn for the same Reason that Mr. Stevens did; and this first discloses the *participes criminis*. But it is now argued that they were not subpoenaed, and therefore not bound to give Evidence. The Use of a Subpœna is to bring them to Court, and if in Court to prevent their going away. When placed in the Witnesses' Box, as in the present Case, of what Use would be a Subpœna? Why should the Plaintiff be put to the Expence? A Person without suing out a Writ may declare against a Defendant already in Court, under a Capias ad respondendum, at the Suit of another. So, as the Witnesses when called voluntarily came in to the very Situation in which a Subpœna would have placed them, they ought to have obeyed the Order of the Court to contribute what they could by their Evidence to the Justice of the Case. It is so laid down in strong Language by Lord Kenyon, in 4 T. R. 340.

The Plaintiff ought not to be reproached with the Difficulties of finding Witnesses to prove his Injury. It appears he was taken out of his Bed at Night; gagged, blinded, beat, tarred, feathered, and left senseless on the Ground!!!

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Some Witnesses were seduced away, others refused to be sworn, and were not compelled, from the Prudence of the Judge, worked upon by the undue Importunity of the Solicitor General, the adverse Counsel. He ought to oppose the New Trial only by a Justification, if possible, of his own Conduct at the Trial, and not evade, as he has done, meeting what at *Nisi Prius* he protested to be Law with such misplaced Solemnity.

Judge Sherwood. — This is an Action of Trespass for an Assault and Battery, brought against the Defendants. They have jointly pleaded the General Issue. At the Trial of the Cause Four of the Witnesses called by the Plaintiff refused to be sworn, alleging for Excuse, that they were Accomplices, and could not give Evidence without criminating themselves. The Plaintiff examined Ten or Twelve other Witnesses, proceeded in the Trial of the Cause, and ultimately obtained a Verdict against Two of the Defendants; and the other Defendant was acquitted by the Jury. No Evidence was offered at the Trial by the Defendants or any of them. The Plaintiff has applied to the Court for a New Trial on the following Grounds :

1st.—The Judge at *Nisi Prius* refused the Plaintiff the Reply to the Jury.

2d.—The Plaintiff lost important Testimony from the Contumacy of Witnesses, in refusing to be sworn when required by the Judge.

The general Practise at *Nisi Prius*, adopted in this Province, has long been established in England, in the following Manner:— The Plaintiff's Counsel opens his Case and calls his Witnesses; and the Defendant's Counsel having done the like for his Client, the Plaintiff's Counsel replies and makes his Observations on the whole Case. When the Defendant's Counsel calls no Witnesses and produces no Documentary Testimony, the Plaintiff has no Reply. This is the general Course where the Pleadings are not special; and I see nothing in the present Case to take it out of these Limits, as the Defendants produced no kind of Testimony at the Trial. It was stated in the Course of the Argument at Bar by the Counsel for the Plaintiff, that a Case reported by Dowling and Ryland, and determined in the Court of King's Bench in England, makes some Alteration in the Practise at *Nisi Prius* in this Respect; but as these Reports are not yet in the Possession of either the Bench or the Bar in this Province, I am not aware whether the Decision alluded to has any Bearing on the Case now before the Court or not. Forming my Opinion, therefore, on the Information within my Reach, I think the First Ground which I have mentioned, as relied on by the Plaintiff for a New Trial, is not sustainable, and that the Plaintiff's Counsel, at the Trial, had no Right to the Reply. Peck's Evidence, 5. Notes. The other Ground in the Motion for a New Trial, on which the Plaintiff relies, is, "that the Plaintiff lost important Testimony from the Contumacy of Witnesses, in refusing to be sworn when required by the Judge."

In the Report of the Evidence by the Learned Judge before whom the Cause was tried appears the following Remark made by himself on the Refusal of Andrew Stevens to be sworn:—"I will not commit him, the Party having a Remedy in case I should be wrong; but if I ought to commit him 'till he is sworn, the Verdict may be set aside for Breach of Duty in the Judge."

Andrew Stevens was subpoenaed to give Evidence on the Part of the Plaintiff at the Trial; and as the Judge, on the Refusal of the Witness to be sworn, declined committing him, giving for Reason, "that if he ought to commit him the Verdict might be set aside," I think a New Trial, on the Second Ground stated in the Plaintiff's Motion, should be granted under these Circumstances, if on Examination it appears there was in truth a Breach of Duty on the Part of the Judge. There was clearly a Sort of Public Pledge given to the Plaintiff, that if the Judge were wrong in his Conduct a New Trial would necessarily follow; and although I have Reason to think that such a Proceeding would form a perfect Anomaly in the History of New Trials, still it appears to me it would be right, considering the unusual Encouragement held out at the Time. Another Question then is, Was the Conduct of the Learned Judge correct?

I feel myself very much relieved on this Occasion, in finding that I shall not be under the Necessity of attempting an Argument from first Principles to arrive at a proper Conclusion in this Matter; for it seems to me, that a Case determined in Westminster Hall contains in effect the required Decision on

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this Point. I allude to the Case of *Doe ex Dem. Supp v. Andrews, Cowper, 845*. In that Case, one Johnson, the Attorney for the Defendant, was a subscribing Witness to the Agreement under which the Ejectment was brought, and being present in Court, at the Trial, was duly served with a Subpœna to give Evidence on the Part of the Plaintiff. On being called as a Witness, after the personal Service of the Writ of Subpœna, he refused to give Evidence, alleging that, as the Attorney for the Defendant, he was not compellable to do so; and the Plaintiff did not think it prudent to proceed without his Testimony, and was nonsuited. Afterwards an Attachment against the Witness was moved for in the Court of King's Bench, for a Contempt in refusing to give Evidence, after being served with a Subpœna Ticket at the Trial.

Lord Mansfield, in delivering the Judgment of the Court, among other Observations, made the following Remark:—"I think Mr. Serjeant Sayer, who tried the Cause, would have been warranted in committing this Man; but he has taken the more prudent Method of leaving the Matter to this Court."

Here then is the Opinion of one of the most eminent and learned Judges which any Country ever possessed, on a Question which I consider precisely analogous to the one now under Consideration; and I feel myself bound on this Authority to say, that the Learned Judge who tried this Cause acted prudently and correctly, and that there was no Breach of Duty on his Part in not committing the Witness Andrew Stevens. He left the whole Matter to this Court; and, as Lord Mansfield said, "he took the more prudent Method." If the Witness (Stevens) has been guilty of Misconduct, this Court, out of which the Subpœna issued, has the full and undoubted Power of punishing him, if they think proper, on a due Application for that Purpose; or the Plaintiff may bring an Action against him for refusing to give Evidence, if he has been legally subpœnaed. I think it unnecessary to express an Opinion whether the Judge at Nisi Prius had Authority to commit the Witness or not; but I entertain no doubt that the Course he pursued was the one generally adopted and approved of in England on the Trial of a Civil Action.

With respect to the other Three Witnesses who refused to be sworn, it appears, by the Affidavits filed on the Part of the Defendants, that these Witnesses were not subpœnaed to give Evidence at the Trial of this Cause. The Counsel for the Plaintiff contends, that all Persons who are present in Court are legally compellable to give Evidence in any Cause which may then happen to be in course of Trial; and as these Witnesses were actually present in Court during the Trial, they were necessarily under a legal Obligation to be sworn as Witnesses for either Party, on being called for that Purpose. This is a Doctrine to which I cannot subscribe, because I see no Authority in support of the Position; but it appears to me the Law is expressly the reverse. In 2 Bacon's Abridg., title *Evidence D.*, it is stated, "that if a Man who is not subpœnaed happen to be in Court during Trial, he shall not be bound to be sworn against his Will; and in certain Cases the Court will wait till a Subpœna can be procured."

In the Case of *Bowles v. Johnson*, Black. Reports, 87., in the King's Bench, a similar Question came before that Court, and it was determined "that a Person not subpœnaed was to be looked upon as a Stander-by, and that it is no Contempt of the Court if he refuse to be sworn." I am therefore of the Opinion, that no Person who is not subpœnaed in a Civil Case is bound by Law to give Evidence in such Action against his Will, and that his refusing to do so is no Contempt of this Court, nor of the Court of Nisi Prius, and that no Attachment can lawfully issue against him, and that no Action will lie for the Recovery of Damages on such Refusal. The Laches of the Plaintiff in not procuring his Witnesses should never have the Effect of placing at his Option the Repudiation or Retention of his own Verdict, especially where one of the Defendants has a Verdict of Acquittal.

When the Plaintiff discovers that the Evidence which he has in his Power to give at the Trial is not sufficient to sustain his Action so well as he would wish, I think he should take a Nonsuit, conformably to the Case before cited from Cowper, 845. If he elects to proceed on the Evidence adduced at the Trial in Proof of a joint Trespass, as this is, and one of the Defendants be acquitted,

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acquitted, as in the Case here, he cannot, in my Opinion, obtain a New Trial on the Ground alone of the Refusal of Witnesses to give Evidence; and this Doctrine, I think, is in Principle recognized in the Case of Sir Charles Barington, reported in 34 Salk. 362., Parker et al. v. Godin, 2 Stran. 814., and Norris v. Tyler, Cowper, 37., Markham v. Mid. St. 1259.

These Cases prove, that a Co-defendant against whom a Verdict has been rendered altogether contrary to Evidence cannot have a New Trial when One Defendant is acquitted; and it appears to me, that a Plaintiff who does not pretend the Verdict to be against Evidence has still less Claim to a New Trial.

In the present Case the Plaintiff has filed no Affidavit to shew that he himself believes the Witnesses who refused to be sworn could give any material Testimony in his Favour against the Defendant who was acquitted, or against either of the other Defendants; nor can this Fact, in my Opinion, be inferred by the Court from the Judge's Notes, which merely state the Refusal of the Witnesses to be sworn, and the Opinion of the Judge, that they ought to be sworn, although they alleged themselves Accomplices.

The Plaintiff's Conduct is altogether unaccountable to me, if he really had a serious Intention of applying to this Court for a New Trial at the Time he sought a Verdict from the Jury; and if he had no such Intention, it appears to me he could not have considered the Evidence of the Witnesses who refused to be sworn very material to his Case; at all Events, he must have thought he had sufficient Evidence to obtain such Damages as his Case merited, or he would not have gone on with the Trial.

Upon Consideration, therefore, of the whole Matter, I am of Opinion, that the Plaintiff is not entitled to a New Trial on the Second Ground. This is my View of the present Case; and I have no Hesitation in saying, that, if the Law of the Country would allow of the granting of a New Trial consistently with adjudged Cases and the Rules established by the Superior Courts in the Mother Country, I should feel a Satisfaction in finding the Measure compatible with what I believe to be my Duty, because I have no doubt that the Trespass committed on the Plaintiff was both gross and flagrant, embracing private Wrong and public Outrage.

It is the Duty of a Judge on the Bench, however, to consider the legal Rights of both Parties; and while he feels an honest Indignation at the Licentiousness of Aggression, he ought not to allow his Feelings to carry him beyond the proper Limits; for he sits to execute, and not to make Laws; and his Mind should be uninfluenced by any other Motive than that of Justice, sanctioned by Law.

Judge Willis.—The Facts of this Case are simply these. A gross Outrage was committed on the Person of the Plaintiff, for which he brought this Action against the Defendants. In order to support the Plaintiff's Case, Mr. Alexander Stevens, Mr. Allan M'Nab, an Attorney of this Court and one of the Counsel employed for the Defendants, Mr. Chewett, also an Attorney of this Court, and a Mr. Gurnett, were called upon to give Testimony; but they refused even to be sworn in the usual Manner, stating as a Reason, that they could give no Evidence in the Matter but what might tend to criminate themselves; and Mr. M'Nab and Mr. Chewett further endeavoured to shelter themselves from being Witnesses, on the Ground of being professionally concerned for the Parties.

The Learned Gentleman who tried the Cause was about to commit these Gentlemen for their Contumacy in refusing to be sworn; but he did not do so, as the Parties, if guilty of Contempt, might be punished on Application to this Court.

Under these Circumstances, and because the Counsel for the Plaintiff was refused the Reply which he had claimed to be entitled to, the Defendants' Counsel, although he introduced no Evidence, having introduced new Matter, a Rule Nisi for a New Trial has been obtained; and it is now for the Court to say whether that Rule shall or shall not be made absolute.

The Solicitor General, in shewing Cause against the Rule, as I understood him, began by stating that this was an Aggression against the Public Peace, and a fit Subject for a Criminal Prosecution. In this I entirely agree with him; and I only regret that he, as the only Law Officer of the Crown on the Circuit

where the Offence was committed, and who therefore, as I am informed, according to the present Practice, was entitled to the exclusive Privilege of being employed in all Criminal Prosecutions, should, by defending those who were charged with the Ontrage, have possibly prevented an earlier Appeal to those Laws which have been made for the Protection and Peace not only of Individuals but of the Community. It is a favourite Maxim in the Mother Country that an Englishman's House is his Castle; and I trust that truly English Feeling will never be lost sight of in a British Colony. But when the Officer whose Duty it is to enforce Obedience to the Law appears in a Civil Action to defend those who have transgressed it, Lord Coke's Axiom, "Oderunt pec- care formidine poenæ," holds good no longer. For how, I would ask, can those whose Conduct is defended by the Public Prosecutor, although merely in a Civil Action, stand in awe of Public Punishment for that very Conduct?

It was objected, in the first place, against this Rule for a New Trial being made absolute, that what it is supposed the Witnesses who refused to be sworn and examined could have proved, and its Materiality to the Issue, should have been shewn to the Court by Affidavit. Now as to this the Law stands thus: "If the Matter be such as did not or could not appear to the Judge at Nisi Parus, it is declared to the Court by Affidavit; but if it arise at the Trial, it is taken from the Judge's Notes, who usually makes a special and minute Report of what occurred." (3 B. C. Com. 91.)

From the Notes in this Case it clearly appears that the Persons refusing to be examined had some Knowledge of the Transaction, as they only excuse themselves from giving Testimony from the Fear of implicating themselves. Two of the Witnesses indeed also superadd the Exercise of professional Confidence. But it is evident there might have been many material Questions asked which would not have criminated the Witnesses, and in respect to Facts unconnected with and before the professional Relation subsisted. No Affidavit in this Case is, in my Opinion, necessary. It was then objected, that the Plaintiff, to qualify himself to move for a New Trial, should have elected to be nonsuited. Without adverting to the Consequences of a Nonsuit, which in a Case like this would only have afforded the Witnesses another Opportunity of refusing to be sworn at a future Trial, I shall only say, the Refusal on the Part of the Plaintiff to be nonsuited has been determined to be no Bar to a New Trial. But where a Plaintiff refuses to be nonsuited, contrary to the Opinion of the Judge, (which was not the Case here, for there does not appear the slightest Intimation to the Plaintiff at the Trial of the Propriety of such a Course being adopted by him,) the New Trial shall be without Costs.

It was then urged that this was a Motion for a New Trial, on account of the small Damages given by the Jury, and that the Court would not in general entertain such an Application. I consider it as made on an entirely different Ground—a Ground which may indeed affect the Damages, but which is totally distinct from an Application solely because the Damages were small. I consider this an Application founded on the Fact, that Evidence sought to be adduced on the Behalf of the Plaintiff was improperly suppressed. It was then said, as one of the Defendants was acquitted, and the Verdict only against the other Two, no New Trial could be granted.

To obtain a Rule for a New Trial in Civil Actions, at the Instance of the Defendants, it is in general required that all must join in the Motion, though there has been a Verdict only against some of them; and if all must join when the Solicitation is on the Part of the Defendants, what Reason is there, in a Civil Action, why all should not be joined when the Plaintiff makes the Application? In regard to a New Trial it has been determined, that notwithstanding Evidence has been given on the Part of the Defendant, and he has obtained a Verdict, the Plaintiff may still on reasonable Ground have a New Trial.

If then a Plaintiff may have this Remedy even against a Verdict for the Defendant, it seems to follow, that where the Plaintiff himself is in Possession of the Verdict, which he waives for the Purpose of a New Trial, there can be no Reason why it should not be granted as to all those who were Parties to a Civil Action, whether found guilty or acquitted, for the Waiver of the Verdict puts them all on the same Footing. I have been speaking hitherto of Civil Cases.

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In Penal Actions and in Criminal Prosecutions for Misdemeanors, the Law, anxiously distinguishing them from purely Civil Suits, on account of the great Favour which it shews to the Liberty of the Subject, has provided that there shall not be a New Trial where there has been a Verdict for the Defendant. And in Misdemeanors, where the Indictment is against several Defendants, and some are acquitted and others convicted, the Court, contrary to the Rule in Civil Actions, may grant a New Trial as to those Defendants only who are convicted, if the Conviction appear improper. (*Rex v. Mawley*, 6 T. R. 619.) And in such Case it has been holden, that the Court is not fettered with any Rules in granting a New Trial, but will either grant or refuse it as may best tend to the Advancement of Justice. (H. 638.) Such then appears to me to be the true Doctrine in regard to granting New Trials, even after the Evidence has been fully gone into, if it appear that it should have been a different Conclusion. In this Case, however, I am satisfied that there are strong probable Grounds to suppose that the Merits have not been fully and fairly discussed, and that the Decision cannot therefore be conclusive as to the Justice and Truth of the Case.

The Evidence hitherto suppressed may establish a Case against the Defendant Robertson; it may give the Jury Reason to award the Plaintiff greater Satisfaction for his Wrongs. Should it not do so, the Plaintiff, who takes the New Trial at his own Hazard, must pay the Penalty of his Rashness.

But it was said the Plaintiff ought to have come prepared with his Testimony; and I admit that a Party will not be relieved on account of the Want of that Evidence, which, with proper Diligence, he might have procured at the Trial. And this brings me to that Part of the Case which seems to have been considered in the Argument as the most important. Of those called upon to give Testimony, Two (Mr. Chewett and Mr. M'Nab) were Attorneys of the Court; the former employed as an Attorney, the latter as a Barrister, for the Defendants in this Cause. They were called upon by the Court to be sworn to give such Evidence as they were able, without criminating themselves, or betraying professional Confidence. How far any Questions they might be asked would have such a Tendency, it was for the Court and not for them to determine. They did not object to give Evidence because they had not been served with Process for that Purpose; nor did Mr. Stevens then object, as he now does, to the Irregularity of the Subpœna; so far from it, indeed, he wished to be sworn, but in a qualified Manner. Neither did Mr. Gurnett object to give his Testimony, because he had not been duly summoned. With regard to Mr. Chewett and Mr. M'Nab, I am of Opinion, that as Attorneys of the Court, they were guilty of Contempt in refusing to obey its Injunctions; and I think Mr. Stevens was also contumacious, even supposing the Service of the Subpœna to have been irregular. Appearing, and not objecting to the Want or alleged Irregularity of the Process, in my Opinion, cured the Defect with respect to Chewett, M'Nab, and Stevens, whatever may have been the Case as to Gurnett. Thus, in the Case in Cooper's Reports, cited in the Argument, Lord Mansfield asserted the Authority of the Court in compelling an Attorney to give Evidence, though the Attorney alleged that the Process with which he was served for that Purpose was irregular; and even considering Mr. M'Nab as a Barrister only, and not an Attorney, it seems clear that notwithstanding Barristers, as such, are not Officers of the Court, but merely practise as Counsellors, yet inasmuch as they have a special Privilege to practise the Law, and their Misbehaviour tends to bring Disgrace upon the Law itself, they are amenable to the Court as other Ministers of Justice are. (2 Hawk. 219. and References.) Respecting the Waiver of the Irregularity of the Subpœna by Stevens, if in fact any Irregularity existed, I shall merely refer to the Case of *Harris v. Mullet*, 1 Taunt. 58., in which it was held, that where a Defendant was summoned to appear before the King's Justices at Westminster on the Morrow of Saint — (without naming the Saint), to answer the Plaintiff in a Plea of Trespass, the Defendant not having appeared, Two Writs of *Distringas* successively issued, and Execution was levied. When the Sheriff's Officer called to execute the first Writ, the Defendant informed him he had sent his Wife to Town to settle the Action. Although it was urged that this was not an Irregularity, but a Defect of Process, and therefore could

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not be cured, yet the Court held the Defendant had waived it; and there are numerous other Instances where the Defect or Irregularity of Process has been waived by Appearance.

I am inclined to think that Gurnett also by his Conduct waived the Necessity of the previous Service of a Subpœna; but on this I give no Opinion. Had the Question merely depended on the Power of the Court to enforce those in its Presence (not properly subpœnaed) to give Evidence, I should have considered myself bound by the Authority of *Bowles v. Johnson*, 1 Sir W. Blackstone's Rep. 36., and decided that the Court had no such Power. It is there said, "A Person not properly subpœnaed is to be looked upon as a Stander-by; and it is no Contempt of the Court of *Nisi Prius* for a Stander-by to refuse to be examined, much less of this Court of King's Bench." Of the Power of the Judge of Assize to fine and imprison for Contempts committed in his Presence there, I have no doubt; but, like all other Powers, it is to be exercised with Discretion; and I think it due to the Learned Gentleman who tried the Cause to say, that in my Opinion he exercised a very sound Discretion on the Occasion. The Liberty of the Subject should always, as has been the Case here, be respected, as far as it possibly can be, without obstructing the due Course of Justice. Next to doing right, says Sir W. Blackstone, the great Object in the Administration of Justice should be to give Public Satisfaction. If a Verdict be liable to many Objections and Doubts (and, I may add, if Evidence be withheld which might serve to strengthen the Verdict, and bring the Matter home to all the Parties against whom the Charge is brought,) in the Minds of his Counsel, or even of the By-standers, no Party would go away satisfied, unless he had a Prospect of reviewing it; such Doubts, such Suppression, 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 the Possibility of Redress. Granting a New Trial cures all these Inconveniences; and if ever there were a Case that called for one, I think it is the present. In regard to the Reply, from the Case of the King *v. Biguold*, cited in Archbold, (I have Notes of that Case as it occurred at *Nisi Prius*, and afterwards in the Court above on this Point, although I have not the Case itself,) and also upon Principle, I think the Plaintiff's Counsel was clearly entitled to it; but I will not say that I consider it so important that I would grant a New Trial on that Ground alone.

In forming my Opinion in this Cause, which I have now given at very considerable Length, I have viewed the Case, as I hope I shall do every Case that comes before me, solely with reference to its intrinsic Merits. Totally devoid of all personal, all party, and all political Feeling, it has been, and ever will be, my earnest Desire to render to every one *impartial* Justice.

My Conduct has not, however, been so construed; and of late the Slanderers and the Revilers, like the venomous Reptile of the Country, although fortunately *heedless of their Rattle*, by which they may be traced, have put forth their poisoned Tongues! But,

"Justum et tenacem propositi virum
Non arduo civium prava jumentum,
Non vultus instantis tyranni,
Mente quæ illic solida."

"The man, in conscious bold,
Who dares his heroes hold,
Unshaken hears the cre multuous cries,
And the stern tyrant's l almost rage defies!"

The *Solicitor General* pressed to be heard to explain his Conduct. I was retained in the Civil Action; and a Civil Action does not necessarily involve a Criminal Prosecution. I could not foresee it. I was retained in the Civil Suit before the Assizes; and it was no Part of my Duty to hunt up whether Criminal Proceedings would take place. Such has been my Practice since I held His Majesty's Commission; and such shall always be my Practice while I continue to do so. I have been acting as His Majesty's *Solicitor General* for Ten Years. If I am wrong, I suppose I shall not hold that Situation much longer; and in that Case, perhaps, the shorter the Time the better.

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It is not a Part of my Duty to hunt up Cases. The Public Prosecutor is known in this Province to receive Pay for his Services; and if I were to go about hunting Prosecutions, I should be charged with doing it for the Purposes of filthy Lucre. The Plaintiff made no Attempt to engage me on his Side before the Action was brought, although my Services were equally within the Reach of both Parties; and the Plaintiff must have known the first that he was going to bring his Action. Had I been officious, it might have been said (and there were plenty of Persons who would be ready to put the worst Construction on my Conduct), that I did it to injure the Civil Action which was pending, and to lessen the Damages.

Judge Willis. — When a Public Prosecutor is retained to defend the Civil Injury, it must deter the Person against whom he has acted from applying to him; it is the natural Consequence.

Judge Sherwood. — The Party injured had Redress without the Aid of the Solicitor. He might apply to the Grand Jury, or to the Judge, or to a Magistrate. I should be sorry to have it said that there was no Road to Justice but through the Crown Officers. The Grand Jury, if they had been applied to, would have found a Bill, and the Court would see that it was proceeded in properly; and the Solicitor, I am sure, would have done his Duty. If he did not, the Court would have taken care that the Case did not suffer by the Want of his Exertions.

Mr. Reporter Taylor. — *A. & Amicus Curie*, I was present at the Assizes in Salisbury when a Case of Capital Felony was tried; it was conducted without any Counsel on either Side, and I never saw a Case managed more regularly. The Judge examined the Witnesses and charged the Jury.

The Solicitor General. — To be sure, my Lord. Such Cases are very common, and I think they get on just as well without Counsel as with them.

Judge Willis. — Undoubtedly he may so prefer his Complaint before the Grand Jury or a Magistrate; but who is to conduct the Prosecution for him? Who is to draw the Indictment? Who is to summon the Witnesses and arrange the Evidence? From the Nature of the human Mind it cannot be free from Prejudices. A Man cannot, and ought not, in the Administration of Justice, to be engaged on one Side To-day and on the other Side To-morrow, whether these Services are rendered to a private Individual or to the Public. If a Man, under such Circumstances, does not suspect himself, others will suspect him.

Judge Sherwood. — I mean to say that the Public Prosecutor was not bound to volunteer his Services.

Judge Willis. — But his Services should be open and unprejudiced, to be rendered to the Person injured, if he holds himself out as a Public Prosecutor to the Exclusion of others; and in all flagrant Cases coming to his Knowledge, he ought, if a Public Prosecutor, to prosecute. However, I have taken Steps, as far as lay in my Power, to procure the Opinion of His Majesty's Government on these Points; and until that is obtained, the Practice will, I am sure, remain as it has been.

Attorney General. — I have forbore to say any thing, because my Learned Friend is well able to take care of himself. But I should have hoped, my Lord, that until the Matter was decided in England, my Learned Friend and myself would not have been subjected to these unpleasant Observations. For my own Part, although I cannot see any Evil to arise from the Public Prosecutor being engaged in the Defence of the Civil Action for the same Offence, yet I may safely allege that I never was so situated.

Judge Sherwood. — I give no Opinion as to the Propriety of being engaged in Civil Action.

Judge Macaulay. — Perhaps some of the Remarks may be considered as applicable to me. Sitting as a Judge I did not think it my Duty to direct a Prosecution, not even if a Felony. It is otherwise I believe in case of Perjury by Statute. Perhaps I might in case of a Felony, but not of a Misdemeanor. A Complaint was made to me upon Affidavit that Mr. Chewett the Attorney, and Mr. Hamilton, one of the Defendants in the Case of *Rolph v. Simons* and others, had prevailed on a Witness to abscond. But I did not then

nor do I now think I could grant an Attachment. I then ordered the Solicitor General to proceed criminally against them.

Solicitor General.—That Application at Nisi Prius was not made 'till Two or Three Days after the Trial. As to Suspicions they cannot be avoided. A few Years ago, the Attorney General was placed in a similar Situation, when he was retained for the Plaintiff in a Civil Action in a Trespass for abating a Nuisance; and the next Day proceeded against the same Plaintiff for a Public Nuisance, and convicted him. At the Trial very unhandsome Suspicions were thrown out.

Mr. Rolph.—The Observations made by the Solicitor General as to any Suspicions intimated at the Trial, appear to me, after all that passed, worse than unnecessary. In the Nuisance Case mentioned, the Attorney General in the Prosecution manifested a Zeal which I may say, without giving him Offence, was the greater from the Stimulus afforded by the Suspicion that his Energy might be paralysed by being retained in the Civil Action. I wish the Court to understand that I made the Application at Nisi Prius for the summary Punishment of the Persons who had seduced the Witness from the Court House. Besides Mr. Hatt, a Witness of the Name of Holly, who had been subpoenaed, was bribed to leave the Assizes; and he did not appear when called to give his Evidence. It appeared upon the Affidavits that Andrew Hatt was subpoenaed, and was Twice in the Act of obeying the Call of the Court, when Mr. Chewett, the Attorney in the Cause, (sitting at the Right Hand of the Solicitor General during the Trial,) prevailed upon the Witness to abscond. The presiding Judge, the Hon. J. B. Macaulay, refused the Application; and upon that Refusal I certainly should have taken other Steps, however hopeless of due Relief: but the Learned Judge took the Matter out of my Hands, and himself delivered the Papers to the Solicitor General, and in making that Choice he acted wisely, as I can have no Pretensions to a Knowledge of Criminal Law, or Experience in Criminal Proceedings. These Affidavits, with the Instructions of the Judge to proceed criminally, have been ever since hidden in the Custody of the Solicitor General, the Public Prosecutor. Why has not an Application been made against the Attorneys of this Court for such Malpractise? That is alone in the Breast of the Solicitor General, the Public Prosecutor, the very Public Prosecutor who has exerted himself with so much Zeal for the Persons guilty of the Outrage. Perhaps I might have goaded him to make the Application before this Case was argued; but never shall that Learned Gentleman, as a Public Prosecutor, while tolerated in the Discharge of these conflicting Duties, have it in his Power to say that I obliged him to take a Course prejudicial to any Civil Suit in which he has embarked.

The Solicitor General might have proceeded voluntarily and with the Rigour called for by Conduet striking at the very Roots of Justice. But after the Learned Solicitor General has again, by a Division of the Court, defeated the Plaintiff in the Justice he sought for, then he slips the Affidavits into the Hands of the Attorney General, who received them Yesterday; and the Judgment of the Court having been thus obtained, the Attorney General will make the Application (I understand) To-day, never having before had any Knowledge of their Existence. I apply for Justice in one Way, and I am told that is the wrong Course. I shape my Course accordingly, and seek for Justice with the like Success. In Truth I cannot find it at all. The Solicitor General has made a generous Profession of his Public Services; but I now tell him, that after the Part he has acted in this disgraceful Transaction, he shall never, with my Consent, be intrusted with the Management of it. If the Defendants should traverse next Assizes, and at the Assizes following the Solicitor General should present himself as the Manager of the Prosecution, I would press the Advice of Postponement even for Ten Years, yea, for ever, and let the Culprits escape. And this Feeling I believe Nine Men out of Ten would participate.

In a case of outrageous Injury I find the Witnesses I have subpoenaed seduced from the Court by the Attorneys of the adverse Party, associated with the Solicitor General, and no Protection is secured against it by a speedy Punishment. And when once thus deprived of the Testimony of the Witnesses I have subpoenaed, I seek it from those around the Court, I am told I cannot

dive

dive into the Audience for the Evidence I need. When this stripped of my Evidence, and defeated by unfair Practices in the Pursuit of Justice, I am told (notwithstanding the Assurances of the Judge at Nisi Prius,) that I shall not have a New Trial. This I say is a Denial of Justice.

The Attorney General. — The Learned Gentleman does me but Justice in saying that I conducted that Prosecution with Zeal; but he is mistaken in stating that I knew of the Communication to the Chief Justice who tried the Cause 'till the Prosecution was over, when the Contents were publicly communicated to me.

Mr. Rolph. — The Learned Gentleman is somewhat mistaken. It is true he did not know the Contents; but, upon Recollection, he will find that enough was intimated to him before the Trial.

Judge Sherwood. — What are these Affidavits? I never heard of them before. Were they read or mentioned when this Application was made? Where are they? I do not remember them.

Mr. Baldwin. — My Lord, I mentioned the Substance of them when I argued the Matter of this Application; and stated that the Affidavits were in the Hands of the Solicitor General.

Judge Sherwood. — Were they mentioned as a Ground for granting this Application?

Mr. Macaulay. — My Lord, they have nothing to do with this Motion.

Mr. Rolph. — My Lord, I say they have much to do with this Motion; this I differ a great Deal in Opinion with the Learned Gentleman who argued the Cause. They are Affidavits shewing the Contumacy of the Witness, and the undue Practices of the adverse Attorney.

Mr. M'Nabb. — I think it due to Mr. Chewett to state to the Court, that there is an Affidavit in existence made by him, contradicting those in the Hands of the Solicitor General. It will appear in what Manner these Affidavits were obtained.

The Solicitor General. — My Lord, the Affidavits were handed to me by the Learned Judge of Assize some Days after the Trial; on examining them, I wished some further Information on the Subject, as I did not think them sufficient as they were to found an Indictment. I applied for that Purpose to Mr. Rolph, who could not then furnish me the Information I wished for, and so the Matter remained until this Morning, when I handed them over to the Attorney General.

Mr. Macaulay. — I do not think there was any Occasion for the Manner in which the Learned Counsel (Mr. Rolph) answered my Remark with regard to these Affidavits. I understood that they were intended merely as Grounds for a Proceeding against Mr. Chewett, as they were made some Days after the Trial; and that this Application was made on entirely independent Grounds.

Judge Sherwood. — The Affidavits certainly were not produced on the Argument Yesterday; and I do not remember having heard of them.

Mr. Rolph. — The Learned Gentleman Mr. M'Nabb stated something about the Manner in which these Affidavits were obtained; they were sworn before Judge Taylor, and were framed by me on the Narrative of the Deponents. I never saw Affidavits more voluntarily given.

The Attorney General. — My Lords, I now make the Application for a Rule to shew Cause why an Attachment should not issue against Messrs. Chewett and Hamilton on the Grounds stated in these Affidavits. I was not in the Country when this Trial took place; and the first Time that I heard of the Affidavits was this Morning, when Mr. Rolph handed them to me.

Mr. Rolph. — The Learned Attorney General mistakes the Matter; they were handed to him by the Solicitor General in my Presence.

The Attorney General. — It was so. If the Matter stated in the Affidavits be true, there is no doubt that it is sufficient to ground either an Attachment or a Criminal Information; but as one of the Persons charged is an Officer of the Court, and subject to its summary Jurisdiction, I do not see any Occasion to proceed in the more troublesome Method, by Information, in preference to the more usual and easy Mode of Attachment.

The Solicitor General. — I handed the Affidavits to the Attorney General, because I understood I was unhandsomely charged in the Law Society of not proceeding upon them.

Mr.

Mr. Rolph moved, That he might have leave to file additional Affidavits during the Vacation.

Mr. Solicitor General. — Such a Course is usual, and the Affidavits thus filed are served upon the Parties, so that there might be no Surprise. I observe that in the principal Affidavit the Matters are stated as bare Hearsay.

Mr. Attorney and *Mr. Justice Sherwood.* — No, no; they are stated positively as coming within Deponent's Knowledge.

The Court granted the Rule Nisi, with Leave to file additional Affidavits a Week before next Term.

The Observer, York, Monday, 12th May 1828.

We refer our Readers to the Tar and Feather Scrape. — In reply to the Remarks of *Mr. Collins*, we do assert, that it is not insolent in a Barrister to tell the Court that he knows his Duty as well as any Judge on the Bench. If, however, such Language be insolent, then we say, that the Courts of England and Ireland teem with such Insolence.

“The Chronicle” has been very severe upon the *old Lady*; and so long as he castigates the Members, so long shall he be entitled to our Praise. But the Editor has entered upon a Subject that ought not, on account of the Parties interested, to be revived; he has touched upon the late unhappy Proceedings, and in doing so he has thrown out uncalled-for and unjust Insinuations against Judge Willis. No Two Cases could have differed more widely than those alluded to by the Editor. In one (the Type Scrape) the Party was convicted in a Civil Action. In the other (the Libel Case) the Party was neither convicted nor arraigned; there was nothing against the Party but the mere Accusation of the Grand Jurors, and which Accusation was not read in his Lordship's Presence.

If the wise Jurors of the Midland District should prefer an Accusation against the Chronicle for his late Strictures upon our necessary House of Assembly, would the Judge act wrong were he to recommend before Trial and Conviction an harmonious Course?—We say no.

Inclosure, No. 9.

Extracts from the Gore Gazette of 17th May 1828.

Mr. Editor,

Mr. Willis in his Judgment in the Case of *Rolph v. Simons et al.* on the Subject of the New Trial which was applied for by the Plaintiff, says, “in regard to a New Trial, it has been determined, that notwithstanding Evidence has been given on the Part of the Defendant, and he has obtained a Verdict, “the Plaintiff may still, on reasonable Grounds, have a New Trial.”

What does the Learned Judge mean by “reasonable Grounds?” Does he intend to say that he can produce a Case in all the Books, of a New Trial being granted, merely because a Witness whom the Plaintiff subpoenaed refused to be sworn? If he can shew such a Case, I will venture to say it was never decided in England. Or does he mean by “reasonable Grounds,” the crude and whimsical Notions of an Individual, unsanctioned by former Decisions? If the latter be the Case, nobody could ever meet him on legal Grounds, because a Person under such Circumstances is not tangible; he is in no Latitude or Longitude heretofore visited by any Gentleman of the Long Robe. As the Sailor would say “he is out at Sea without a Compass.” Let the Learned Judge point out a single solitary Instance in England where a New Trial has been granted to a Plaintiff who has obtained a Verdict against some of the Defendants in a Joint Action of Tort, where one has been acquitted, and I will then admit that he is truly wise, and that I am shamefully ignorant. I will go still further; let the Learned Judge shew a single Case where a New Trial was ever granted to a Plaintiff in an Action of Tort, merely because a Witness refused to be sworn or refused to attend, and I will give up the Point. In 2 Salk. 645. a new Trial was applied for by the Defendant, because the Trial came on at Seven o'Clock in the Morning, and an old Witness could not rise to be there in Time; but it was denied, unless an Affidavit should be made, to shew the Testimony to be material. So strict are the Courts when a Defendant applies for a New Trial;

Trial; but the Plaintiff is never obliged to proceed with the Trial, when he finds that his Witnesses fail him. He may always be nonsuited, and begin anew whenever he thinks proper; and therefore it is entirely his own Fault if he goes on with the Trial, and afterwards is disappointed at the Result.

The Learned Judge also says, "without adverting to the Consequences of a Nonsuit, which in a Case like this would only have afforded the Witnesses another Opportunity of refusing to be sworn at a future Trial," &c. Mr. Willis thinks, if the Plaintiff were nonsuited and had brought another Action, *the Witnesses might again refuse to be sworn*, and I would like to know if they could not do the same on a New Trial? What Difference could there possibly be in this Particular in the Two Cases? Any Person of common Sense would at once say none; but Mr. Willis insinuates that there *would* be a Difference.

Messrs. Chewett and M'Nabb, Two Attornies of the Court of King's Bench, were present at the Trial, but were never subpoenaed, and they refused to be sworn when called upon to give Evidence. Mr. Willis says, "With regard to Messrs. Chewett and M'Nabb, I am of Opinion, that, as Attornies of the Court, they were guilty of Contempt in refusing to obey its Injunctions." This is the Opinion of Mr. Willis; but I would like to know upon what Authority he forms that Opinion, because I am a Man who always require, for my Satisfaction, that a Judge should either state his Authority for an Opinion, or deduce the same logically from some known and acknowledged Principles; neither of which is done here. It happens, unfortunately for the Learned Judge, that immediately afterwards he fully recognizes the Doctrine of the Case of *Bowles v. Johnson*, when it was determined by the Court of King's Bench in England, that "a Person not subpoenaed must be looked upon as a Stander-by, and that it is no Contempt of the Court for a Stander-by to refuse to be examined." This Decision of the Court does not except Attornies, Sollicitors, Clerks, or Sheriffs; but it says, in general and broad Terms, that "a Person not subpoenaed is a Stander-by," and that "a Stander-by is not obliged to be sworn." Such a Person may be examined as a Witness, if he is willing, but he cannot be compelled to do so unless he is subpoenaed. Now, why is an Attorney to be put in a worse Situation than any other Person? I have often heard that Attornies were privileged, in many Cases, from giving Testimony; but I never dreamt that they were deprived of the common Privilege, which all others of His Majesty's Subjects confessedly enjoy, of not giving Evidence without being called upon by the King's Writ to do so. When an ordinary Person is subpoenaed to give Evidence, he must, for the Sake of Public Justice, divulge the Secrets of his nearest and dearest Friend, however painful to his Feelings; but if he is not subpoenaed he need not do so. An Attorney, however, according to Mr. Willis's Opinion, can be obliged to do so whether he is subpoenaed or not! *O tempora! O mores!* This never was the Case in Old England; why should it be in Upper Canada? If an Attorney, who attends a Court of Justice on the Business of his Clients, could be obliged by any Suitor in Court to become a Witness against his Will, and without being commanded by the King's Writ, his Situation would be more troublesome than that of a Waiter at an Inn, and almost as degrading; he would soon be called a standing common drudge Witness. I don't know how this Doctrine will suit the Gentlemen Attornies in general; but for my own Part, I must ingenuously own, that I consider it altogether apocryphal, and so completely subversive of the Liberty of the Subject, and the Respectability of the Bar, that I am quite astonished it should take its Origin from a Judge who professes an intimate Knowledge of the Common Law, and an uncommon Anxiety for the Privileges of the Subject. His proposed View of the Jurisprudence of Upper Canada will most probably explain all these Things, and perhaps convince every body in every Part of the World that, in truth and in fact, Attornies are nothing more nor less than constitutionally standing Witnesses, and ought to spring into the Witness Box at the Beek of both Plaintiff and Defendant. It will be in vain for the unfortunate *Latitat* to say that he knows nothing of the Matter, for who will believe him 'till he is sworn? In this Way all the Attornies in Court might be literally pumped, which would certainly be extremely convenient for Suitors, because, when hard run for Testimony, they might put the whole Tribe of Lawyers in requisition, without

Expence or much Trouble; and if these failed, all the Constables would be called, because, as Officers of the Court, they would be equally liable with the Attornies. No Subpœna is necessary for these Fellows; they are obliged to tell all they know, without any Notice or Reward, and must, every Mother's Son of them, turn out in Rank and File, and swear through thick and thin, or they will be committed for Contempt.

The Learned Judge further says, "If all (the Defendants) must join when the Solicitation is on the Part of the Defendant, what Reason is there in a Civil Action, why all should not *be* joined when the Plaintiff makes the Application?" I will tell Mr. Willis the Reason, since he asks for Information. When the Defendants are prosecuted for a Misdemeanor on an Indictment at the Suit of the King for an Assault and Battery, and they happen to be acquitted against the Judge's Charge, the whole Weight of the Evidence, and the Opinion of every body else not on the Jury, still a New Trial cannot be granted conformably to the Rules of English Law. When a Civil Action is brought for the same Cause, the same Rule of Law prevails as in Criminal Proceedings, because in its Nature it savors of Criminal Suits. If Mr. Willis will peruse the Case of *Norris v. Tyler, Cowper, 37.*, and many other Cases since that Time, on the same Principle of that Case; and if he dispassionately forms his Opinion on these English Authorities, he will not find it necessary in future to ask a Question like the above.

Mr. Justice Willis again says, "Totally devoid of all personal, all party, and all political Feeling, it has and ever will be my Desire to render to every one impartial Justice." Now I do not see the Necessity of all this. Did any one ever accuse Mr. Willis of being a Demagogue, or an intimate Acquaintance and familiar Associate of any Demagogues either *in* or *out* of the late House of Assembly? Did any one ever think that Mr. Willis is beating the Democrat Drum, or that he wishes to make himself popular by an uncommon Show of Anxiety for the Rights and Liberties of the People? Did any one ever imagine that M. Willis could suppose that the *People of this Country could long be gulled with the low and drivelling Arts of a Buffoon?* Can he suppose that People suspect him? If not, why does he deny that of which he has not yet been accused? When a Lady asserts her Virtue—a Clergyman his Piety—a Miller his Honesty—a Physician his Skill—or a Judge his Impartiality—without first being accused of the contrary "Feelings," Mankind are too apt to suspect that there may be "something rotten in the State of Denmark."

I intend, Mr. Editor, to trouble you with One more Epistle on this Subject, for I find it impossible to produce his Lordship as large as Life without the additional Part to make up the Picture. I shall then wait for a Reply before I again intrude upon your Patience.

A STANDER-BY.

Sir,

As Mr. Justice Willis has lately taken upon himself to condemn, in no very measured Terms, (and without, apparently, possessing any Information upon the Subject,) the Mode of conducting Public Prosecutions in this Province, through the Medium of His Majesty's Attorney and Solicitor General; and without conferring either with them or his Brother Judges, as I have heard—which would have been no more than becoming in a Person of so little Experience—and has presumed to recommend to a Committee of the last Session of the House of Assembly the Abolition of a Practise coeval with the first Organization of the Government of this Colony, and the Introduction of an entirely different System (*vide* the Report of Mr. Justice Willis, relative to the Establishment of an equitable Jurisdiction in Upper Canada, published by Order of the House of Assembly); I hope I may be permitted merely to express my *entire Accordance* with the Sentiments publicly delivered by the Right Honourable Robert Peel, the present Secretary of State for the Home Department, when filling the same Office during Lord Liverpool's Administration, in the British House of Commons, in the recent Discussions respecting the *Improvement* of the Administration of the Criminal Law of England; and which, I have no doubt, will be repeated by that Right Honourable Gentleman, should the threatened Appeal of Mr. Justice Willis to His Majesty's Government have the Ill-luck to come under his Notice.

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In his Speech of the 9th of March 1826 he said, " If we were legislating *de novo*, without Reference to Customs and formed Habits, I for one should not hesitate to relieve private Individuals from the Charge of Prosecution in the Case of Criminal Offences, justly called, by Writers upon Law, Public Wrongs. I would have a *Public Prosecutor*, acting in each Case on Principle, and not on the *heated and vindictive Feelings* of the individual Sufferer, on which we mainly rely at present for the due Execution of Justice. Such Feelings are rarely the fit Measure of the *Propriety* of Prosecution. They are apt on the one Side to over-rate the Wrong committed; on the other, still more apt to subside after the first Impulse of Revenge; and, coupled with the just Fear of Trouble and Expence, to lead to disgraceful Compromises, in which the Interests of Justice are altogether overlooked. I would therefore make the Prosecution of these Public Wrongs much more a Matter of Public Concern than it is at present. I would (taking, at the same Time, all proper Security against the Encouragement of undue Litigation,) indemnify Parties more liberally from the precarious Charge which the Trial of a Public Offender entails; and I would, by the Appointment of a Public Prosecutor, guard against *malicious* or *frivolous* Prosecutions on the one hand, and on the other I would ensure Prosecution in Cases in which Justice might require it. In Scotland, Crimes are prosecuted in this Manner, through the Agency of a Public Officer, responsible for the *Justice* and *Propriety* of the Prosecution, when undertaken at the Public Charge, and for the Conduct of it through its various Stages."

I shall only observe, that these Statements must be presumed to have been in strict Conformity with the Opinions of both Sides of the House (Mr. Calvert, Mr. Lockhart, Sir M. W. Ridley, Mr. J. Abercrombie, Sir John Sebright, Mr. Sykes, Sir G. Chetwynd, and Mr. Estcourt, having taken Part in the Debate). On this Speech the Discussion I have alluded to took place in the House of Commons; and the Statements I have quoted were made by Mr. Peel, then Secretary of State, without their being attempted to be refuted or contradicted.—*Ne Sutor ultra Crepidam.*

Your obedient Servant,
AN EQUITY DRAFTSMAN.

Gray's Inn, 1st April.

P.S. I very much fear, should Mr. Justice Willis's Recommendation be adopted, that it will tend materially to impede another Scheme that he is said to have had very much at heart, and which, if carried into Effect, must be of the greatest Advantage to the Province; namely, the Union of the State of New York with Upper Canada; because in that, as in all others of the United States, Public Prosecutions are uniformly conducted by Public Prosecutors; and I doubt extremely whether the Honour conferred upon the State by including the most opulent of the Citizens in the first Batch of his forthcoming Order of Canadian Baronets, would be deemed by the People at large a sufficient Compensation for the Loss of their District Attornies, and for affording the Opportunity to private Individuals, prosecuting in their Stead, to become *Public Prosecutors*.

I sincerely hope that Mr. Willis will seriously reflect upon the Importance of the Union of the State of New York with Upper Canada, and not allow Questions of minor Import to come in competition with Considerations which may be regarded as truly national. By this Union, the Navigation of the St. Lawrence would be secured for ever, and Barnhart's Island, already become celebrated in Diplomacy, might become still more renowned in History by being coupled with the first Canadian Baronetage, which should be annexed to it in Fee, (as the Earldom of Arundel is to Arundel Castle,) and then conferred by Royal Grant upon the Honourable John Walpole Willis and his Heirs, as a Reward for being the Author of so great a national Benefit.

When Mr. Willis has effected this Union, so much to be desired, I will cheerfully second him in any other Improvement he may suggest; as he will then be entitled to entire Confidence as a Politician, from the Proof which will have been afforded of his Statesman-like Conceptions, and able Diplomacy. Then he may truly say with Cicero,

" O fortunatam Natam me Consule Romanus."

These Remarks were suggested to me by a Friend, to whom Mr. Willis had communicated the enlarged Views he had taken of our Public Policy.

By the bye, I ought to apologise to your Female Readers for quoting Latin ; but my principal Object being the Amusement of Mr. Willis, who often seasons even his Judgments with Dashes of Horace, I hope I shall, on that Account, be excused, although I must say I hate a judicial Coxcomb.

Regimental Order.

Head Quarters, West Flamborough, 14th May 1823.

The First Regiment, District of Gore Militia, will parade for Annual Review in front of Burley's Hotel, in the Village of Ancaster, on Wednesday the Fourth Day of June next, at Eleven o'Clock, Forenoon, as fully armed and equipt as Circumstances will permit. The Colonel Commanding expects a full Attendance; and none will be excused unless provided with a regular Leave of Absence from their Officer, in Writing.

By Order of the Colonel Commanding,

GEO. GURNETT,
Capt. and Adjutant, 1st Regt. Gore Militia.

Preparing for Publication.

An Enquiry into the Propriety and Expediency of Equity Pleaders presiding in the Court of King's Bench in the Colonies; and whether Equity Pleaders were ever appointed Judges of the Courts of Common Law in England. With a few Remarks upon our present admirable System of Jurisprudence in Upper Canada. By a Canadian Barrister. *Deteriora timens.*

Preparing for Publication.

A View of the present System of Jurisprudence in Upper Canada. By an English Barrister, now one of His Majesty's Judges of the Province of Upper Canada. *Meliora sperans.*

CHAPTER I.

Subject proposed.—Law with reference to Civil Government.—Rise and Progress of the Laws of England.—Quebec, its History, Capture, and Capitulation.—Subsequent Treaties, Statutes, and Ordinances.—English Settlers in what is now called Upper Canada.—Emigration, Examples of, from Greece, Rome, Scythians, and other Northern Nations.—Effects of, with reference to the Mother Country.—With reference to the Place of Settlement.—The Question whether Colonies acquired by Conquest, or peopled by Subjects owing natural Allegiance, can be affected by the Legislation of the State to which they belong, without an actual or implied Participation in it.—Necessity of a uniform System of Law in every Community.—In Colonies the Law should be assimilated, as far as Cases will admit, to that of the Country from which Emigration is sought to be induced.—So in regard to Ecclesiastical Matters.—Increase and Prosperity, and Means of Improvement.—How far Emigration from Foreign States desirable.—Debates on proposed Division of the Provinces.—Stat. of 31 Geo. 3. passed, and Constitution of the Colony.

CHAPTER II.

Lieutenant Governor's Prerogative and Power.—Executive Council, Office and Duty of.—First Meeting of the Local Legislature.—Legislative Council, of whom composed.—House of Assembly.—Payment of Members.—Want of Intelligence.—Introduction of the English Law in Matters of Property and Civil Rights.—Observations thereon, and Propriety of an entire Assimilation.—Ditto, and Administration of Criminal Law, and Defects in Punishment, as in 1792.—Classification and Arrangement of the Statutes, Importance of.

CHAPTER III.

Provincial Law with reference to Limits and Boundaries.—First, with respect to Religion and the Government, and herein of Crown Lands purchased from Indians, and Local Revenue.—Secondly, with reference to the Public, and herein, 1st, of the Administration of Justice.—Court of General Jurisdiction throughout the Province.—Its Constitution.—Terms of Sitting, Alteration of.—Practice, &c.—Officers of the Court.—Attorney General.—Solicitor General.—Barristers and Attornies.—Want of Court of Equity to restrain Proceedings and enforce Discovery.—Propriety of separating the Two.—High Character of the English Bar, and that of Ireland.—Beneficial Effects of the Example of the Bar, who since the Union have supplied the Place of the non-resident Nobility.—2d, Courts of limited Jurisdiction.

CHAPTER I.

IN endeavouring to bring before the Public the System of Jurisprudence which now prevails in the Province of Upper Canada, with a View of pointing out those Defects which either were inherent in its original Structure, or which Time may have engendered and rendered so inveterate that it may perhaps require strong Measures to correct them; (assuming, as I have done, not

not only the Sentiments but the Language also of a distinguished modern Senator and Jurist) (a); I am only borne up against the Burthen of the Undertaking, by the Consideration that it is of such Moment as to require early and serious Attention. Impressed, as I have ever been, with the utmost Reverence for the established Religion of my Country, and entertaining no Feeling but that of Charity and Good-will towards those who profess different Tenets; regarding with almost filial Respect and Gratitude our beloved King; deeply venerating the Institutions of my Country, and the general Administration of its Laws; and mindful always of the Rights and Liberties of my Fellow-subjects, for whose Security and Protection those Laws were made, I cheerfully and boldly enter upon my Undertaking. Where Religion and Piety, Honesty and decent Behaviour, are duly established; where the People are surely defended from external Enemies, and protected from internal Aggressions and private Injuries by the Aid and due Administration of the Laws; where they are grateful for such Blessings, and honour and obey their King; the Fruition of Riches and Plenteousness must be their happy Lot. Such a State of Things is the Perfection of Legislation; for in the Words of the greatest Lawyer and Philosopher of his Age (b) "*Finis enim et scopus quem leges intueri, atque quem jussiones et sanctiones (c) suas dirigere debent, non alius est quam ut cives feliciter degant: id fiet si pietate et religione rectè instituti; moribus honesti; armis adversus hostes externos tuti; legum auxilio adversus seditiones et privatas injurias muniti; imperio obsequentes; copiis locupletes et florentes fuerint. Harum rerum instrumenta et nervi sunt leges.*"

The best practical Exposition of the Laws, particularly those of a new State, may probably be made by resorting to their Origin. In Civil Society, either Law or Force inevitably prevails (*In societate civili aut lex aut vis valet*). (d) To impede the latter, recourse must be had to Justice, which may be termed the Fruit of Law; Law being the Bond or Obligation (e), and Justice the Effect or Operation of it. (*Lex præcipit*) (f); (*id quod præceptum est vocatur jus.*) (g) The Art or Science, therefore, of Justice, must be learned by considering Law (*Jus est ars boni et æqui*) (h); the Result of which is the unvarying Desire to give every one his due (*Justitia est constans et perpetua voluntas suum cuique tribuendi*). (i) The true Definition of Law then is, that it is the Perfection of Reason, commanding what is useful and requisite, and prohibiting the reverse. (*Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria, et contraria prohibet.*) (k) It is the Rule or Bond prescribed by some Superior, which the Inferior is bound to obey (*Jussio summa majestatis singulos cives in republicâ obligans*) (l); by which what is right or wrong is ascertained and established (*Jubens utilia et necessaria, et contraria prohibens*) (m); so that Men's (n) Actions and Civil Society may be properly governed (*Lex est præscriptum ad quod omnes qui in republicâ sunt, vitam instituere debent*) (o); and thus it is the common Covenant of the State by which every Member of the Community ought to direct his Conduct (*Συνθήκη κοινὴ κατ' ἑξῆς πᾶσι προσήκει ζῆν τοῖς ἐν τῇ πολιτείᾳ*) (p), and so direct it as to live honestly, to injure nobody, and give to every one his own (*Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere*). (q) Positive Law has been said to be in all respects a Contract or Covenant. (r) The contracting Parties are the Public and the Individuals; the Governors and the governed. On the Side of the Public it is stipulated by these Laws that a general Security shall be maintained; that every Person who is a Party to the Contract shall have his just

(a) Mr. Bringham. See his Speech in the House of Commons, 7th February 1828.

(b) Lord Bacon's Aphorisms, 7.

(c) Sanctio, is a Ratification or Confirmation. Sanctio est, ex legis pars, quæ in legem committentibus penam irrogat. *Inst. de re. divis. § sanct.*

(d) Lord Bacon's Aph. 1.

(e) Law; Sax. *log*; Lat. *lex*, from *lego*, or *legendo*, choosing; or rather *d ligando*, binding.

(f) Summ. Rom. Law, p. 16.

(g) *Ibid.*

(h) Dig. 1. 1, in princ.

(i) Dig. 10, in princ. *Inst. idem in princ.*

(l) Lord Coke's Definition of Law, from Cic. and Bracton's Definition.

(m) Sum. Rom. Law, p. 61.

(n) Vide (k) supra.

(o) Hooker, Eccl. Pol. 1. 1., defines Law to be the Rule which an intelligent Being setteth down for the framing of Actions by.

(p) Dig. 1. 3. 2.

(q) Demosth. Orat. cont. Aristogit.

(r) *Inst.* 1. 1. 3.

(s) Aristot. cited in Sum. Rom. Law, p. 63.

Rights protected; and that he shall not be molested by any Act of Violence in his Person or his Fortunes; or if he be molested, upon a proper Complaint he shall find that these Laws will revenge his Quarrel, and that they can punish as well as prescribe. This is all for which the Public engages; but by this Covenant Individual Right is protected by Public Justice. The Law provides for the Citizens, the Magistrate for the Law. The Authority of the Magistrate is derived from the Supreme Power of the State, according to the Constitution of the Government, and established Institutions: if those be good the Laws will be beneficial, but if otherwise, of no avail; or to use the more expressive Language of Lord Bacon, "*Jus privatum sub tutela juris publici latet, lex enim cavet civibus, magistratus legibus. Magistratum autem auctoritas pendet ex MAJESTATE IMPERII (s), et fabrica politicae, et legibus fundamentalibus. Quare si ex illud parte sanitas fuerit, et recta constitutio, leges erunt in bono usu; sin minus, parum in iis praesidii erit.*" (t) Nor is Individual Right the sole Object of Public Justice, which although it be enthroned as the Guardian of private Right, to prevent its Violation and to suppress Injury, yet the Majesty of Public Justice also extends its protecting Influence to Religion, to Arms, to good Order, to Arts and Sciences, and Wealth; and to guard and to encourage all Things requisite for the Prosperity of the State. *Neque tamen jus publicum ad hoc tantum spectat, ut addatur, tanquam custos, juri privato, ne illud violetur, atque ut cessent injuriae; sed extenditur etiam ad religionem, et arma, et disciplinam, et ornamenta, et opes; denique ad omnia circa bene esse civitatis.*" (u) This is the true Object of all Laws; and in order to effect their Purpose (x), they should be peculiarly adapted to the People for whom they are framed. They should distinctly relate to the Nature and Principles of the Government; whether they form it, as may be said of Political Laws; or whether they support it, as in the Case of Civil Institutions. They should also be relative to the Climate of the Country, to the Quality of its Soil, to its Situation and Extent, and to the principal Occupation of the Inhabitants. They should have relation to the Degree of Liberty which the Constitution will bear; to the Religion of the Inhabitants, to their Inclinations, Riches, Numbers, Commerce, Manners, and Customs; in fine, they should have relation to each other, and also to their Origin, to the Intent of the Legislator, and to the *Order of Things on which they are established.* Law, then, being the Sovereign Rule or Contract to which every Member of Society must submit, and by which Men's Actions and Civil Society is governed, it follows that that Power (y), whether single or combined of many Parts, which gives or prescribes Law to the Community, must be supreme; and when its Will is declared, cannot admit of any Controul without a Dissolution of the political Frame. Upon this Ground, Liberty seems to require that every Member of the Commonwealth should have Access, before the Law is enacted, to guard himself against any Wrongs to which he might be exposed by the Admission of any partial Regulation; or, in other Words, that the People of every separate Order or Rank, however distinguished by Fortune, should each have an active Share in the Legislature of their Country. In early Rome, at first the Decemvirs (z) were named, and their Laws or Tables (as they were called) approved of by an Assembly of the CENTURIES, in which Riches preponderated against Numbers. But the Tribunes soon established the more specious and popular Maxim, that every Citizen had an equal Right to enact the Laws which he was bound to obey. (a) According to this Doctrine, if admitted in its full Extent, Liberty would necessarily be confined to a few small Democratic Governments, in which alone it would be practicable to carry such an Arrangement into Execution. In those States where the supreme Power or Right of Legislation thus rests with the People (b) at large, Public Virtue or Goodness of Intention will

(s) Thus His Majesty's present Secretary of State for the Colonies, in a late Public Dispatch to the Lieutenant Governor of Upper Canada, used the following strong and constitutional Language: "For the Principle that all Courts are Courts of the King, and that Justice is to be dispensed only by Officers commissioned by the King for that Purpose, cannot be too fully recognized, or too strictly enforced."

(t) Lord Bacon's Aph. 3.

(u) Ibid. Aph. 4.

(z) Montesquieu, Spir. Law, vol. i. p. 8.

(y) Ferg. Mor. & Pol. Sci. vol. ii. p. 467. ch. 5. § 8.

(a) Gibb. Decl. & Fall Rom. Emp. vol. viii. ch. 44. p. 10.

(a) Ferg. Mor. & Pol. Sci. ubi supra.

(b) 1 Bl. Com. 49.

more probably be found, than in either an entire Aristocracy or an absolute Monarchy. But popular Assemblies are for the most Part futile in Expedient and feeble in Effect, though seldom deficient in Patriotism, Honesty, or Justice. The Difficulty, however, which would otherwise exist in populous and extensive Nations, of each Member of the Community (possessed of such Property as gives him an Interest in the State) taking Part in the Legislation of his Country, is happily overcome by the System of Representation (c), which enables every Order of the Nation, if not collectively, at least by Deputation, to take a Part in the Councils of his Nation, and to watch vigilantly all its Proceedings. Under this System it may be urged, that every Statute being a Treaty or Act of Convention between the Parties concerned, is like any other Compact, binding only on those who personally or by their Deputies have given their Consent (d), and that the Representative must have an express Commission or Authority to bind his Constituents before he can subject them to any Condition in the Form of a Law; and that in Acts of Legislation every Individual has a Right to name his Representative; or if this Right be withheld from him, he is not bound by any thing which may follow; but the only practicable Assent, and that only which is required, is the general Concurrence of the Majority of those competent to act; which, though it in fact amounts to no more than a Rule *de facto*, yet, by others subsequently availing themselves of it, or by their tacit Acquiescence in it, ultimately receives the universal Sanction; for “*Omne jus, aut consensus fecit, aut necessitas constituit, aut firmitur consuetudo.*” (e) Thus in England it is said to have been always held (f), that no Freeman is bound by a new Law to which he himself has not given his Consent either in Person or by his Representatives; and there are Instances of the House of Commons refusing to pass a Bill before the several Members had consulted their Constituents. What then is the Effect of this Contract when entered into on the Part of the People? Without doubt every Member contracts for his own good Behaviour, and engages to pay a Penalty if he perform not his Part of the Covenant; and both the Greeks and Romans (g) were so possessed of this Notion, that all Civil Penalties were looked upon by them as so many Debts arising from the Breach of Contract. At Rome the Person who proposed a Law, was said to ask the Consent of the People; the Term “People” comprehending all Classes of Subjects, including those of the highest Orders. *Populi appellatione omnes cives significantur, communeratis etiam Patriciis et Senatoribus.* (h) And the Form of proposing a Law, viz. “Is it your Will and “Pleasure?” is to this Effect; wherefore Law is defined to be *quod populus, Senatorio Magistratu interrogante, (veluti Consule,) constituebat.* (i) Enough has already been said of Democratic Governments. (k) In regard to Aristocracies, which are generally composed, or intended to be composed, of the most experienced Citizens, they are said to be in general more sapient though less honest than a Republic, and less vigorous than an absolute Monarchy. A Monarchy indeed is the most powerful of any; for by an entire Conjunction of the legislative and executive Powers, all the Sinews of Government are knit together and united in the Hand of the Prince, subject, however, to the good or bad Application of them by him, and by him alone, without Controul. These are the different Powers which for the most Part in civilised Society exercise supreme Rule, or the Right of making Laws to bind the People or Nation with which they are connected. Each of these Three Forms of Government has its Advantages, mingled indeed with considerable Imperfections. But they may be, and they have long been contrary to the Opinion of the Historian, that such a mixed Form of Government could not subsist (*haud diuturna esse potest*), and they are admirably blended together, particularly in the British Constitution, as to reach the highest Summit of Excellence to which any human Institution can attain: verifying the Idea of the Roman Advocate and Philosopher (m), *Optimè esse constitutam rempublicam, quæ ex tribus generibus illis,*

(c) Ferg. Mor. & Pol. Sci. ubi supra.

(d) 3 Salk. 112.

(e) Dig. l. 340.

(f) Sum. Rom. Law, 62. note (v).

(g) Sum. Rom. Law, p. 64.

(h) Dig. § lex est vers. Plebisc.

(i) Inst. de Jur. nat. gent. § lex est.

(k) 1 Bl. Com. 49.

(l) Tac. An. b. 4.

(m) Cic. Frag. de Repub. l. 2. cited 1 Bl. Com. 49.

regali, optimo, et populari, sit modicè confusa, and which, though subject to some few Faults, necessary, perhaps, to mark its mortal Origin, is still so beautiful, so thoroughly imbued with the sublime Spirit of perfect Liberty, that those who enjoy it are and always will be ready to die in its Defence; and those who have once participated in its Benefits, are Strangers to Felicity when beyond the Reach of its Protection. In this splendid and enduring political Creation, the Execution of the Laws under the Superintendance of the King gives to the Constitution the Energy and Force of an absolute Monarchy, a Power that never can be delegated without diminishing its Effect. And whenever the Power to awe or to oblige is lessened, the strongest Ties which connect Mankind in every Relation social and civil, and which teach them mutually to respect each other, are proportionably weakened. Thus we find that accordingly as the Distance (*n*) of the Subject removes him from the Seat of supreme Rule, Abuses of subordinate Authority increase, and Means of Redress are obtained with greater Difficulty. The dearest Title—the best Security for the Exercise of this sovereign Sway, is the universal Confidence and Affection of those who owe Submission to its Influence. This, indeed, it is the Happiness of our present revered Monarch most eminently to possess. To Him may be applied what the Imperial Roman Biographer (*o*) wrote of the excellent Titus; for He, indeed, is not only the Delight and Object of Affection of His People, but of the human Race:—“*GEORGIVS IV. cognomine paterno, AMOR AC DELICIE GENERIS HUMANI; tantum illi ad promerendam omnium voluntatem, vel ingenii, vel artis, vel fortunæ super-est; et quod difficillimum est, in imperio quando privatus, atque etiam sub patre principè, ne odio quidem, nedum vituperatione publicè caruit.*” And of His illustrious Parent, now we trust in the Enjoyment of everlasting Felicity, it may with equal Truth be added, in the Words of the same Writer (*p*), speaking of the Death of the same Emperor; “*Quod cum palam, factum est, non secus atque in domestico luctu, merentibus publicè eunctis, OMNIS tantas mortuo gratias egit, laudesque BENE MERITAS congescit, quantas ne vivo quidem unquam atque præsentì.*” Nor was such Eulogy too great; for to Him His Subjects are indebted for the Preservation of the Civil and Religious Institutions (*q*) of their Country pure and unimpaired amidst the Anarchy and Revolution of surrounding Nations; “*Nullam reipublicæ administrandæ rationem Monarchiæ domi constitutæ præposuit, cæteras omnes ecclesias Anglicanæ longè posthabuit.*” His grateful People, remembering the Mercies which under Providence He was the Means of continuing to His Country, will for ever praise him; “*Illum habebunt inter hymnos et preces; illum inter sacra gaudia et suspiria.*” Pious, unostentatious, upright, and benevolent, (“*Vir, pius, simplex, candidus, urbanus;*”) (*r*), though (like the Language in which this Character is sketched, and that good Man from whose Epitaph it is quoted,) he be dead in Name, yet does he live, and will for ever live, a lasting Example of Patriotism and Virtue, in the grateful Recollection of his Country, (*vivit adhuc, et in omne ævum vivet, in factis nunquam morituris.*) He will be remembered in the Province of Upper Canada, for the paternal Exercise of His Prerogative, and His fostering Protection of the Infant Colony; and it will never be forgotten that in His Reign these Colonists obtained their present Constitution, conferring on them the Privileges and Immunities of British Subjects.

(*n*) Burke's Address to the King, vol. ix. 178.

(*o*) Suet. vit. Tit. in princ.

(*p*) Ibid. in fin.

(*q*) In Memory of the late King's Prime Minister, the great Magician of the Times has beautifully alluded to the Preservation of National Religion in the following Lines:—

“Then while in Britain's thousand Plains,
One unpolluted Church remains,
Whose peaceful Bells ne'er sent around
The bloody Tocsin's maddening Sound,
But still, upon the hallow'd Day,
Convoke the Swains to praise and pray;
While Faith and Civil Peace are dear,
Grace this cold Marble with a Tear—
He who preserved them—Pitt—lies here!” — *Introd. to Marm., cant. 1.*

(*r*) Bishop Smalridge's Epitaph on R. Wilson, Esq., Author of the Fasts and Festivals of the Church of England.

But

But to revert to the Frame of the British Government. The King, who executes the Law, is also the First (s) component Part of the Legislature. The Second is formed by the Lords Spiritual and Temporal; an Aristocratical Assembly composed of the highest Persons in the Realm, selected (but when selected, as far as regards the Lords Temporal of England, possessing an hereditary Right to a Place in this Assembly,) for their Piety, their Birth, their Valour, or their Property. The Third Part consists of the Representatives of the People, freely chosen from among themselves, forming a Species of Democracy, and known as the House of Commons. These Three Powers constitute the British Imperial Parliament, which makes all Laws in force throughout the Realm, and governs the Nation. Each Branch (t) of this supreme Body may be supposed to act from different Motives; and each of them, jealous and vigilant of its own peculiar Views, is enabled to defeat any dangerous or inexpedient Measure which one or both of the others may endeavour to effect. Nothing, it is said (u), can subvert this happy Constitution but one or other of the Three Powers losing the Weight which it possesses, which, by keeping an equal Balance, preserves the Government of the whole. Should this Balance of any of them be lost, the Legislature would be changed from that which, presuming an original Contract to have subsisted, is considered to have been established in the first Instance by the general Consent and fundamental Act of Society. Such a Change might at once (x) release all Ties of Government, and, by reducing the Community to its original unsettled Condition (so far at least as regarded that Power whose Balance has been lost), afford an Opportunity to the remaining Powers of vesting in other Hands the supreme Rule or Right of Legislation for the State. This indeed appears to have been the Case at the Period of the happy Revolution in the Year 1688. The Lords and Commons of the Realm in full Convention then declared (y), that King James II., having endeavoured to subvert the Constitution of the Kingdom, by violating the original Contract between the King and the People, and having violated the fundamental Laws, and withdrawn himself from the Kingdom, had abdicated the Government, and the Throne became thereby vacant; and on the same Occasion, the Estates of the Kingdom of Scotland (z) declared, that King James the Seventh had invaded the fundamental Constitution of the Kingdom, and altered it, from a legal and limited Monarchy, to an arbitrary despotic Power; and had governed the same, to the Violation of the Laws and the Liberties of the Nation, inverting all the Ends of Government, whereby he had forfeited the Crown, and the Throne was become vacant. "Thus it was not to passive Principles in our Ancestors," says an elegant Writer and distinguished Statesman (a), alluding to this great Event, "that we are now governed by a Sovereign who cannot feel that he is a Prince without knowing his Subjects should be free." The Revolution was a Departure from the ancient Course of the Descent of the British Monarchy. The People at that Time re-entered into their original Rights; and it was not because a positive Law authorized what was then done, but because the Freedom and Safety of the Subject, the Origin and Cause of all Laws, required a Proceeding paramount and superior to them. At that ever memorable and instructive Period, the Letter of the Law was superseded in favour of the Substance of Liberty. To the free Choice, therefore, of the People, without either King or Parliament, is owing that happy Establishment out of which both King and Parliament were regenerated. From that great Principle of Liberty have originated the Statutes confirming and ratifying the Establishment from which the King derives his Right to rule over his Subjects. Those Statutes have not given to the People their Liberties; their Liberties have produced them. What a Lesson does this mighty Effort afford of the Equity and Wisdom of Compliance by those to whom supreme Power is entrusted with the general Feelings of great Communities, and of those Orders which compose them. Much Power is tolerated, and passes unquestioned, where much is yielded to Opinion; all is disputed where every thing is enforced. Laws should be tuned in unison with Manners; and

(s) 1 Bl. Com. 50.

(t) Ibid.

(u) Ibid. p. 51.

(x) Locke on Government, part 2, § 212., cited in 1 Bl. Com. ubi supra.

(y) Com. Jour. 7th Feb. 1688.

(z) Tyndal's Cont. of Rapin, fo. 71.

(a) Burke's Address to King Geo. 3d.

Legislators should modify their Opinions and fashion their Actions to the Spirit of the Age in which they live; and to that Spirit even the Laws themselves, if intended to be satisfactory and useful, must be adapted.

The only Ground, however, for a legislative Alteration (*b*) of any legal Establishment is this, that he who proposes it finds the Inclinations of the Majority of the People concurring with his own Sense in favour of the Change. If Laws be defective (*c*), if Abuses have grown up, and this be without Hesitation admitted, it is the Duty of every one to endeavour to remedy them, and introduce a System of impartial, speedy, and inexpensive Justice. No practical Man, however, will interfere with a defective System, without being able to introduce a better in its Stead.

“ Still as you rise, the State exalted too,
 “ Finds no Distemper while 'tis chang'd by you —
 “ Chang'd like the World's great Scene! when, without Noise,
 “ The rising Sun Night's vulgar Lights destroys.”

Burke gave this Quotation (from Waller's beautiful Panegyric on Cromwell) as a Compliment to the Memory of the Protector; and the present Right Hon. Secretary of State for the Interior of the British Realm, famed alike for his legal Improvements and political Integrity, not only repeated, but entirely assented to it; declaring at the same Time his Conviction, that the Principle on which all Laws should be founded ought to be, not to introduce a System which might appear perfect to a Philosopher, but a System which should take into Account all the different Circumstances of Society, without which no Alteration could be effectual. Indeed nothing is more true than that Laws are not to be judged so much by their apparent Consistency or philosophical Propriety as their peculiar Adaptation to the Time. This is fully illustrated in the History of the Laws of England. (*d*) Of these Laws it has been justly said (*e*), “ View “ the whole Establishment of the Constitution. Regard the Civil Government “ as it respects the Dominion of the King, the Estates and Real Property of “ the Subjects, and the Administration of the Laws themselves. Look at the “ Military Government as regards the Land or Naval Forces of the Realm. “ Turn your Eye to what Point of the System you will, — whether to the “ Foreign Relations of Great Britain, adopted for the Preservation of Peace “ Abroad, or to the Domestic Administration, to preserve the Respect of the “ People to constituted Authorities — to the Fiscal Administration, for sup- “ porting the Financial Concerns of the State, or to the Military Arrangements, “ for furnishing a Protection and Defence for the whole, — they may not “ shrink from Comparison with the Laws; no such odious Comparison is “ made. Those Institutions were all framed by revered Authorities; but, “ without Extravagance or Exaggeration, the whole Support of the whole “ System is the pure and free Administration of Justice between Man “ and Man.” But to pursue the Subject. The Common Law of Eng- land, says Lord Coke (*f*), is nothing else but Reason gotten by long Study, Observation, and Experience, and not of every Man's natural Reason; for “ *nemo nascitur artifex* :” a Truism, it might be supposed, that would not easily be doubted, not only in regard to Law, but also in respect to Equity as administered in England in Courts of that Name, which, according to Sir W. Blackstone (*g*), is a laboured, connected System, governed by established Rules, and bound down by Precedents, from which those Courts do not depart, even though the Reason of some of them be liable to Objection. But the legal Genius of Upper Canada, spurning dull Labour and hard plodding Men, having been parliamentarily (*h*) invoked, did not, like Minerva, burst the rassy Barriers of the Skull, but taking Advantage of the evident Emission of some of her attendant Spirits from that Tower of Strength, entered the Breach thus made, and formed at once Six Barristers and Attornies. Thus also the

(b) See Burke's Speech on the Acts of Uniformity.

(c) Mr. Peel's Speech on Reform of the Law, House of Commons, 7th Feb. 1828.

(d) Mr. Sugden's Speech on the State of the Law, in the British House of Commons, 23th Feb. 1828. See also the Conclusion of Mr. Secretary Peel's Speech on the same Occasion.

(e) Mr. Brougham's Speech on the State of the Law, House of Commons, 7th Feb. 1828.

(f) Co. on Lit. 97 b.

(g) 3 Bl. Com. 432.

(h) Provincial Stat. 43 G. 3. c. 3.

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Two Senior Judges, not doubting, it is presumed, that the Sister Spirit of Equity (though her benign Influence had never hitherto irradiated the Province, or shed its Halo round their Heads,) would be equally propitious *when duly summoned according to Law* (i), and fortified by the Opinion of the subordinate legal Officers, der'ared themselves individually competent, in addition to the Discharge of their legal Functions, to hold a Court of Equity at fixed Periods, where, in their own emphatic Language, "equitable Causes alone should be "heard and adjudged." To revert to the Laws of England; they are divided into Two Kinds, (k) First, of the unwritten Law, which includes not only general Customs, or the Common Law properly so called, but those more particular Laws and Customs applicable to certain Courts and Persons. And secondly, of the written Law, consisting of Statutes contained in Acts and Records of Parliament, which Sir Matthew Hale confines to such as were made within Time of legal Memory; which, as the Law now stands, is since the Beginning of the Reign of King Richard the First. But it is proposed (l) that the Law in this Respect should be altered, and that the Time of legal Memory shall be reduced to a reasonable Period. Both the Common and the Statute Law flow originally from the same Source; the Statute Law being the Will of the Legislature remaining on Record; the Common Law, nothing else but Statutes anciently written, but which Time has destroyed; and as all the Law began by Consent (m) of the Legislature, it is the same Thing whether it be now Law by Custom and Usage, or by Writing. Whatever is ancient and venerable in our Constitution (n) — Royal Prerogative, Privileges of Parliament, Rights of Elections, Authority of Courts, and Trial by Jury — must have been modelled according to the Occasion. It is impossible it could be otherwise than that Matters so elaborate and artificial should have been not the Work of Chance, but Subjects of Institution. The Common Law, in its largest and most comprehensive Signification, includes as well the written Statutes as the immemorial Customs and Usages of the Realm, and, as such, is the Birth-right of every Englishman, who is naturally entitled to the Protection of those Laws under which he was born; in its stricter and more usual Acceptation it means that Law by which the Proceedings of the King's Courts of Justice are directed and guided. It is said to be called (o) "the Common Law," because it is the Common Municipal Law, or Rule of Justice in the Kingdom. The Origin of it was said by Lord Hale to be as undiscoverable as the Source of the Nile was formerly supposed to have been, and without Doubt it is involved in considerable Obscurity; but, like the Effect of the Mantle used by the Painter to conceal the Expression of that Feeling which he could not delineate, the very Obscurity excites a greater Interest in the Examination of those Features which remain unveiled. And surely there can scarcely be an Object of Curiosity more rational than the Origin and Progress of those Laws under which we live. Political and Military Relations are, for the greater Part, Accounts of the Ambition and Violence of Mankind. The History of the Law is the History of Justice; and nothing can be more instructive than endeavouring to search out the first Appearances of Jurisprudence (p); to observe the first Principles of Right springing up, involved in Superstition, and polluted with Violence, until by Length of Time and favourable Circumstances it has worked itself into Clearness: the Laws, sometimes lost and trodden down in the Confusion of Wars and Tumults, and sometimes over-ruled by the Hand of Power; then victorious over Tyranny, growing stronger, clearer, and more decisive by the Violence they had suffered; enriched even by those Foreign Conquests which threatened their entire Destruction; softened and mellowed by Peace and Religion; improved and exalted by Commerce, by social Intercourse, and by that great Opener of the Mind, ingenious Science. Most peculiarly gratifying and useful must this Employment be in a new Country, whose Laws and Institutions, still in their Infancy, yet may so be modelled as

(i) See the joint Opinions of Chief Justice Campbell and Mr. Justice Sherwood, and those of the Attorney and Solicitor General, on the Erection of a Court of equitable Jurisdiction in this Province.

(k) See Hale's Hist. Com. Law, c. 1. p. 1—4., and c. 2. p. 27. et seq.

(l) See the Solicitor General's (Sir N. C. Tindal) Speech on the Reform of the Law.

(m) See 2 Wils. Rep. 348. 351.

(n) See Hale's Hist. Com. Law, c. 2 & 3.

(o) See Burke's Speech on Prosecutions for Libel.

(p) See Burke's animated Frag. of an Essay towards an History of the Laws of England.

to avoid the Imperfections, and reap the Riches of that Experience which, surmounting even the Sports of Time, must endure for ever. The present System of the Laws of England, like its Language and its Learning, is of a very mixed and heterogeneous Description, in some respects its own, in more borrowed from the Policy of Foreign Nations, and compounded, altered, and variously modified, according to the different Necessities which the Manners, the Religion, and the Commerce of the People have at different Times imposed. Our Laws, says Lord Bacon (q), are mixed as our Language; and as our Language is so much the richer, the Laws are the more complete. I shall endeavour briefly to sketch the Outline of these Changes and Improvements, on account of their intrinsic Value, and to be the better enabled to comment on the existing Laws of Upper Canada — Laws which are founded, and in a great Measure dependent upon, and almost inseparably connected with, the Laws of England. Proximity of Situation, and Resemblance in Manners and Language, afford abundant Proof that Britain was first peopled from Gaul. When this took place is a Matter of Uncertainty. In the first rude State of uncultivated Countries, as Society is not close or intricate, and Property is of little Value, Liberty subsists with few Restraints, and there are but obscure Lines of any Form of Government. But though there is then but little Authority in the Magistrate, there is often great Power lodged, or rather left, in the Father; for as among the Gauls, so among the Britons, he had the Power of Life and Death (r) in his own Family, over his Children and his Servants. With respect to the Wife, if indeed the Bond of Marriage subsisted in such barbarous Times, the Husband, it would seem, had the same Power; at all Events, after the Arrival of the Romans, according to the rigorous Spirit of their ancient Law, which is said to have originated with Romulus, the Husband, who, as *paterfamilias*, had the Sovereignty of the Mansion, (*dominus qui in potestate habebat*), might, in the Plenitude of his Power, dismiss (s) his Wife at Pleasure, and without Controul, and the Wife had no Redress against him; as in case of Adultery, he had even the Power of Life and Death. This Supremacy of the Husband does not seem very extraordinary; and Dionysius Halicarnassus says, that the Wife was equally punishable by the Husband for the Crime of drinking strong Liquors — a Law to which is attributed the Reason for the Ladies saluting their Relations, that they might convince them, by their Breath, that they had not offended against the Custom; and it is supposed that the old English Custom of saluting the Bride (t) immediately after the Wedding, is derived from this Practice of the Romans. That Attention which is ever due to all that relates to the loveliest Part of the Creation, will perhaps excuse this Digression. To return to the ancient Britons. The Druids or Priests (and Justice was in all Countries originally administered by the Priesthood (u), which was considered, in early Society, to have more than human Power in enforcing Laws,) decided all Causes of every Description among Freemen and Heads of Families. They summoned and dissolved all the Public Assemblies; they alone had the Power of Capital Punishments, and the sole Execution of whatever Laws subsisted among this People. These Druids were of both Sexes (x); they were kept entirely distinct from the Body of the People; and there was a Class of them called Bards, who delivered in unwritten Songs, which they committed to the Memory of their Pupils, the History and Customs of their Country. Of their Institutions but few Traces remain; though it is said that to them may be attributed the portable Quality of that Land which is known in England as Gavelkind, and the ancient Division of the Goods of an Intestate, established in later Times by the Statute of Distribution. (y)

Such was the State of Things, when, according to the Poet —

“ The British warrior Queen,
Bleeding from the Roman Rods,
Sought, with an indignant Mien,
Counsel of her Country's Gods,” — *Cowper's Boadicea.*

(q) See this Quotation from his Proposal for a Digest, cited in 1 Bl. Com. 64.

(r) Burke's Abr. Eng. Hist.

(s) Sum. Rom. Law, 176.

(t) Ibid. note.

(u) Dig. lib. 1. tit. ii. De Orig. et Proc. Jur.

(x) Burke's Abr. Eng. Hist.

(y) 4 Bl. Co. . . 408.

The

The Roman Law prevailed in the Colonies (z) which that Empire possessed in Britain, so long as the Imperial Power continued to maintain them. Cesar, when he carried his Arms to that Island, is said to have found its Inhabitants using the same Religion, the same Government (a) and Customs, as the Gauls before their Subjugation. Gaul and Britain, subdued by the same Legions, fell Victors to the Vices they acquired from their Conquerors. Thus were the former unable to resist the Inroads of the Burgundians, the Viso-Goths, and the Franes; and the latter were left by the Romans without Defence against their Saxon Invaders.

* But the devouring Flood
No more endur'd Controul, when to support
The last Remains of Empire (b) was recalled
The weary Roman, and the Briton lay
Unner'd, exhausted, spiritless, and sunk.
Great Proof how Men enfeeble into Slaves!
The Sword behind him flash'd; before him roared,
Deaf to his Woes, the Deep." (c)

The Roman Law seems utterly to have expired with the Extinction, indeed almost with the Decay, of the Imperial Power in Britain, and even before the Establishment of the Saxons. The last Forces of the Empire which were left in England, consisted chiefly of Batavians and Germans. The Saxon Intruders were also of German Origin, and their Manners and Government similar to those of the People they subdued. But the Victors possessing the supreme Power, did not assume the Laws of the Country, but imposed their own Laws on the vanquished. Each, however, springing from the same Source, tended materially to strengthen and perpetuate the Features of the German (d) Institutions in the Country. In the Year of Christ 600, and 150 Years after the coming of the first Saxon Colonies into England, Augustin, and the Missionaries by whom he was accompanied from Rome, were introduced to Ethelbert (e) King of Kent, who speedily became a Convert to the Christian Faith. These Strangers at the same Time introduced the Use of Letters; and impressed on the King's Mind the superior Advantages of the Roman Civil Institutions, which were written and permanent, to the Laws of his own Kingdom, which consisted merely of the oral Traditions of the Country. Ethelbert, in consequence of this Report of the Roman Method, and in Imitation of it, first digested the most material Customs of his Dominions into Writing, adding only from the Roman Law some Regulations for the Encouragement and Support of the new Religion. These Laws (f), written in the Language of the Nation at that Period, still exist. Edric and Lothaire, the Successors of Ethelbert, followed his Example in giving written Laws. Ina, King of the West Saxons, was considered the greatest Legislator of the Times in which he lived, and his Laws also still subsist. These Laws are all extremely rude, and seem principally designed for the Preservation of the ancient Customs. Of the Collection of Laws said to have been made by Offa, King of the Mercians, no Trace appears to be now extant. Egbert, who succeeded to the Throne of Wessex, which had formerly been filled by the celebrated Ina, succeeded in bringing all England under his Dominion (g), made the Welsh tributary, and carried his Arms with Success into Scotland. He then assumed

(z) For the System of Government of the Roman Colonies settled in Britain, and the Method used to preserve the Subjection of the Inhabitants, see Burke's *Abr. Eng. Hist.* c. 3.

(a) De la Croix on the Constitution of England.

(b) The Roman Empire being miserably torn by the Northern Nations, Britain was for ever abandoned by the Romans in the Year 426 or 7.

(c) The Britons, applying to Ælius, the Roman General, for Assistance, thus expressed their miserable Condition: "We know not which Way to turn us. The Barbarians drive us to the Sea, and the Sea forces us back to the Barbarians; between which we have no Choice of Two Death, either to be swallowed up by the Waves, or butchered by the Sword." See Thompson's *Liberty*, part 4. l. 656. and the Notes.

(d) De la Croix, *ubi supra*.

(e) *Abr. Eng. Hist.*, *ubi supra*.

(f) Lamb. *Archaon. Leg. Ethel. and Wilkin's Angl. Sax. Laws*.

(g) "In many a Field, by Civil Fury stain'd,
Bled the discordant Heptarchy, and long
(Educing good from Ill) the Battle groan'd,
Ere, Blood-cemented, Anglo-Saxons saw
Egbert and Peace on one united Throne."—*Thomson's Liberty*.

the Title of Monarch of all Britain ; but the tranquil Enjoyment of his Victories was not of long Duration. About the Year 832, the Danes, who had previously in scattered Parties begun to make those formidable Incursions and Settlements which so long disturbed not only the Peace, but even the very Laws and Customs of the Island. These Invasions continued during the subsequent Reigns of Ethelwolf, Ethelred, and Alfred. Alfred (a Name for ever resplendent in the Annals of his Country) subdued these Intruders in Northumberland, and made them tributary in East Anglia, where they had formed regular Establishments, and expelled them from all other Parts of his Dominions. But the Memory of the Invaders was perpetuated by their Customs and Institutions ; and the *Dane-lage* continued in force in the Part of the Country inhabited by these Invaders until its subsequent Consolidation with the *Merchen* and *West Saxon-lage*, and the Reduction of them all into one Body, attributed to King Edward the Confessor, though said to be evidently of a much later Date. (*h*) With respect to the *Dane-lage*, however, from the League between Alfred and Guthrum it appears, that the Danes took their Laws from the English, and accepted them as a Favour ; but without Doubt they incorporated with them many of their own peculiar Customs ; and although they may have retained the great Outline of the Laws which they are said to have adopted, yet must the Fruit have necessarily varied according to the Nature of the Scion engrafted on the native Stem. Alfred, as renowned in Peace as victorious in War, revived, improved, and digested all the Saxon Institutions, and compiled that Code from the local Customs of the several Provinces of the Kingdom, called his *Dome-book*, and known under the more general Appellation of the *West Saxon-lage*. The *Merchen-lage* consisted of the ancient Constitutions of the Kingdom of Mercia, and obtained in the Neighbourhood of Wales, and is said (*i*) to have probably abounded with British Customs. To Alfred is generally attributed the Honour of being the Founder of our Laws. He made a general Survey and Register of all the Property in the Kingdom, by whom it was held, and of what it distinctly consisted ; justly said (*k*) to have been “ a vast Work for an Age of Ignorance and Time of Confusion,” and which has been neglected by more civilised Nations in more settled Times. It was called the Roll of Winton, and served as the Model of a Work of the same Kind afterwards made by William the Conqueror. He brought the whole Kingdom under a regular System of Government and Subordination, by dividing the Shire into Hundreds and Tithings, and compelling every Freeman to be entered in some Tithing, the Members of which were mutually bound for each other, for the Preservation of Peace and the avoiding Theft and Rapine. He is even said to have divided the Kingdom into Counties ; but it seems obvious that the Shires were never settled upon any regular Plan (*l*), nor were they the Result of any single Design. For securing the Liberty of the Subject, he introduced the Method of giving Bail, the most certain Fence against the Abuses of Power. All these peculiar Regulations were under the Influence and Administration of one supreme (*m*) Magistrate, the King ; in whom, as in a general Reservoir, all the executive Authority of the Law was lodged, and from whom Justice was dispersed to every Part of the Nation by distinct, yet communicating, Ducts and Channels. These perpetual Testimonies of his Wisdom remain unimpaired even unto this Day. Of Alfred may be said, as of Justinian (*n*), the vain Titles of his Victories are crumbled into Dust, but the Name of the Legislator is inscribed on a fair and lasting Monument. It has been observed, that the Reigns of weak Princes (*o*) are Times favourable to Liberty ; but Alfred, the wisest and bravest of all the English Princes, is the Father of their Freedom. This great Man was even jealous of the Privileges of his Subjects ; and, as his whole Life was spent in protecting them, his last Will breathes the same Spirit, declaring he had left his People as free as their own Thoughts. He not only collected with great Care a complete Body of Laws, but he wrote Comments on them for the Instruction of his Judges, who were then in general, by the Misfortune of the Time (*p*), *ignorant* ; and if he took care to correct their

(*h*) Abr. Eng. Hist. and Essay Hist. Law Eng.

(*k*) Burke's Observations on the Reign of Alfred.

(*n*) Gib. Decl. & Fall Rom. Emp., ch. 54.

(*i*) Ibid.

(*o*) Abr. Eng. Hist.

(*l*) 4 Bl. Com. 412.

(*m*) 4 Bl. Com. 411.

(*p*) Ibid.

Ignorance,

Ignorance, he was rigorous towards their *Corruption*. He enquired strictly into their Conduct ; he heard Appeals in Person ; he held his Wittena-Gemotes, or Parliaments, frequently ; and kept every Part of his Government in Health and Vigour. He seems, indeed, to have been that perfect Model of a Prince (*q*) which Sages and wise Men seem fond of delineating, rather as a Picture of their own Imagination, than supposing such a Character could ever exist. We leave with Reluctance a Theme so fascinating as the mighty Works of Alfred, dwelt upon, with the fond Partiality of an Englishman, perhaps too long, to pursue the History of those Institutions which, by his great Wisdom, were so happily improved and founded.

Inclosure, No. 11.

A plain Statement of a plain Case.

DOCTOR BALDWIN, Mr. Ketchum, Dr. Morrison, and others, take upon themselves to tell the Public, that Mr. Willis has been cruelly treated by the Government. They may *believe* this, *but they do not and cannot know* it. They think they can get some Number of Persons to take the Thing upon *their Word*, and let the *Facts* be what they may, their Purpose will then be answered. Their Government may be stigmatised as unjust, and some few People will be prejudiced against it. But let them consider, that such People of Upper Canada as think and act for themselves will look at all Sides of a Question before they decide, and that although Mr. Shephard may bring Half of the People of Vaughan and Markham to Town, and they and Mr. Ketchum's Friends should vote a great deal to be true which is wholly untrue, it will signify little with good and sensible Men, and will neither do Mr. Willis any Service or any one else any Harm.

These are plain Facts, and what will they make of them ?

Mr. Osgoode, a very learned and experienced English Lawyer, was sent out to Upper Canada more than Thirty-five Years ago, to frame proper Acts of Parliament for establishing our Courts. He did so ; and he brought in a Bill, and had it passed in 1794, forming the present Court of King's Bench. Mr. Osgoode was the first Chief Justice himself. There never were Two Puisné Judges sitting with him in Court. He soon went to Lower Canada, and then we had for a Time no Chief Justice, as was often the Case, from Sickness, Absence, or Death. Mr. Elmsley, Mr. Alcock, Mr. Scott, and Mr. Powell, were all English Lawyers, and have all been Chief Justices in Succession since Mr. Osgoode's Time. They have often sat in Term with One Judge when the other was absent, and Two Judges have sat for many Terms without the Chief Justice, from the Death or Absence of the Person holding the Office. We remember very well that the Court has been in this State for many Years together, because His Majesty did not find it convenient at once to supply the Vacancy. So Things went on, and nobody ever fancied that we must be without a Court whenever the Chief Justice could not attend. The Legislature never thought so — the Judges never thought so — the Bar, including Mr. Baldwin and Mr. Rolph, never thought so — and the People never thought so. Did they never read the Statute ? To be sure they did ; and they knew what it meant as well then as anybody can tell them now.

Well, in 1828 the Chief Justice Mr. Campbell asked for leave to go to England ; he had been more than Sixteen Years a Judge among us, and never had been absent from the Province for a single Term. His Health is very indifferent, and he wished to take a Sea Voyage, and to go to England, in the Hope of obtaining Benefit. Till Mr. Willis came out he never asked for Leave ; but when there were Two Judges well able to do the Duty, he saw no reason why he might not have an Indulgence, which Public Officers obtain in all Countries, for no Man is required to be a perpetual Prisoner in this or any other Colony. It is true, as the Papers state, that Mr. Baldwin tried to prevent his obtaining Leave ; and it is true also, that the Chief Justice would have staid, as he was pressed to do it, if there had been any Certainty of his being

(*q*) See Hume's Reign of Alfred.

well enough to attend his Duty; but there was too much Reason to believe that he would not be. I have heard it stated on good Authority, that the Chief Justice was requested by the Government to remain a few Weeks longer if his Health would permit, and every body who knows him knows that no Man was more steady in the Discharge of his Duty than he was, or more desirous of fulfilling the Orders of his Government, so far as he was able.

The Chief Justice went early in April, having made Arrangements to sail on the First of May. No Objection was made; some Cases perhaps were not decided as Mr. Baldwin wished; and after this Term was over the grand and very new Discovery was made, that without a Chief Justice we could have no Court. Every Judge, every Lawyer, and every body who has had any thing to do with these Matters must have known as much about the Court for Twenty Years past, as they can know now. If Mr. Baldwin or Mr. Rolph never read the Act they were practising under, what are we to think of their Industry?— If they did not understand it till it was explained to them by a new Judge, what are we to think of their Sense? If they did understand it then, as they do now, what are we to think of their Conduct? My firm Belief is, that they are all wrong now, and Judge Willis as wrong as any of them. I know he is not a better or more experienced Lawyer than Mr. Alcock was, or Mr. Elmsley, or Mr. Powell; and besides, for Seven Months of the Nine that he has been here, he has been of a different Opinion himself, and acted upon a different Opinion.

And now, if Mr. Willis, or Mr. Baldwin and his Son, thought there could be no legal Court on the First Day of the last Term, why did they put on their Gowns and go there? Was it to prove to the Public that they had no Right to be there? Or was it for the Pleasure of stating in a Public Assembly, that there was no Court in Existence to protect Life, or Character, or Property. Happily the other Judge, older than Mr. Willis, with much more Experience, and I must say with not less of Dignity or good Sense, was not to be puffed about by this new Wind. He chose to do, as he and every other Judge, and Mr. Willis among the rest, had done before; he declared that he had no Doubt of the Legality of the Court, and should continue to do his Duty.

Then it was, that Mr. Willis protested against Mr. Sherwood doing what he thought to be his Duty, and told him there could be no Court, and almost forbade him to adjourn, as if he really was annoyed, that Justice was likely to go on without him. Now surely Mr. Sherwood has as good a Right to an Opinion as Mr. Willis; and why Mr. Willis should not be content with giving his own Opinion, but should seem so desirous of over-ruling his Brother Judge, in order that Justice, in a Country like this, might come to an absolute Stand, I think wants explaining. So it was, however; and Mr. Willis, by way of further Consolation, told the Public, and among them the Radical Printers, who, by mere Accident of course, were all in Court with their Note Books ready for the Occasion, that he (One of His Majesty's Judges) had gone to the Council Office to enquire, and he found that the Chief Justice had gone Home without proper Leave, and that he had forfeited his Office. Some other Officers of Government, he said, had forfeited their Offices too. Having performed this last Act of *judicial Duty*, and seeing that Mr. Sherwood intended to proceed in the Business of the Court, his Honour walked out, very much afraid, no doubt, (for he said so,) that all he had told the Public must produce some Public Excitement; but it did not. Mr. Rolph came down to help on the Concern, and finding that Things were likely to be unaccountably quiet, he and the Two Messrs. Baldwins, on one dread Morning took off their Gowns, and by a most alarming simultaneous Movement left the Court, protesting too, and sending their Protest to adorn the Columns of the Advocate and Freeman. Still there was no Confusion, and every thing was most alarmingly quiet, till at last these same Three Lovers of Peace, in despair, have taken to circulating inflammatory Handbills about the Country, calling a Meeting to consider of the "cruel Treatment of Judge Willis," Mr. Joseph Shephard and Mr. Ketchum the Tinner, and the Printers have been stirred up; but they are easily moved, that we know of old; and now I have to ask these Gentlemen these plain Questions:

1st. Which of them would take the Opinion of the other, on any difficult Point of Law that concerned their own Property?

2d. How did the Printers and Mr. Fothergill and many others happen to know, some Weeks beforehand, that there was to be no Court in July Term?

3d. What Judge before ever went to Court to tell the Public that there was no Court, and to utter a Lamentation that our Lives and Fortunes were in Danger; to be published afterwards, *verbatim et literatim*, in all the Radical Newspapers?

4th. Is it true, as I have heard, that Judge Willis went and shook the Chief Justice very cordially by the Hand, wished him a good Voyage, and sent Bundles of Letters by him?

5th. Was it very kind or very honourable in Mr. Willis to go when the Chief Justice was off, and hunt up Stories, in the Hope of depriving him of his Office?

6th. Is it true that Mr. Willis has told many People that he intends to be Chief Justice?

7th. What must he think of his Government, if he supposes that he is likely to succeed by such Means?

8th. What is Mr. Rolph doing here just now, when his Constitucnts are passing Judgment against his Conduct in his own County?

9th. Who are Messrs. Baldwin, Ketchum, and Shephard, and where are the Proofs of their Wisdom or Patriotism?

Inclosure, No. 12.

Extract from the *Kingston Chronicle*, 28th June 1828.

We are indebted to a legal Friend for the following Remarks upon the Address of Mr. Justice Willis:—

IN no Instance within this Province have we ever known a Case which more imperatively called for the Exercise of manly Criticism than the one now before us. The Judgments of the Superior Courts of Law in England have frequently engaged the Public Attention; and have often been subjected to that Freedom of Discussion which is so essential to the Well-being of Society in a free State. The happy Results which have been produced in England by the unrestrained Discussion of legal Questions and Opinions, through the Medium of a free Press, have never been more sensibly felt and acknowledged than in the passing of the Act in the Thirty-second Year of His late Majesty's Reign, respecting the Rights of Juries on Trials for Libel. With the Example, then, of the English Press before us, we the more readily enter upon the Execution of a Task which might otherwise be considered presumptuous and irreverent.

The Subject upon which we venture to remark is, the Address delivered by the Honourable Mr. Justice Willis, One of the Judges of the Court of King's Bench in this Province, at the Opening of that Court on the First Day of the present Trinity Term. As this Address will be found in another Part of our Paper, our Reference to those Remarks of the Learned Judge, which, in our humble Opinion, call for Observation or Censure, will be made to the Address itself. The Learned Judge seems to insinuate, that the Powers of the Judges in this Country are dissimilar to those of the Judges of the Court of King's Bench in England, and therefore that the Analogy between the Powers of these Courts does not hold. Upon this Subject we beg leave to differ with the Learned Judge, and we offer the Sentiments of Judge Blackstone in support of our Opinion:—"The Court of King's Bench," says Judge Blackstone, 4 Com. 41. ("so called because the King used formerly to sit there" in Person, the Style of the Court still being *coram ipso rege*;) is the Supreme Court of Common Law in the Kingdom, consisting of a Chief Justice and "Three Puisné Justices," &c. At Page 42, the same Learned Commentator says, that "the Jurisdiction of this Court is very high and transcendant." From this Statement of Judge Blackstone it appears that it is the Court of King's Bench which possesses Authority in England, and not the *Individuals personally,*

sonally, any more than they do in this Country. But, as we do not intend to extend our Remarks to all such Parts of the Learned Judge's Opinion as we think erroneous, we shall shortly state the Arguments which we propose to maintain, in opposition to some of those contained in the Address.

In the first place we propose to shew, from the Constitution of the Court of King's Bench in this Province, that the Powers of the Court are in all Respects equal to those of the Court of King's Bench in England, and that they may be exercised in the same Manner; secondly, that from the express Language of the Provincial Statute erecting the Court, the Manner of exercising these Powers in *certain Cases* is clearly and positively pointed out and authorized; and lastly, we intend to make a few passing Observations upon that Part of the Address relating to the Leave of Absence which should be obtained by all the *Patent Officers* of the Government leaving the Province.

In the first place, we beg to premise that, prior to the passing of the King's Bench Act, the Laws of England were introduced into this Province by an Act of the Provincial Legislature. The King's Bench Act provided for the Administration of those Laws in a Manner similar to that observed in the highest Common Law Court in England. The Law of England being thus established and in force in this Province, the Act, erecting a Court for the Administration of that Law, was not, as is said by Lord Coke of the 31 Ed. 3. c. 12. introductory of "a new Law," but in Affirmance of the then existing Law. The Act constituting a Court of King's Bench in this Province, possessing all the Powers of the Court of King's Bench in England, did no more *change* the Constitution of the Court, than the Act introducing the Laws of England into this Province did the Laws which were thereby introduced, except in Cases wherein the Alteration was specifically pointed out. It must be recollected that as our Legislature is modelled upon that of England, though constituted by Act of Parliament, they follow implicitly the Usage of the British Parliament, and that in Cases wherein no Provision is made by our Constitutional Act. It may then be objected, with at least equal Propriety, against the Legislature as against the Court of King's Bench, that they, being erected into a Legislature by an Act of Parliament, and possessing no original or incidental Rights, do not confine themselves within the Powers granted by such Act. The Legislature of Upper Canada, it is well known, contend that as a Legislature, they have a Right to all the *Privileges* of the British Parliament, without any Enactment of their own for that Purpose. The Court of King's Bench have hitherto also considered, that being a Court of King's Bench, and expressly invested by an Act of the Legislature with "all such Powers and Authorities as by the Law of England are *incident* to a superior Court of Civil and Criminal Jurisdiction," and being also authorized to proceed in all Actions in their Court, "by such Process and Course as shall tend, with Justice and Dispatch, to determine the same," and also to give Judgment thereupon, "in as full and ample a Manner as can or may be done in His Majesty's Court of King's Bench in England," that they possess in all Respects the same Powers possessed by the Court in England, and that they can *exercise* those Powers in the *same Manner* as they are exercised there. Proceeding upon this Supposition, the Court in this Country has uniformly been governed by the *Practice* of the Court in England, unless otherwise provided for by the Act. The Practice in England is, for the whole Number of Judges to sit in Court when they can; but for *Two or even One Judge*, in the unavoidable Absence of the other Judges. This Practice has been observed also in this Country, and in our Opinion with perfect Propriety. The Court in England consists of a Chief and Three Puisné Justices; that is to say, it is composed of, &c. — a much stronger Expression than the one used in our Act. Our Act declares, "that His Majesty's Chief Justice, together with Two Puisné Justices, shall *preside* in the said Court." To preside, is "to be set over, or to have Authority over," according to Dr. Johnson; consequently, to preside in a Court is to have Authority over a Court, or the Business of a Court. To form a just Judgment of the Meaning of any Word or Expression in any Paragraph it is absolutely necessary that the whole Paragraph be taken together, and the Meaning gathered from the Tenor thereof. This is particularly necessary with respect to the Construction of Acts of Parliament; "for every Statute ought to be expounded, not according to the *Letter*, but according to the *Intent*."

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“*Intent*.”—2 Rol. 318. Bl. Com. 353. 363. This being the Rule with respect to the Construction of Statutes, we have only to observe, that the King’s Bench Act erects a Court of the same Name as the Supreme Court of Common Law in England, and confers upon it all the Authority and Powers of that Court; and in addition, states the Number of Judges which shall compose the Court so constituted. Were the Constitution of this Court in derogation of the Common Law Courts of England, or were the Court erected with Powers opposed to those Courts, then indeed the Court would be bound to conform its Practice to the Law by which it was erected. The contrary, however, being the Case, and the Constitution of our Court being a mere Copy of that of the Court of King’s Bench in England, it is not only entitled to the same Powers, but it is also justified in following the Example of its great Prototype in all respects. The Argument, therefore, with respect to the Decision upon the 31st of Edward the Third, cannot have the least Weight in determining the present Question; for, in that Case, a new Court was raised, new Judges were appointed, and a *new Law* was introduced; but in the present Case the Court is not opposed to existing Institutions: it is the Establishment of an old System, according to the general Law of England, introduced into a new Country. Besides, the Language of the Statute of Edward differs essentially from that of our Statute; it requires that “the Chancellor and Treasurer shall cause to “*come before them, &c. taking to them,*” &c.

The *express Language* of the King’s Bench Act, respecting the Manner in which the Powers of the Court may be exercised, next claims our Attention. By the Fourth Clause of this Act it is enacted, “that all Writs to be sued out “of the said Court shall issue in the King’s Name, and be tested by the Chief “*Justice, or in his Absence* by the Senior Judge of the Court,” &c. That the *Absence* of the Chief Justice is clearly contemplated by this Enactment must, we apprehend, be apparent to all Mankind. By *Absence* must be meant such *Absence* as the Chief Justice may obtain from the Government, even if it should be extended to the Space of more than One Year. But does the Learned Judge contend that the Business of the Court, the Interests of the Suitors, and the general Administration of Justice should be suspended during such *Absence*? Surely not; for no Opinion so palpably injurious and absurd can for a Moment be seriously entertained. Such then was the Constitution of the Court in 1794, and such did it in all Respects continue until 1822, when it was considered that many of the Provisions of the first Act might be modified with Advantage to the Public. The Constitution of the Court, in so far as it respected its Powers and Authority, remained untouched; a slight Alteration was made in the Periods for holding the Court, and the Fourth Clause of the new Act also provided for the *Absence* of the Chief Justice, though in Language a little different from that used in the first Act. It enacts that the original Process shall be “tested in “the Name of the Chief Justice or Senior Puisné Judge of the said Court “*for the Time being;*” evidently meaning in the *Absence* of the Chief Justice, for when present all Writs are to be tested in his Name. Were the Fourth Clause of the last Act entirely omitted, at least so much of it as respects the Puisné Judge, it would not have altered the *Practice* which had obtained under the former Act, although partially repealed. For the new Law was a mere Modification of the *Practice* of the Court, not of its Principles or Constitution; consequently, that which remained unprovided for by the new Act would have received the same Construction as if no new Act had been passed, or such Construction as the Court might have chosen to put upon it. But if, by the first Act, the Chief Justice might absent himself without any Interruption of the Business of the Court, such *Absence* was allowed, because the Presence of that Judge in the Court of King’s Bench in England was not absolutely necessary to the due Determination of any Cause pending in that Court. It proceeded upon the Principle and Practice which obtain in that respect in England; and unless the subsequent Act changed this Principle, it would still prevail without any particular Notice respecting it.

As to what is stated by the Learned Judge respecting the Clauses of the last Act authorizing the Appointment of Commissioners of the Court of King’s Bench, and requiring the Presence of the Chief Justice before any Commission can issue, it is only necessary that we should state, for the Information of those

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who are ignorant of the Fact, that the Law (29 Car. 2. c. 5.), under which Commissioners are appointed in England, requires the Presence and Sanction of the Chief Justices of the several Superior Courts in England before such Commissions can issue. This Statement of the Learned Judge does not, therefore, in the least strengthen his Argument, but only shows that he was not aware of the Law in England respecting the Appointment of Commissioners there.

The Observations of the Learned Judge relative to the necessary Leave of Absence which should be obtained by Officers of the Government before leaving the Province now claim our Notice; and not because we intend to oppose the Statement of the Learned Judge, but because we consider his Opinion uncalled for and extra-judicial. Indeed we might with great Truth declare our solemn Conviction that the whole Proceeding of the Learned Judge bears evident Marks of a strong Desire *ad captandum vulgus*. Whether such was his principal Object, it is not meet that we should declare; but that it bears strong Evidence of a Desire to obtain popular Applause, we cannot conceal. Were this the only Instance in which the Learned Judge had discovered an Aberration from the Track of Prudence and Propriety, we should have said "*hominis est errare*;" but when we bear in mind his Acquiescence in the most extraordinary and unconstitutional Proceeding of the Majority of the House of Assembly at its late Session in endeavouring to pass an *ex post facto* Law, appointing the Learned Judge a sort of Umpire between the other Judges upon a Point long since settled by the Court, we cannot but add, "*insipientis est perseverare*."

That the Learned Judge should publicly volunteer an Opinion upon a Point certainly of Importance to the Individuals concerned, but of no Moment to the Public generally, we do indeed think most extraordinary. What have the Public to do with the Manner in which the Chief Justice or the Solicitor General, or the Honourable James B. Macaulay, obtained their Leave of Absence from this Province? So far as it concerned the Public, *eui bono* was the Information publicly vaunted forth in a Court of Justice assembled for the sole Purpose of deciding upon such Matters as should be moved *before* them, and not *by* them.

The Opinion of the Learned Judge upon the 22d and 54th Geo. 3. as *penal* Statutes cannot be passed over without a Remark. The Learned Judge declares that as they are *penal* Statutes, they must be construed strictly *against* those Officers of Government who have made themselves obnoxious to their Provisions. This Declaration from a Judge possessing, in his own Opinion at least, more legal Information than all the Judges who have preceded him, from Chief Justice Osgoode down, does, we confess, increase our Scepticism of his extraordinary Abilities. So far from finding any Law to warrant the Opinion of the Learned Judge, we find on the contrary that penal Statutes must be construed *strictly* for the *Benefit* of Offenders, and *not* against them: Thus the Statute 1 Ed. 6. cap. 12. having enacted "that those who are convicted of stealing Horses should not have the Benefit of Clergy;" the Judges conceived that this did not extend to him that should steal but *One Horse*. A Construction of the like Strictness and Humanity was put upon the 14th Geo. 2. c. 6. against the stealing of Sheep or other Cattle. But it is useless to multiply Decisions upon a Point well known to every *Tyro* in the Profession; we shall therefore forbear, with this Recommendation, however, to all volunteer and extra-judicial-opinion-giving Judges and others, to make themselves Masters of their Subject ere they appear before the Public; *cacoethes scribendi, aut loquendi, aut carpendi*, to the contrary notwithstanding.

Inclosure, No. 13.

Extract from the *Gore Gazette* of 5th July 1828.*Court of King's Bench.*

WE have hitherto abstained from offering any Remarks upon the extraordinary Events which have marked the Proceedings of the above Court since the Accession of Mr. Justice Willis to the Bench of Upper Canada, partly on account of the supposed Connection of the Editor of this Paper with one of the Cases which have been brought before that Court, and partly because we were unwilling to make the Conduct of a Judge, to whose Office the highest Degree of Respect is and ought to be attached, the Subject of Newspaper Animadversion. But the Events which have transpired in that Court within the last few Days are so extraordinary in themselves, have added so much to the Excitement which had previously been created, and have called forth from some of the Presses in York such an unusual Torrent of inflammatory Abuse, undeserved and misplaced Abuse, as we think, upon one Party, and of adulatory Encomiums, equally undeserved and misplaced Encomiums, as we also think, upon the other, that we feel ourselves fully justified in waiving those Considerations of mere Delicacy toward the Judge, for the Purpose of stating candidly, but unreservedly, the Views which we have taken of the Conduct of Mr. Justice Willis.

Among the many Qualifications which are necessary to fit an Individual to discharge the important Duties of the Office to which Mr. Willis has been appointed, an intimate Knowledge of the Laws which he is about to administer, a sound Judgment, and the strictest Impartiality, are assuredly the most conspicuous. There are a Thousand other necessary minor Qualifications, of which that courteous and respectful Bearing towards his professional Brethren, always observed in the British Courts, is not the least essential. How far the Possession of these indispensable Qualifications by Mr. Willis has been indicated in his judicial Career in this Colony it is our Object to enquire.

The first Public Act of Mr. Justice Willis which attracted Attention is fresh in the Remembrance of our Readers. During the last York Assizes, Mr. Francis Collins, of the Canadian Freeman, complained to the Judge that he, Mr. C., had been indicted for Libel by the Grand Jury, at the Instance of the Attorney General, whom he accused of partial and vindictive Feelings toward *him*, while he, the Attorney General, had neglected his Duty, in not prosecuting the Solicitor General for Murder, and in not instituting a Criminal Prosecution against the Persons who had attacked Mr. M'Kenzie's Press. Upon these Accusations of Mr. C., not under Oath, Mr. Justice Willis reprimanded the Attorney General, whom he charged with not having performed his Duty as a Crown Officer, and whose Conduct he threatened to represent to the Home Government. Now, it did at that Time, and does yet, appear to us, that the Judge in this Instance evinced neither the legal Knowledge, the sound Judgment, or the Courtesy above alluded to. It is certainly not the Practice in England for Crown Officers to file Criminal Informations, or institute Prosecutions, except upon Affidavit or formal Complaint against the Accused. The Crown, even in Criminal Cases, is but the nominal Prosecutor, and the Crown Officer assumes the Charge of the Prosecution only upon the Complaint of the aggrieved Party, or, what is more usual, upon the Presentment of a Grand Jury, before whom the Complaint is first preferred. If the Friends of the deceased Mr. Ridout in the one Case, or Mr. M'Kenzie in the other, had taken either of those Steps, and there is no doubt but they would have done so, if they conceived that the Ends of Justice required it, it would then have become the Duty of the Attorney General, on behalf of the Crown, to conduct the Prosecution against the Accused; but surely it is neither consonant with Common Sense, or, we humbly conceive, with Law or Usage, for a Crown Officer to institute a Prosecution upon mere hearsay Evidence, or upon his own supposed personal Knowledge of the Case; when the aggrieved Parties are living on the Spot, with all the Power, and we may well suppose, with all the Disposition to make a Complaint, if Cause for it existed; particularly in the Cases in question, in which the Ends of Justice,

as has since been proved by the Second Trials, had been previously attained ; in one of which, indeed, the Parties were only accused of being Accessories to an Offence, of which the Principal had been previously acquitted by a Jury of his Country ; and the other, in which the Accused had already been tried and mulcted, upon the Confession of the Accuser, in a Fine of *Fifty* Times the Amount of the Injury sustained ! But it does appear to us that there was also a Want of Courtesy, not to say of Impartiality, in the Course pursued by the Learned Judge upon this Occasion. Mr. Collins, the World should suppose, was unknown to the Court ; and even were he known, his Character, as a Public Writer, we mean, would not, we apprehend, entitle his Assertions to much additional Consideration ; made as they were, without the Obligation of an Oath, and confessedly under the Influence of personal Resentment, on account of the Presentments which had been preferred against himself. Whether known or unknown to the Court, therefore, his Accusations, made under such Circumstances, could, we imagine, by no means justify the Learned Judge's Con-
 nect to the First Crown Officer of the Province, whose Character as a Public Prosecutor and a private Individual it is universally conceded is irrefragable, and whose Talents as a Lawyer, it is no less generally admitted, are of the highest Order ; while the Judge himself, if he has been correctly reported, had but a short Time before confessed in open Court, that *he* was but very little acquainted with Criminal Law. But apart from every other Consideration, an Officer of the Court ought, in common Courtesy, to be entitled to the *Protection* of the Bench from such Imputations as those in question ; at least until they were exhibited in a less questionable Shape ; a Proposition which was shortly afterwards sanctioned by the Judge himself ; for, after listening to all the Charges which Mr. Collins had to make, after directing him indeed to recite his Accusations against the Attorney General in open Court, the Judge told the same Person, immediately afterwards, when he was about to prefer Complaints against the Solicitor General, that he, the Judge, could not listen " to any Observations which were " calculated to asperse a Member of the Bar ; " and that if Mr. Collins had any thing to complain of, he must go before the Grand Jury ; a Course which, in our Opinion, was the only one which ought to have been dictated to Mr. Collins when he first called the Attention of the Court ; and we must say that we have never been able to discover either the Justice or the Impartiality of Mr. Justice Willis, in encouraging Mr. Collins to proceed so far with his Harangue, before this very necessary and proper Intimation was given to him. The Course taken by the Judge in this Instance is more difficult to account for, when it is viewed in connection with other Circumstances, which it would be the merest Affectation to suppose that Judge Willis was not just as well acquainted with as every other Person in the Province. The Newspaper published by Mr. Collins had for many Weeks prior teemed with the most vehement Attacks upon the Persons alluded to — Attacks which, for Grossness of Language and Virulence of Spirit, were, perhaps, altogether unparalleled. Avowedly stimulated by a Spirit of Revenge, on account of a personal Affront from one of the Parties, he had laboured to inflame the Public Mind, by propagating, with the most exaggerated Colouring, the Charges in question, and by invoking the severest Punishment known to the Law on the Heads of the Persons whom he accused. The Tale, in fact, which Mr. Collins recited to Mr. Willis in Court had been reiterated so repeatedly in the Columns of the Freeman, that his greatest Admirers, offended with its Indecency and wearied with its Monotony, had ceased to peruse it. When, we say, the Course adopted by Mr. Justice W. upon this Occasion is viewed in connection with those Circumstances which we hazard nothing in assuming that he was perfectly well acquainted with, his Conduct does appear to us to be inexplicable. Mr. Justice W. knew how much, or rather how little Foundation there was for the Charges which formed the Burden of Mr. Collins's Complaint ; he knew how, and for what Reasons, the Individual before him had laboured to propagate those Charges ; he must, or ought to have known, that by bestowing his Countenance upon this oft-repeated, but then nearly worn-out Tale, he would impart a Consequence to the Individual, and an Importance to the Imputations, which they neither intrinsically merited, or, without his Countenance, could have acquired ; and, above all, he surely *should* have known that, by making such a Tale

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so made by such a Person the Ground-work for a Public Rebuke of the Attorney General, he was imparting a Poison to the heretofore comparatively harmless Arrows which it is the Business of the Persons in question to aim at that Officer, and giving to the disaffected generally an Accession of that Influence which, if we are not very much mistaken, was at the Period in question very fast subsiding. We speak of the Effects of Judge Willis's Conduct, not of his Intentions. We are confident that he could not, and did not intend to produce such Effects; but we say that such Effects have been produced, and that the Course he pursued was calculated to produce them; and we infer, from a Review of the whole Premises, that Mr. Willis did not evince either the legal Information or the Soundness of Judgment which are so necessary to the proper Discharge of his high and responsible Situation; and this Inference is justified by the Result of the legal Proceedings which grew out of the Circumstances of which we have been treating. The Parties accused by

Mr. Collins, and for the Non-prosecution of whom the Judge had reprehended the Crown Officer, were put upon their Trials; the Solicitor General and Mr. Small as Accessories to a Murder, (though the Principal had been indicted only for Manslaughter, and acquitted Eleven Years ago,) and they were declared not guilty, as every body knew they must be; and the Parties charged with a Riot on Mr. M^cKenzie's Premises (who had previously been tried on an Action for Damages, and fined, as we before stated, Fifty Times the Amount of the Damages sustained,) were again put upon their Trial, and of course convicted; but Mr. M^cKenzie stated, very ingenuously we conceive, that he considered the Ends of Justice to be amply satisfied by the former Verdict, and that he had no Wish to pursue the Matter any further; when the Judge, tacitly assenting to the Proposition, ordered the Parties to be discharged, upon the Payment of Five Shillings. Thus, so far as the Ends of Justice are concerned, Matters were left precisely where they began; and no other Effects were produced by these extra-judicial Proceedings of Mr. Willis, save the Gratification of Mr. Collins's Resentments, the breaking up of private Friendships, the Destruction of all Harmony between the Bench and the Bar, and numerous other Evils, which every generous Mind must long deplore.

For obvious Reasons we shall pass over the Proceedings in the following Term, and the Collision of Opinion which arose between the Two presiding Judges — Sherwood and Willis, which furnished the Presses before alluded to with ample Materials for enhancing the Public Excitement, and come at once to the still more extraordinary Events which occurred during the recent Trinity Term, premising, by the Way, that which is pretty generally known already, that during the whole of the Proceedings of the late York Assizes, Mr. Justice Willis presided alone; and that during the Easter Term he sat with Judge Sherwood in the Absence of the Chief Justice.

At the opening of the Court on the 16th Ult. Mr. Justice Willis expressed his Opinion that no Courts of King's Bench could legally be held in this Colony unless all the Three Judges were present; that since the last Sitzings of that Court he had examined the Provincial Statutes, and had discovered that in the Act of 34th Geo. 3. cap. 2., which established the Court of King's Bench in this Colony, it was enacted, that One Chief Justice and Two Puisné Judges should preside therein; that, in consequence, all that had hitherto been done by himself, and by the other Judges, when Three were not present, was "*altogether nugatory and void.*" He stated that the Court of King's Bench in this Colony owed its "Origin and Existence" to the Provincial Statute, and therefore its Constitution was altogether different from the Courts of Law in England. After which Mr. Willis proceeded to make a Number of Quotations from the English Law Books relative to the Constitution of the English Courts of Justice from the Time of William the Conqueror down to the present Period.

When his Remarks on this Subject were ended, the Learned Judge proceeded to call the Attention of the Court to the Manner of granting of Leave of Absence to the Public Officers of this Colony; he read an Extract from the British Statute, which requires that such Leave should be granted only by the "Governor in Council;" and then proceeded to state, that the Practice in this Province had been for the Licut. Governor alone to grant Leave of Absence;

sence; that, in his Opinion, the Absence of a Public Officer under such Circumstances "amounted to a Forfeiture of his Commission," "that his Appointment was to all Intents and Purposes void and of none Effect," and that a Resumption by such Person of his official Duties after such Forfeiture was illegal, and must be productive of the most serious Consequences. This is the Substance of the Opinions delivered by Mr. Justice Willis upon the Occasion in question. We are not Lawyers, and have no Pretensions to the Ability to speak to this Question as such; but upon a Review of the whole Circumstances the following Suggestions very naturally present themselves.

That there is an Irrelevancy between the Position taken by Judge Willis, regarding the Constitution of the Provincial Court of King's Bench, and the Arguments adduced in support of that Position. If its Constitution be "altogether different" from that of the King's Bench in England, and if it owes its Origin and Existence to the Provincial Statute alone, the Appeal to the numerous English Authorities on the Subject of the Manner in which the English Courts were originally constituted was unnecessary; and the Merits of Judge Willis's Opinions must be tried by a Reference to that Statute, which Statute enacts that "One Chief Justice together with Two Puisné Judges shall preside therein;" meaning, as we apprehend, that the Court should consist of that Number of Judges, and not that the whole Number of those Judges should preside together at the same Time; in like Manner as the Court of King's Bench in England consists of One Chief Justice and *Three* Puisné Judges, but in which we all know that it is not necessary the whole should preside at one Time. There is no doubt but the Framers of the Provincial Statute in question adopted the English Court of King's Bench as their Model, and intended the Constitution and Practice of the Court they were about to organize should correspond therewith. This appears to us to be a rational Inference from the Premises; and if so, the Opinion laid down by Mr. Willis, that Two Judges only cannot legally preside in this Court, must be erroneous, since nothing is more common than for the same Number to sit in the same Court at Home; and whatever Inconvenience may have been produced on a recent Occasion, from the Court being so constituted, and however much the Evils so produced are to be regretted, yet it by no means justifies the Inference that the Court itself was an illegal one.

With regard to Mr. Willis's Opinion on the Subject upon which he next addressed the Court, we look upon it in the first place to be an extra-judicial Proceeding, since he was not called upon, nor did any Necessity exist, for him thus publicly to give an Opinion on that Subject; and in the next place we apprehend that he has taken wrong Grounds. The British Statute from which he quoted says, that Leave of Absence shall only be granted by the Governor or Lieutenant Governor *in Council*, and not by the "Governor and Council," as reported in the Observer; and we presume it will turn out, that no Leave of Absence has been granted in any other Way than that *intended* by the Statute. And if so, Judge Willis may very justly reproach himself with having been the Cause of whatever Injury may result to Individuals or to the Country, from the Propagation of the Opinions which he advanced on this Subject.

Indeed, it is the *Consequences* of the Course which Mr. Willis has adopted, that are most to be deprecated. The most disaffected and disreputable Persons in the Country, who have long exerted themselves to inflame the Public Mind, for the Purpose of afterwards turning the Public Excitement to their own Account, but who, prior to the Events which we have been speaking of, were fast sinking into Contempt, have acquired a Power and Consequence from the Countenance which their Principles have received from Judge Willis, for which they could never otherwise have hoped. Already, adopting the Signal of that Gentleman, we find these Persons declaring that almost all the Public Officers of the Colony have forfeited their Situations; that all the Public Acts which those Officers have done since the Resumption of their Duties are null and void, and that the People have no Right to respect or obey them; that one of the Judges has been guilty of High Treason; that the Country, in fact, is without a Government; and that a Public Convention of the People is immediately to be called, in order to decide upon what Steps are to be taken in so

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alarming a Crisis! Indeed there are no Bounds to the riotous Exultation of those Individuals who are thus labouring, upon the Strength of Judge Willis's Countenance, to work up the Public Mind to the highest Degree of Excitement, for the Purpose of gratifying their own individual Resentments, or promoting the Object of their own individual Ambition.

The most fulsome and adulatory Encomiums are bestowed upon Mr. Willis; so fulsome and so vulgar, that they cannot but be disagreeable and odious to his Feelings as a Gentleman; while one of these Persons modestly takes to himself the Credit for all the good Qualities which has been attributed to Mr. W. To *him* the Judge is declared to be indebted for all the Information which has enabled him to set at defiance the "Allurements of Colonial " Mistrule."

We repeat that we do not accuse Mr. Justice Willis of an Intention to produce the State of Things which we now witness; but we repeat also, that, wittingly or unwittingly, to the very extraordinary and unaccountable Line of Conduct which that Gentleman has thought proper to pursue, that State of Things is alone to be attributed.

In viewing the Transactions in question, we would be permitted to say, that we have not intended to wound the Feelings of Mr. Justice Willis; we have not stooped to the Employment of the Language adopted by the Writers who have taken the other Side of the Question; we have not accused Mr. Willis of "High Treason," nor insulted him with the Appellation of "the late " Mr. Justice " Willis. It has been our Object to place the Matter before the Public in the Light in which it presents itself to us, in Contradistinction to that in which it has been so industriously exhibited by the Advocates for Mr. Willis.

Inclosure, No. 14.

Extract from the *Bathurst Independent Examiner* of 30th August 1828.

WE have, in this Number, concluded the Attorney General's Opinion on the important Questions put to him by Major Hillier. We now submit it to the calm and inquisitive Tribunal of Public Opinion, not doubtful but the Decision of every honest and reasonable Man will be, that the Toils of artificial Sophistry which Mr. Willis has spread have been broken through as easily as a Lion would break the Meshes of a Cobweb. A few Animals, who are hardly capable of reasoning, yet keep up the Clamour; but their puny Attempts to assail the impregnable Fortress, which they behold every Day gaining fresh Strength and Beauty, by the Accession of all Men of Discernment and Respectability, are only the last dying Echo of the infuriate Clan who brought on the Ruin of Mr. Willis, because he was weak enough to suffer that Party to make a Tool of him, to gratify their own base Purposes. Shortly after he came to the Province, the intriguing Rascals, who have worked his Overthrow, discovered his Weakness, and began to blarney and extol him for his Independence. The fulsome Adulation, thus poured out in abundance, took hold of the little Man's Heart. He flattered himself that he was superior to the Laws; at least that he could twist and construe them at Pleasure, to suit the Convenience of himself or his Party — that his Arm was the standard Length for the other Judges — that they were bound to acquiesce with his Opinion, no Matter how absurd, and to venerate his *Dictum*, no Matter how lawless.

All, however, went on smoothly for a little. The precarious Health of that venerable Man, Chief Justice Campbell, not suffering him to attend to his Duties, he had gone from the Province on Leave of Absence.

Judge Willis must now strike the Blow, and gain an imperishable Renown — have his Name blazoned in the Columns of the *Freeman and Observer*, as a spotless Patriot — live in the *immortal, never-dying, bright-green Pages* of the *Advocate*, which is certainly as loyal as either of the other Two — and descend to Posterity, like Day and Martin, *the brightest and the blackest*.

He comes into Court, tells them there is an entire and total Suspension of all further Business; in fact, that there is no such Court existing in the Province; that he knew it. and could give them Law for it. Well, what is the

Result of all his captious Quibbles, legal Sophistries, and scholastic Ratiocination? It is nothing but a crude, undigested Jumble—a String of wild incoherent Ravings—a Collection of Extravagancies and Cavillings, so inconsistent with Reason and Sense, that the meanest Pettifogger might blush to father the Bantling. Let those who stand up as the Advocates of his Doctrine coolly ask themselves, what would have been the Result had Mr. Willis's Logic prevailed? The Decisions of the Superior Court in Upper Canada would have been rendered doubtful; many Titles to Property now undisputed would have been invalidated; and, by engendering these Doubts, the Confidence of the People, as the natural Consequence, must have been destroyed in those Institutions to which Britons proudly look as the strongest Bulwarks of their Liberty. Because others, foreseeing these Evils, did not wish to humour the Whim of Mr. Willis, he leaves the Court, and goes off in a Pet. As his Conduct has degraded the Character of that learned and enlightened Body the English Bar, of which he is a Member, the most charitable Construction we can put on it is, with the Quebec Mercury, to try and consider him under a temporary Alienation of Intellect. That his monstrous Absurdities should find some Admirers does not much surprise us at such a Time as this, when every unprincipled Mountebank, who figures on the Theatre of Opposition, is sure to be greeted as a Patriot. From the Respectability of the *Station* he held, these designing Incendiaries thought him a fit and proper Instrument to strike the Blow for the Completion of their Schemes; and, unfortunately for himself, he listened to their Blandishments with a kind of *Credulity* which so inflated his Vanity, that at length the Bubble burst. Now that their Projects are blasted, they growl most pitifully against the Firmness and Patriotism of those who saved the Province from the Anarchy and Confusion to which they meant to reduce it, through the Instrumentality of their *Puppet*. The Attorney General has reconnoitered every Strong-hold wherein they might expect Shelter, and has driven them from every Position. They know their Ground is untenable, but a *cowardly Pride* will not suffer them to make a decent Surrender. The York Observer is trying to find Flaws in this Opinion, and to make his Readers believe that no Weight should attach to it; but in this the Editor proves himself to be as ignorant as he has always been inconsistent. At first he conducted as bitter and as unprincipled a Vehicle of Disaffection and Stupidity as ever disgraced a British Colony. He then wheeled (right about face) and drudged on under a Mask for several Years past. In this Character he seemed quite out of his Element; besides, the Result of the Experiment did not answer his Expectations. So far from having his *Dullness deified*, or his Disposition for Venality applauded, to the Honour of the loyal Party, he was heartily despised. He now returns again, like the Dog to his Vomit, having lost the Confidence of all Parties. Of all the Efforts of misguided Genius that ever issued from the Press of a political *Newsmen*, the monstrous Progeny of which he has now been *delivered* is the most contemptible. It is a low, talentless, envious Attack on the Attorney General, with a few Hits at others whenever he can find an Opportunity to vent his Spleen; indeed this seems to be his only Aim in daring to approach the Subject. When that miserable Weathercock the Editor of the *Observer* attempts to grapple with the Attorney General, and to refute his able and argumentative Opinion, it is like a Dog baying the Moon. Mr. M'Kenzie is much better fitted for the Task; and had he thought it practicable he would no doubt have undertaken it, but he has thought proper to let it rest. The *Freeman* has not Time for the Task himself, but he tries to puff Carey off to some Advantage. For several Weeks past his sole Employment has been calling the *poor Advocate* Nicknames, abusing the *Morgan Wig*, and advertising his Readers of the different volcanic Eruptions which are about to burst forth to bury the *patriotic Press* under their *Lava*. Mr. Collins is as much afraid of the Appearance of a loyal Press as of the Bite of a Rattlesnake. Well may we expect that he will endeavour to stigmatize ours as a Volume of Trash, when he says that the Absurdity of the Attorney General's Opinion is a laughing Sport for every School-boy in York.

He denounces the same deep Condemnation upon the Gore Gazette, the Kingston Chronicle, and the Perth *Volcano*. We are proud to be classed with these Papers.

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Yes, Mr. Freeman, our *Volcano* shall continue to *belch* forth such Streams of Lava as shall overwhelm the whole Band of *patriotic* Villains who are now attempting to check the Progress of British Feeling from rolling its pure crystalline Current over the Face of the Province. The Voice of Truth we will not suffer any longer to be stifled, and palpable Falsehoods and gross Misrepresentation we will not suffer to pass undetected. We shall support the Colonial Government in every Act which we think is just and equitable; and, as stated in our first Number, we shall expose every Action wherein we cannot recognise the Spirit of the British Constitution. It is our Opinion that never was the Royal Prerogative more justly exercised than in the Removal of Judge Willis from Office; and therefore we maintain both the *Justice* and *Necessity* of this Act. By pursuing this Line of Conduct we are sure to incur the Displeasure of such Men as Collins; but that we disregard. We shall never shrink from their Attacks. We have Nerve to retaliate; and the Justice of our Cause will ever supply us with additional Vigour for the Encounter. These *immaculate* Villains, who have long been an Opprobrium and a Blot upon the Country, shall meet with an Antagouist who dreads not to grapple with them. We have nothing to fear; we ask no Mercy, and we shall give no Quarter to the Rascality of such unprincipled Slanderers.

The Law laid down in our first Number, we wish to be still in force:

"That Mercy I to others shew,
That Mercy shew to me."

The *Freeman*, with a kind of ironical Sneeer, insinuates, that this is not a loyal District. He jeeringly calls it the "Loyal Scotch District of Bathurst," which must be warmed by our loyal Lava. This is a malicious and base Insinuation. The Loyalty of Scotsmen is too well known; and their intrepid Bravery too well tried and appreciated by their beloved Sovereign, to require from us an Eucouium on either. It has been emphatically said of Scotland, that she is a Country which never turned her Back on either Friend or Foe. He is wrong as to the Nationality of our Settlers; they are not all Scotch; there are many Irish and some English Settlers; but they are not of that Description of Persons who left their Country for the Sake of saving *Irish Hemp*; not one of them ever left Home by the Consent of *Twelve Men*. Ah! Collins, we were bred in Ireland as well as you! but we almost blush for our Birth-place, by means of the Disgrace which such *Refugees* as you bring upon that lovely western Gem. We have known you of old; yes, know you too well for your Advantage; we shall never shrink from the Task of pointing out your unhallowed Course, and dragging you before the Public Tribunal, where you may expect your Due. Attack us whenever you please, you shall find the *Examiner* your Match, and you shall be forced to shrink into your proper Dimensions; for we shall no longer permit you with Impunity to insult Public Feeling, outrage common Deceucy, palm off your vile O'fals of Billingsgate, and spread Disaffection over the Face of this happy Province.

Inclosure, No. 15.

Extract from the *Loyalist of Upper Canada*, 2d August 1828.

The *Montreal Canadian Courant* is pleased to say that we "have come out in favour of the Dismissal of Judge Willis." The Fact of the Matter is, that although the *Courant*, after the Example of others, has "come out" and pronounced its Judgment on the Subject, we have neither said nor written much about it.

In the First Number of our Paper which appeared after Mr. Willis had delivered his Speech from the Bench, we concisely stated the *Facts* as they occurred; and while we gave him an undoubted Right to the Exercise of his own Opinions with respect to the Discharge of his judicial Duties, we stated that although we did not feel ourselves competent to express an Opinion on a Subject of so much Consequence, yet that we regretted the *Manner* in which it had been agitated. There were not wanting those, however, who felt

felt themselves *fully qualified* to determine the Question; and Judge Willis's Opinion *verbatim* made its immediate Appearance in the *Canadian Freeman*, and was sent forth to the World as incontrovertible. The Sentiments of the *Freeman* were eagerly adopted by other Papers in York, and were followed by those in some other Parts of the Country, and by the *Courant* in Montreal.

Others, however, quite as "*learned in the Law*" as these sapient hasty-judging Editors, being called upon by the proper Authorities for their Opinions, declared that Judge Willis's View of the Question was an incorrect one. It may have been, and we are not disposed to doubt but that it was, a conscientious one; but at the same Time we will not say this at the Expence of supposing that the Opinions of others, as well qualified to judge of its Merits, were not *equally conscientious*.

The Balance of legal Opinion was decidedly against the Conclusions drawn by Mr. Willis; and, after "a long Deliberation on the Subject," we stated, that the Executive Council, to whom, as the Constitutional Advisers of the Government, it had been referred, had recommended the Removal of Judge Willis from Office, in order that another Appointment might be made, until the Pleasure of His Majesty should be known. In making this Second Allusion to the Subject, we contented ourselves, as we did in the first, by simply relating the Fact.

No sooner, however, had the Government exercised a constitutional Right, in a constitutional Manner, than its having done so was seized upon as an Opportunity to cast Reproach upon it, and, as is now well known, to render the Subject subservient to other Purposes. If the *Canadian Courant*, who on other Occasions professes to entertain a high Respect for constituted Authorities and constitutional Rights, had informed its Readers, that those Editors in Upper Canada who are in the constant Habit of vilifying and abusing the Government under which they live, had "*come out*" in their usual Style "in favour of" Judge Willis, by heaping the grossest Calumnies on the *Governor, the Council, the Judges, and other Law Officers of the Crown*; if the *Courant*, we say, had given Information such as this to his Readers, he would have been much nearer the Truth.

But although we have hitherto considered it unnecessary to notice the many Misrepresentations which have been attempted to be imposed upon the Public, and although we have contented ourselves by performing what we conceived to be our Duty in this Case as in all others, by a Narration of *Facts*, let it not be supposed that we are desirous of avoiding the honest Expression of our Sentiments on the Removal of Judge Willis.

We have no personal Feeling of an improper Kind towards Mr. Willis, when we say, that in our Opinion the Act of the Government, exercised as it was in a temperate Way, after due Deliberation, and in a constitutional Manner, was but the Consummation of that which Mr. Willis, from his own Conduet, had every Reason to expect. He had publicly declared, that as the Court, *in his Opinion*, was not constituted according to Law, he could no longer continue to sit on the Bench. He had publicly *withdrawn himself from the Bench*, and by doing so had given the most incontestible Proof that he was determined, even if that *Opinion* should ultimately prove to be incorrect, and in whatever State of Hazard and Uncertainty it might involve the Business of the Country and the Administration of Justice, to act upon it to the fullest and farthest Extent. Now we will ask, whether, under such Circumstances, when the Administration of Justice was placed in so singular a Situation, the Interference of the Government could be called unnecessary? Was it not rather an imperative Act of Duty on their Parts, to provide an immediate Remedy for such an unusual Exigency, as that of a Country about to be deprived of the due Administration of the Laws and of Justice. If it had *not* taken the Matter up, and exercised its constitutional Powers, at such a Time, and upon such an Occasion, how could it have answered to the People, when they found their Courts of Law, no longer in existance, closed to their Complaints, the Property, Character, and Life of every Individual in the Community at the Mercy of those, who in such a State of Things, might feel disposed, from the Security which would be afforded them, to invade and destroy them. Would it be enough when the Evil was pressing sorely upon them, for the

the Government to answer the Complaints of the People, by telling them, that One of His Majesty's Judges was *of opinion* that he could no longer sit on the Bench to administer Justice to them, and that in deference to that *Opinion*, though contrary to that of all other its legal and constitutional Advisers, the Pressure must be borne in Silence; that there was no Remedy, no Redress; the Judge was conscientious, and that therefore the Courts of Justice must remain closed: Till when? Till His Majesty's Pleasure should be made known? — No. But until the Pleasure of Mr. Justice Willis, under the *conscientious* Expression of his *Opinion*, was complied with; because to remove him from Office, to restore the Administration of Justice to the Performance of its necessary Functions, might be considered an Act of *Cruelty* towards an Individual.

To Reasoning such as this, the People, when uttering their Complaints against the Arrest of Justice in the Land, would naturally be led to inquire, And what is Mr. Justice Willis's Pleasure under the conscientious Opinion he has expressed? What must be the Reply? He declares that in the Absence of the Chief Justice the Court is incompetent to proceed to the Discharge of its Duty; he declares that the Chief Justice, and all other Officers of the Court, who have been absent from the Province, have *forfeited* their Situations, from their having, in his Opinion, obtained Leave in an illegal and informal Manner. Now the Return of the Chief Justice to his Duties will not be sufficient to do away the conscientious Scruples of Mr. Justice Willis; for even if His Majesty, with all his Law Officers, should differ in Opinion with him, as to the Leave of Absence to the Chief Justice, that Leave (as well as all others) having, in Mr. Willis's Opinion, been obtained illegally and informally, and the Acts of the Court, in Times past, having been declared by him to be "void," the Constitution of the Court, under such Circumstances, even if the Chief Justice should return, would, under Mr. Willis's Opinion, be quite as illegal as it was if the Chief Justice remained in England. The Acts of *others* who had been absent under the same Circumstances being in his Opinion *void*, those of the Chief Justice on his Return (although his Absence might receive the Approbation of His Majesty) would be equally "void;" the Constitution of the Court would, therefore, in Mr. Willis's Opinion, remain just as illegal as it was before the Return of the Chief Justice, and it would consequently be quite as impossible for Mr. Willis, under the conscientious Expression of his Opinion, and the Sanctity of his Oath of Office, to *replace* himself on the Bench from which he had *removed*, to sit by the Side of a Chief Justice who, in his Opinion, had *forfeited* his Situation, and whose Acts must, as a Consequence, be "*void*." Contrary Opinions of the legal Advisers in the Colony, the Pleasure of His Majesty's Government, and the Opinions of his Crown Officers, cannot interfere with the conscientious Opinions of Mr. Willis, expressed under the Sanctity of his Oath of Office. It is *his Opinion* that the Court is not legally constituted; that the Judges and other Officers who have been absent from the Colony have *forfeited* their Offices; that their Acts are "*void*;" and until these Opinions of Mr. Willis's are concurred in, there is no Remedy; he cannot be compelled to act contrary to his conscientious Opinions. We are advised that those Opinions are erroneous, and yet, however it might promote the Interest of the Country to exercise a Power which we know we possess, by removing him from Office till the Pleasure of a higher Authority should be known, as such an Act might be deemed one of personal Cruelty, we prefer that the Country should suffer rather than that an Individual should be put to Inconvenience; Mr. Willis must therefore be permitted to *withdraw himself* from the Bench — there is no Remedy; the Courts *must remain closed*; the Administration of Justice *must stand still*.

Would Reasoning such as this, we ask, be an Answer to the Public, from any well constituted Government in the World, on the Occasion of such an Emergency arising in the Country? Supposing such a Want of proper Energy to exist, would not the People have just Cause of Complaint? Would not such a State of Things be indeed "*an alarming Crisis*?" The People have a Right to expect, when Emergencies present themselves which are calculated to impede the Business of the Country, and especially one of such Magnitude as threatens to arrest the due Course of the Administration of Justice, that the

Government will exercise those wholesome Powers with which it is invested to avert the Danger; and what would be said of that Government which could suffer the Act or Opinion of one of its own Members to inflict upon a Contry the Evils which we have feebly attempted to depict, without making a single Effort to avert them?

We will now ask the "*Canadian Courant*" and others, who "have come out" against the Government since Mr. Willis agitated this Question, to account for the Perversions they have been guilty of. A moderate, a judicious, and constitutional Course has been pursued; Mr. Willis, by his own Act, had withdrawn himself from the Bench; the Exigency required the Interference of the Government; the Opinions and Advice of its legal and constitutional Advisers is taken; the necessary Provision for the continued Administration of Justice is made; Mr. Willis is not compelled to act contrary to his declared Opinions; he is removed from Office as the unavoidable Consequence of those declared Opinions, followed up as they were by an Act which in itself constituted a *Self-removal* from the Bench — a vacating of the Judgment Seat. The Question at Issue is referred, as it must be, for the Signification of His Majesty's Pleasure. In the meantime the Country is not left without that which may be considered of the most vital Consequence to it — the due Administration of Justice. Can this be called Injustice to Mr. Willis? Can this be termed Injustice to the Contry? Can it be called *refined Cruelty* towards an Individual?

But what is said on the other Side? The Government is accused of acting cruelly towards an Individual. Designing Demagogues, to answer their own Purposes, raise the Cry of "alarming Crisis." The most industrious Arts are used to mislead Public Opinion. The Demagogue Lawyer insultingly throws off his Gown in the Face of those who sit upon the Judgment Seat, and leaves the Hall of Justice, to show, as far as his evil Example can have Effect, that the Court in whose Presence he has worn it for the last Twenty Years, perhaps, is no longer entitled to *his* Respect. The Demagogue of the Press, emboldened by the Example, adds to the Bitterness of his former Vituperation against the Government and the Courts of Justice; the Demagogue Suitor insolently charges the Judges of the Land with having robbed him; the Demagogue aspiring to the Favours of the People spreads the Poison as far as may serve his Purposes, and makes it subservient to his Elevation. But, Thanks to the Firmness of the Government; and when the People shall have had Time to exercise their own unbiassed Judgment on the Subject; when the Excitement which for electioneering Purposes has been so industriously kept up; when in their cooler Moments they shall ask themselves what must have been the Consequence to the Country, to themselves, and to their Families, if their Courts of Justice were not now in existence, if the Law of the Land had been suffered to become a dead Letter, and Redress could not have been procured for Injuries committed on their Persons or Properties; then will they, too, say with us, Thanks to the Government, who, by a judicious Exercise of those Powers with which they are entrusted for our well-being, have acted with Energy, and, at the same Time, with Moderation, and have averted Evils which must otherwise have resulted in the utmost Confusion and Disorder.

Inclosure, No. 16.

Extract from the *Canadian Freeman* of 10th July 1828.

Great Constitutional Meeting.

On Saturday last, pursuant to Notice, a Meeting took place in this Town, such, we believe, as was never before seen in York. Although a busy Season in the midst of the Hay Harvest, and only Three Days' Notice, Farmers were in attendance from Residences Thirty or Forty Miles distant. The Object of the Meeting was to seek, by Petition to His Majesty, the Redress of Grievances, and particularly to complain of the arbitrary, oppressive, and high-handed Conduct of the Colonial Executive in removing from the Bench Judge Willis,

Willis, without other Cause than that of a strict Adherence to the Law of the Land, in the conscientious Discharge of his judicial Duties. No Room in Town being large enough for the Purpose, the Meeting was held in the Public Market-place. Dr. Baldwin was called to the Chair; and Wm. Roe, Esq., of Newmarket, appointed Secretary. Dr. Baldwin opened the Proceedings with a patriotic and eloquent Address, of which the following is the Substance:—

Gen. men,

This Course of expressing Public Opinion by County Meetings has not been so frequently pursued as it ought. In meeting here To-day we are only exercising the Right enjoyed by our Fellow-citizens in Great Britain, and following their Example. He therefore hoped that County Meetings would in future be more frequent; that as this was the first, it would not be the last; but that they would often meet in this Way, and their Children after them.

This Meeting, he said, was called for a very important Purpose — to petition His Majesty for a Redress of Grievances. In the Notice convening this Meeting, the present is called an “alarming Crisis;” and some stupid Attempts at Wit have appeared upon the Occasion; but he hoped this Meeting would concur with him in saying that it was an “alarming Crisis;” not that they felt alarmed from unworthy or womanish Fears, but as Men and Patriots, jealous of their Rights, and anxious to guard their Liberties and those of their Families from the Encroachments of arbitrary Power. He contended, then, that in the present State of this Province there was just Cause for Alarm; there were many Points of Oppression and Misrule; but the most important was, that a Judge of the King’s Bench, His Majesty’s chosen and faithful Servant, the Honourable John Walpole Willis, who, in the Judgment Seat, had acquitted himself to the Satisfaction of the People, has been spurned from the Bench, without Cause, without Accusation, and without Offence! (Hear, hear.) When Things have come to this Pitch, is there no Cause of Alarm? When a learned, independent, and just Judge is driven from the Bench in an arbitrary and oppressive Manner, and that, too, without the slightest Cause, is it not Time to petition His Majesty that he may be restored to his Office to administer the Laws with Justice and Impartiality? When the Advisers of His Majesty’s Representative in this Province have counselled such a daring and arbitrary Measure, is there not strong Grounds for Alarm; particularly at the present Period, when the Question of an Alteration in the Constitution of the Canadas is under Consideration before the Imperial Parliament? Now, with reference to this, is there a Man amongst you who is willing to give up our Constitution? (A universal Cry of No, no.)

Our Constitution was given by the Liberality of Great Britain as a Blessing to ourselves and our Children; shall we give up our Constitution and leave our Children Slaves? (Cries of No, no.) In order to point out this Cause of Alarm, he would read the Remarks of Mr. Huskisson, Colonial Secretary, relative to our Constitution, as reported in the London Newspapers, and said to have been delivered in the British House of Commons. He (Dr. Baldwin) was satisfied that Mr. Huskisson had the best Wishes for the Welfare of the Colony, but he has probably been misinformed, and his Views are wrong; indeed it is impossible he can well understand the real Situation of a Country so remote, when the grossest Misrepresentations have been sent Home, from Time to Time, both by the Authorities here and in Lower Canada. But if Mr. Huskisson be incorrect in his Views, the People of Canada had Friends in the British Parliament who would set him right, and hoped that we, in return, would always be Friends to British Legislators and British Laws. (Cheers.) Let us then stand forth in defence of our Constitution — in defence of our Rights and Privileges. [Here Dr. Baldwin read an Extract from the Speech of Mr. Huskisson, and proceeded.] Mr. Huskisson here says that Parliament has the Right to alter our Constitution, and that the Colonies would willingly acquiesce in such Alteration. How could Mr. Huskisson suppose that the Colonists would acquiesce in Alterations in their Constitution without knowing what Alterations were about to take place? Mr. Huskisson is very much mistaken on this Point. He also made some Remarks on the Petitions from this Province and Lower Canada; but he (Dr. Baldwin) would say, that the
People

People of Upper and Lower Canada were the same. The Lower Canadians, it is true, speak French and we speak English; but they are our Brethren, our Fellow-subjects, enjoying the same Constitution, and governed by the same Laws; whatever affects their Interests, affects ours; whatever oppresses them, oppresses us. He hoped it would never be forgotten here, that the People of Lower Canada were the same as ourselves; and that they were brave, independent, and patriotic. An Attempt was made to new-model their Constitution, and deprive them of their Rights; but they sent Men of Talents Home to oppose it, who will be successful in their Mission.

A most important Act was passed in 1778, the famous declaratory Act by which Great Britain relinquished the Power to tax America. Mr. Huskisson had doubted whether that Act applied to the Canadas; but he (Dr. B.) contended that that Act did apply to the Canadas, and protected the Subjects in the Colonies from Taxation, except with their own Consent. We had a Constitution which recognized this Principle, and that Constitution was not subject to change from Day to Day, as Mr. Huskisson would have us believe, but was permanent. There were many other Points in the Speech of Mr. Huskisson highly calculated to excite Alarm, and, in conjunction with other Matters, went to show that no Crisis could be more alarming than the present. A Bill was introduced some Time ago to unite the Canadas, and to compel the People of this Province to send Representatives to Lower Canada. Is there any one of you, having a Complaint to make, who would like to carry it to Quebec or Montreal? (No, no.) Let me beseech you, whenever the Question of taking away your Legislature comes before you, to cast your Eyes to unhappy Ireland. (Hear, hear.) Ireland, the Theatre of Oppression and Misrule, the Seat of Poverty, Discontent, and Wretchedness. (Hear, hear.) Keep your Legislature then to yourselves; cling to your Constitution; they have their Faults, and so has every human Institution. The Power is in your own Hand, by being watchful at Elections. (Hear, hear.) Yes, take the Advice of a Friend, and be watchful at Elections; send Men to represent you who are free from undue Influence, independent of the Executive, and worthy the Trust reposed in them; a Government Officer is wholly unfit to represent the People. In the House of Commons, Sir James M'Intosh ably defended the Interests of the Canadas; he said, he was astonished at the Proposition of the Right Hon. Gentleman (Mr. Huskisson); and should not we be astonished also?

[Here Dr. Baldwin read an Extract from the Speech of Sir James M'Intosh, and proceeded.]

Sir James M'Intosh very properly asked, "Were the Colonies so ignorant as not to be trusted with the Management of their own Affairs?—Was it dangerous to trust them?" What do you say Gentlemen? (General Cry of "No, no.") Is the Home Government at such a Distance half so well qualified to perform the Task? (No, no.) Sir James M'Intosh again remarked, that the House of Assembly in Lower Canada "claimed the Right to appropriate the Supplies, and were perfectly justified in so doing." Mr. Huskisson admitted that the Assembly of Lower Canada had a Right to dispose of a certain Sum, but not the rest. If this were so, what Power would the Assembly have? Would they not be a mere Feather in the Scale of Legislative Power; a Blank among the other Branches of the Legislature? Would it not be contrary to every Principle of British Liberty? (Hear, hear.) Mr. Labouchere, a Member of the British Commons, spoke admirably upon this Question; he said, he considered the Act of 1791, giving us our Constitution, as the great Charter of the Liberties of the Canadas, and thought it could not be altered without the greatest Danger; remarking that a fair Trial of this Charter had not as yet been given. Mr. Huskisson again thought that Mr. Pitt's Experiment of this Charter had failed. But in this he (Dr. Baldwin) differed widely from Mr. Huskisson, and agreed perfectly with Mr. Labouchere, that the Constitution of the Canadas never as yet had a fair Trial; the Legislatures of these Provinces have never been formed agreeably to the Spirit of our Constitution. In Lower Canada, with a French Population, almost all the Members of the Legislative Council are Englishmen and Government Officers. In Upper Canada they are Placemen and Pensioners, depending upon the Executive for a Living, instead of being an independent Gentry. Can this be said to be a fair Trial of Mr. Pitt's

liberal

liberal Experiment? No; and he hoped the first Change in our Charter would be to have the Legislative Council composed of a liberal and independent Gentry; and the next Change to be an enlightened, independent, and efficient Representation of the People in the House of Assembly. These were Changes that he hoped would soon take place; Changes which would tend greatly to the Advantage and Security of the Province. (Hear, hear.)

When the Union Bill was introduced it was late in the Session, and only Sixty Members present. It was taking the Canadas by Surprise to introduce a Bill to destroy our Constitution at such a Time. But let it be recollected, that when that Measure was agitated it was the Petitions which went Home from this Country that saved the Colonies; and we may hope, from the Remarks of honourable Members in the late Discussion, that no Alteration in our Constitution will take place without mature Deliberation, and after Information from the Colonies has been previously obtained. But as an Attempt was made to take us by Surprise before, it may be so again. Shall we then lie down quietly like Sheep in the Pasture, while the Wolves are about the Fences? (Hear, hear.) He hoped not — he hoped they would all sign the Petition which he held in his Hand; he would read it for the Information of the Meeting; and he was happy in being able to state that it was approved of by Men of sound Minds and good Understandings at a private Meeting lately held at Mr. Ketchum's for that Purpose. In taking this Course they were only discharging their Duty as British Subjects; and when our Petitions came before His Majesty, he had no doubt but our Grievances would be redressed, the Legislative Council would be re-modelled, our offensive Statutes repealed, and particularly that odious Law of the 44th of the late King; the Bench would be purified, the Laws impartially administered, and we should all live peaceably together, as good Subjects, in the active Pursuits of Industry and Improvement.

Dr. Baldwin then read the following Petition :

To the King's most Excellent Majesty, (and to the several other Branches of the Imperial and Provincial Legislatures.)

We, Your Majesty's dutiful and loyal Subjects, Inhabitants of Upper Canada, are constrained by the most painful Necessity to appeal to the Justice of Your Majesty against the Misrule of the Provincial Administration, and humbly to point out to Your Majesty the alarming Increase of our Grievances, and the Necessity of their Redress, as they become more and more inveterate from the Patience with which we have hitherto endured them. We offer our warmest Thanks and Gratitude to Your Majesty for appointing to be a Judge over Your Canadian People the Honourable John Walpole Willis, whose private Virtues and acknowledged Learning, blended with high and uncompromising Principles, uniformly evinced in the impartial Discharge of his judicial Duties, have already endeared him to the Country as one of its greatest Blessings, and as affording to the People the most flattering Presage of a new Era in the Administration of Justice. Of this Blessing we have been unconstitutionally deprived; and Misrule has at length become so bold, and Power so indiscriminate of its Victims, as to spurn from the Judgment Seat the Honourable Justice Willis, who there presented what has long been wished for, but seldom seen, the stern and fearless Integrity and Independence of a British Judge. Such judicial Integrity and Independence are alarmingly endangered when such a Judge, without Impeachment, and even without a Charge, can be ignominiously removed from his high Office.

Although we entertain the fullest Confidence in Your Majesty's Desire to promote the Happiness and protect the Rights of British Subjects throughout Your ample and glorious Dominions, yet our Hopes of speedy Redress are not a little discouraged by a Knowledge, that while we, on our Part, open to Your Majesty the Abuses and Oppressions growing upon us, the very Persons we accuse are pressing, through other Channels, affording a more favourable Access to Your Royal Belief, those interested Misrepresentations which are designed both to promote Misrule and protect the Authors of it; for it cannot be forgotten, that Misrepresentations from such Sources have already recently endangered our civil and religious Liberties, and cruelly vilified and traduced

the fair Characters of the dissenting Denominations of Christians in this Province. And the impending Consequences of such secret Misrepresentations are further apprehended, from the Tenor of the Speech of the Right Honourable William Huskisson, Your Majesty's Principal Secretary of State for the Colonies, in the Imperial House of Commons, as reported in some of the Public Prints.

Notwithstanding Defects in the Law defining our Constitution, we are, nevertheless, warmly attached to it; and view, with just Fear, every Attempt to amend it, without the Intervention of our Provincial Legislature, which is the constituted Guardian of our Rights and Liberties, and which, considering the great Distance of the Imperial Legislature, can best understand our Necessities, and apply the proper Remedies. It has long been the Source of many Grievances, and of their Continuance, that the Legislative Council is formed, not of an independent Gentry, taken from the Country at large, but of Executive Councillors and Placemen, the great Majority of whom are under the immediate, active, and undue Influence of the Person administering Your Majesty's Provincial Government, holding their Offices at his mere Will and Pleasure. Hence arises, in a great Measure, the practical Irresponsibility of Executive Councillors and other official Advisers of Your Majesty's Representative, who have hitherto with Impunity both disregarded the Laws of the Land and despised the Opinions of the Public. From the Impunity with which the greatest Abuses have hitherto existed, and the Difficulty in such a State of Things of applying an efficient Remedy, most of our Grievances have taken their Origin and Growth.

First, The Rejection by the Legislative Council of the most salutary Measures, passed by large Majorities in the House of Assembly, and much desired by the People.

Secondly, The frequent Want of a casting Voice in the Court of King's Bench in this Province, owing to the illegal Absence of the Judges, especially of the Chief Justice, as well on distant Journeys out of the Province, as on Attendances in the Legislative and Executive Councils.

Thirdly, The undue Influence which the mingled Duties of Legislative and Executive Advice have on the Judicial Function.

Fourthly, The Assumption of a Power by the Executive to appropriate a large Portion of the Revenue and other Monies raised from the Sale of Land and otherwise in the Province, independent of the Will or Sanction of the Assembly.

Fifthly, The extravagant Augmentation of Salaries, Offices, and Public Expences, quite disproportioned to the State and Circumstances of the Colony.

Sixthly, The Confinement of Public Prosecutions of Offences to the sole Conduct of the Law Officers of the Crown in the Colony, embarrassing private Prosecutors in this small Community, where the Influence of Politics and Family Connections is so injuriously felt.

Seventhly, The retaining in Public Offices, and the Introduction into the same, of Persons who notoriously ought to be excluded.

Eighthly, The Want of carrying into Effect that rational and constitutional Controul over Public Functionaries, especially the Advisers of Your Majesty's Representative, which our Fellow-subjects in England enjoy in that happy Country.

Ninthly, Our present imperfect Jury System.

Tenthly, That Sheriffs, Coroners, and other Public Officers, hold their Offices during Pleasure, and not during good Behaviour, or otherwise, as in England.

Eleventhly, That the Supreme Judges of the Land hold their Offices during Pleasure, and are subjected to the Ignominy of an arbitrary Removal.

Wherefore we humbly entreat for the Interference of Your Royal Prerogative, to favour our Exertions to correct the Grievances under which we labour.

We humbly suggest that the Legislative Council should be increased in Number, of whom a small Proportion only, strictly limited by Law, to be permitted to hold or enjoy any Place of Emolument or Profit under the Government, or to be Members of the Executive Council.

Secondly,

Secondly, That the Judges of the Court of King's Bench be not Legislative Councillors, nor Executive Councillors, nor Privy Councillors, in any Respect, in the Colony.

Thirdly, That the Judges shall not be permitted to absent themselves from the Province but on the most reasonable Cause, and with Leave obtained as prescribed in the British Acts relative to Colonial Officers.

Fourthly, That the Judges be made independent, as in England, holding their Offices, not as at present in this Province, but during good Behaviour, to be enquirable into, by Impeachment alone, in the Provincial Parliament, before the Legislative Council, when that Body is so modified as to become an independent Branch of the Legislature.

Fifthly, That for some Time, at least 'till the Province affords an adequate Source of legal and constitutional Education, the Judges be appointed from the Bar in England.

Sixthly, That a Legislative Act be made in the Provincial Parliament, to facilitate the Mode in which the present constitutional Responsibility of the Advisers of the Local Government may be carried practically into Effect, not only by the Removal of these Advisers from Office when they lose the Confidence of the People, but also by Impeachment for the heavier Offences chargeable against them.

Seventhly, That our present Jury System be amended by a new Law, whereby the Jurors to be impanelled may be more equally selected from the Country, and less at the mere Nomination of the Sheriff or his Officers; such new Law to extend both to Grand and Petit Jurors.

Having thus, under the Pressure of the present Crisis, hastily concentrated our most pressing Grievances, and humbly prayed for the Royal Aid of Your Majesty's Prerogative in providing appropriate Remedies, we, Your Majesty's dutiful and loyal Subjects, cannot omit again to bring under Your Majesty's serious Notice, as indicative of the Necessity of a Change of Men and Measures, the recent violent and unconstitutional Removal from Office of the Hon. John Walpole Willis, a Public Wrong, calling more and more loudly for our most earnest Remonstrance to Your Majesty, and strongly elucidating the injurious Character of the Policy pursued by the present Provincial Administration.

Such was the Apprehension of the practical bad Consequences of the King's Bench being without a casting Voice, that, previous to Easter Term last, a Memorial was addressed to his Excellency, pointing out, in some Respects, the Failure of Justice in such a State of Things, and requesting his Excellency to suspend his Leave of Absence to the Chief Justice, whose Departure from the Province was at that Time publicly spoken of, even until after the approaching Term. His Excellency, however, did not think proper so to do, and the evil Consequences anticipated have been realized. During the Terms of Michaelmas and Hilary last past, with a full Bench, there was not fewer than Ten Cases wherein Differences in Opinion arose amongst the Judges on important Points; and in Easter Term, during which the Chief Justice was absent, the Two Puisné Judges were divided in Opinion in Six several Cases. In such a State of Things, substantial Justice cannot be said to be administered. The Provincial Law wisely enacts that Your Majesty's Chief Justice of this Province, together with Two Puisné Justices, shall preside in the Court of King's Bench. And as a Diversity of Opinion has, in many important Points, unhappily prevailed among the Judges of that Court, which is the only one of Superior Jurisdiction, and from which, in the vast Majority of Cases, there can be no Appeal, the Importance of maintaining that Court as organised by Law becomes the more urgent, and the Violation of that Law productive of the greater Evils.

Under these Circumstances we feel that the Hon. Mr. Justice Willis deserves the Approbation and Confidence of all good Men for withdrawing from the Court House, under a conscientious Conviction in his own Breast, that he could not administer Justice according to Law while the Court was not constituted as that Law required.

Sensible as we are that the Appointment of Judges, esteemed by the People for their Learning, and beloved by them for their Virtues, is in every Colony

so blessed the most conclusive Evidence of the Health of the great Body Politic, so do we feel that this deliberate, violent, and unconstitutional Removal of Mr. Justice Willis, depriving us of the Benefit of his honourable and conscientious Services, is a Grievance of such Magnitude as requires your Majesty's paternal Interference; and this Evil we feel the more serious, because it furnishes the present Provincial Administration with an Opportunity of placing upon the Judgment Seat a Man labouring under those Prejudices of Family Connections and Party Feeling from which Mr. Justice Willis was necessarily and happily free,—Persons withal very inferior to that Gentleman in Education, in Talents, and in legal Knowledge. While strongly feeling this Injury, Your Majesty will, we beseech, hear our Complaint of the Conduct of the Hon. Mr. Justice Sherwood, who, in the Absence of the Chief Justice and of Mr. Justice Willis, proceeded alone to exercise all the Powers of Your Majesty's Court of King's Bench, and yet abstained from offering any Justification for such Assumption for the Satisfaction of the Public, although requested to give to the Bar his legal Reasons for such a Course. He had at that Time vacated his Office by absenting himself from the Province without the Leave prescribed by Law.

We should omit a Matter of the first Importance to the happy Conduct of our Civil Affairs, did we forbear to mention to Your Majesty, with all the Delicacy becoming us when referring to the Exercise of Your Royal Prerogative, the total Inaptitude of Military Men for Civil Rule in this Province.

The almost constant Absence of Your Majesty Representative from the Seat of Government, where almost daily is required his assiduous Superintendance over Public Affairs and Public Functionaries; his total Unacquaintance with the Inhabitants of the Country, with the Exception of those whose official Occupations place them about his Person, whereby he can be but ill informed of the true State of the Country, or of the Condition or Wants and Wishes of its People; the Charge of Disloyalty against those who question the Policy of the present Administration; a System of Espionage spreading, from the Seat of Government, over the Face of the Country; a threatened Degeneracy in the State of Society, endangering, by the insidious Operations of those morbid Causes, that Public Feeling, truly British, and yet happily alive in this Colony; the undue Influence over Electors in many Ways, but especially by the issuing of Patents granting Land, sent into the Country in Profusion to be distributed by Candidates acceptable to the present Provincial Administration; the Acceptance of Office by Members of the House of Assembly, without vacating their Seats, as is the necessary Consequence in England; and the almost mortal Violence offered to the Constitution by the Exercise of worse than Military Rule in the Intimidation of the more dependant Members of the Legislative Council into the Views of the Administration at the Peril of their Offices, as was exposed in the Testimony of the Honourable William Dickson and the Honourable Thomas Clark, in their Evidence before a Committee of the House of Assembly, during the last Session of the Provincial Parliament; wherein we, Your Majesty's faithful and loyal Subjects, being greatly aggrieved, most humbly, most earnestly, and confidently pray Your Majesty for Redress, as far as such Redress lies within Your Majesty's constituted Power: And, as an Object filling us with peculiar Solicitude, we do most earnestly importune Your Majesty, that you will be graciously pleased to restore Mr. Justice Willis to the honourable Situation to which Your Majesty had appointed him, and thus protect Your Majesty's Royal Choice, Your faithful Judge, and us Your loyal Subjects, from the Wrongs that arbitrary Rule in the Provincial Authorities unchecked, would assuredly inflict.

And Your Majesty's Petitioners, as in Duty bound, will ever pray.

The above Petition was then adopted, and also an Address to the Honourable John Walpole Willis.

[The Address is already printed at p. 135.]

At a Meeting of the Inhabitants of York and its Vicinity, held at the Market Square, in the Town of York, on Saturday the 5th Day of July 1828, for the Purpose of petitioning His Majesty and the constituted Authorities for a Redress of Grievances, and to consider the cruel Conduct of the Provincial Executive towards the Honourable Mr. Justice Willis, in his violent Removal from Office, as a Judge of the Court of King's Bench.

Dr. Baldwin was called to the Chair, and Mr. W. Roe appointed Secretary.

Doctor Baldwin opened the Object of the Meeting in a Speech of some Length; detailed the various Heads of Grievances of very serious Import; and, amongst these Grievances, the unjust Removal from Office of the Honourable Mr. Justice Willis, so recently sent here by His Majesty, and so unceremoniously and cruelly maltreated and rejected by the Colonial Executive. The Doctor then read the Petition to His gracious Majesty at length, wherein is detailed the Catalogue of Complaints; and having asked the Meeting if they approved of the Petition as read, he was answered by general Acclamation of "Yes, yes." The Doctor then said that the Friends who acted with him in the Meeting deemed it proper also to prefer similar Petitions to both Houses of the Imperial Parliament, as also to our Provincial Legislature, and hoped the Meeting would approve. The Answer as before was "Yes, yes."

Mr. Fenton then ascended the Platform, and begged to be heard. (Noise, Hoots, and Hisses prevented him.) He entreated the Chairman to interfere. Doctor Baldwin accordingly requested the People would hear Mr. Fenton. Mr. Fenton again attempted, but Hoots and Hisses as before.

Mr. Robert Baldwin entreated, but all to no Purpose, the People would not hear Mr. Fenton.

Then Mr. Stanton, the Editor of the Government Gazette, stepped on the Platform, and vindicated the Conduct of the Executive, who, he said, only suspended Mr. Justice Willis, but did not remove him; that it was done with all imaginable Gentleness; that the Administration of Justice required his Removal, that another might be appointed to his Office, as he would not act. The People expressed Dissatisfaction, and frequently interrupted him, till at length they would hear Mr. Stanton no more, and he retired.

Mr. McKenzie ascended the Platform. He highly approved of the Petition, and recommended it to the Meeting; spoke of many Matters in detail, especially the gross Interference of the Executive with Legislative Councillors by Intimidation, as given in the Evidence of the Honourable Mr. Clark and the Honourable Mr. Dickson to a Committee of the House of Assembly.

Mr. Sherwood spoke in Explanation of his Conduct towards Mr. Justice Willis, and in Vindication of his Conduct in the Destruction of the Types.

Mr. Small concurred in the general Object of the Meeting, and approved of petitioning.

Dr. Morrison then addressed the Meeting in general Approbation of the Proceeding, and dwelt much on the unconstitutional Removal of Mr. Justice Willis, and proposed an Address to that injured and worthy Judge, approbatory of his Conduct, and expressive of Public Confidence in him.

The Address was read and carried with Acclamation, and signed by the Chairman and Secretary.

Mr. Wenham then addressed the Meeting; he seemed to follow Mr. Stanton's Course of Vindication, but with like Non-effect.

Mr. McMillin addressed the Meeting, approving of its Object.

Robert Baldwin, Esq. moved some Resolutions condemning the Grounds on which the Sheriff of the Home District refused to call a Meeting pursuant to the Requisition; inasmuch as he declared that he would follow Usage in this Province and in the other Colonies, as to such Meeting, instead of those Usages in Great Britain, which are, as Mr. Robert Baldwin urged, a Part of the Liberties of the People of this Province.

The Resolutions, seconded by Mr. Carey, were then put and carried, as follows:—

Resolved, That full Liberty to petition for the Redress of Grievances is one of the dearest Rights of British Subjects; a Right guaranteed to us by the most solemn Legislative Pledge, and one for which every Man of truly

British Feeling would unhesitatingly sacrifice not only his Property but his Life.

Resolved, That to apply to the High Sheriff of the District to call Meetings for the Purpose of such petitioning is a Course highly constitutional and truly British.

Resolved, That that Part of the Answer of William Botsford Jarvis, Esq., High Sheriff of this District, to the Gentlemen who presented him with a Requisition to call a distinct Meeting for such Purpose, wherein he states that "it not having been the Usage in this Province, nor so far as he could learn in other Colonies, to apply to the Sheriff to call Public Meetings, except for Purposes specified by Law, he might probably, under any Circumstances, have hesitated to comply with their Request," is particularly deserving of the most marked and unqualified Disapprobation, as upholding the Principle that morbid colonial Mal-usages is to be persisted in, in preference to wholesome British constitutional Customs.

Mr. Ketchum approved of the Petition, and with much Feeling observed, that every Man should feel the Cause of the oppressed to be his own, for if one Man after another was allowed to be sacrificed, no one could tell who might be the next Victim.

Mr. Collins then addressed the Meeting.

The Resolutions, seconded by Mr. Bergin, were put, and unanimously carried, as follows:—

Resolved, That as a lasting Token of the Affection and Esteem of the People of Upper Canada for this enlightened, independent, and just Judge, a Subscription be now opened for the Purchase of a Piece of Plate, (with suitable Inscription,) to be presented to the Honourable John Walpole Willis; and that John Galt, Esquire, Doctur Baldwin, and Marshall S. Bidwell, Esquires, be a Committee to receive Subscriptions, procure said Piece of Plate, and present the same. — Adopted.

Resolved, That from the well-known Talents, Acquirements, and private Virtues of Robert Baldwin, Esquire, he enjoys the Confidence of this Meeting; and as his Services in the House of Assembly at this particular Crisis must prove a valuable Acquisition to the Cause of Freedom and Independence, he is hereby named as a fit and proper Candidate for the County of York, at the approaching Election. — Adopted.

The Address to Mr. Justice Willis was then carried up by the People in a Body, with the Chairman at their Head. The worthy Judge and Lady Mary received the Address on the Portico of their House, and Mr. Willis, in a few pithy Words, full of manly Sentiment, thanked the Body, who then gave Four Cheers for the King, and Three Cheers for Judge Willis and Lady Mary, who seemed sensibly affected at this Mark of Public Approbation. The People then retired to Mr. Howard's Hotel.

York, 5th July 1828.

W. W. BALDWIN, Chairman.
WILLIAM ROE, Secretary.

(From the Canadian Courant.)

A most impotent Attempt has been made in the last Gazette, by Authority, to vilify the Character of Judge Willis of Upper Canada, in which, as usual with that Paper, Rancour and Abuse float, Scum-like, uppermost. In the Articles in question, what has the Appearance of Argument is borrowed from the U. E. Loyalist; the Vituperation is purely his own. The absurd Queries proposed by the Gazette are sufficiently answered in the Explanation given by Judge Willis from the Bench; in which, however, as he tells us, the Gazette does not entirely agree with them! He is of opinion that, right or wrong, the Learned Judge should have been silent; thinking, no doubt, that—

"Where Ignorance is Bliss, 'tis Folly to be wise;"

and that it were better that he had persisted, and suffered his Brother Judges to persist, in gross and dangerous Error, than to attempt a Reformation. The Gazette does not condescend to give his Reasons for disagreeing in Opinion with Judge Willis; but no doubt, if he had given them, they would have been overwhelming ones, and would have plainly shewn the Weakness of Judge Willis's

Willis's

Willis's Understanding ; for how could it be supposed that the legal Opinions of a mere Judge of the King's Bench would bear any Comparison with those of the Editor of the Gazette? They would be "Hyperion to a Satyr"—the meridian Sun to a Farthing Rushlight.

Of all the Journals in this City the Gazette stands alone in his Abuse of Judge Willis ; and as, in his Article on Monday, he makes allusion to "adulatory Terms applied to him (Judge Willis) by some of his Contemporaries in this "City," among whom we are included, we could not well pass over in Silence the high Encomium which he has thereby paid to us.

Inclosure, No. 17.

Extract from the *Canadian Freeman* of 21st August 1828.

Court of King's Bench.

WE copy the following Remarks on the Attorney General's Opinion against that of Judge Willis on this Subject, from the York Observer, and think it must be admitted that Counsellor Carey has floored the Attorney General most completely. We repeat it, that it is a Pity Carey is not called to the Bar ; we see no reasonable Objection to this. Carey knows more Latin than the Solicitor General ; for in quoting the Phrase "*fiat justitia*," &c. the other Day, Carey was correct ; while the Solicitor, in attempting to quote it before the House of Assembly some Time ago, called out "*ruat justitia*," which every School-boy knows was wrong. It is also evident, by the following Remarks, that Mr. Carey is a Man of more legal Research than either the Attorney or Solicitor, and therefore we hope soon to see him raising his lofty Figure to display his masculine Eloquence at the Bar. We think it appears evident from the Authorities referred to, that the Appointment of Messrs. Hagerman and Sherwood to go the Circuit is not strictly according to Law. If so, the Rule laid down in one of the Law Reports will apply directly to them, which says, that if a Judge, who hath no Jurisdiction of the Cause, give Judgment of Death, and award Execution, which is executed, such Judge is guilty of *Felony*, and also the Officer who executes the Sentence. Now if it should turn out that the Arguments of Judge Willis and Counsellor Carey are correct, Messrs. Sherwood and Hagerman stand upon very ticklish Ground. We shall see more about it by-and-by.

(From the *York Observer*.)

Judge Willis and the Attorney General.

Remarks upon the Attorney General's Opinion.

The Attorney General says, "that Chief Justice Osgoode, who framed the Act of 1794, never, during the Time he was in this Province, sat on the Bench together with Two Puisné Judges." But what of that? It only confirms the old Saying, "that Law Makers are Law Breakers." If he did not comply with the plain and forcible Meaning of the Act which he himself aided in making ; if he thought proper to sacrifice the Provisions of the Statute to his own Convenience or to that of his Brethren on the Bench ; all we can say is, that we are happy Judge Willis has not followed his Example.

Of all Lawyers in this Province the Attorney is the last that should bolt from the Words of the Statute, and throw himself into the Saddle of one of its Violators. Surely he cannot have forgotten his own Declaration upon the Discussion of the Repeal of the 44th of the late King? During the Discussion of the Bill, it was declared by those who framed or assisted in the passing of the 44th of the late King, that it was never meant to apply to the King's Subjects. In reply to which the Attorney asserted, that he did not care what might have been the Intention of the Members who framed and passed it ; he should read the Words of the Act, and be governed by their Meaning, and not by the Assertions or Acts of those who aided in the framing or passing of it. In this

Case he adopts a different Course; he throws aside the Words of the Act, directs our Attention to the Practice of Mr. Osgoode, and assures us that the Judge (like Ambassador Randal) *was known to Men of great Eminence!* And in order to prove that Twenty Wrongs make *One Right*, he asserts that the Act was violated by Messrs. Elmsly, Powell, Scott, Russell, Powell, Thorp, Campbell, Boulton, Sherwood, and Willis.

But how came the Act to have been violated by Judge Willis? Because, upon his Arrival in this Province, he supposed that Judges Campbell and Sherwood, who were on the Bench, *read and understood* the Act constituting the Court of King's Bench, and strictly adhered to it. But when, from the Practice of the Court, he found it to be any thing but what it professed to be, "a Court for the general and regular Administration of Justice throughout this Province," he had recourse to the Act himself, and discovered the Illegality of his Proceedings. Upon this Discovery, what was the Conduct of Judge Willis? Did he, as has been unfairly represented, keep the Discovery to himself, and wait the approaching Term for its Publication? No. He communicated, as we have been recently informed, the Result of his Enquiry to his Excellency and to Judge Sherwood, in the Hope that the *only* Means which the Constitution points out to remedy the Evil would be adopted. Yet no Steps have been taken, if we except the Amoval of the Judge; but this will not cure the Evil!

The Attorney says, (speaking of the Act of 1794,) "if a Construction thus uniformly acted upon, and thus confirmed, is not to be considered as settled, but may be overturned by any succeeding Judge, there is no longer Certainty or Safety in the Law." And in speaking of doubtful Conveyances, he says, "it has been declared by high Authority, that the Courts would not now suffer a Question to be raised which would disturb a great Portion of the Landed Estates of the Kingdom."

Before putting such Reasoning upon Paper, the Attorney should have read and taken into Consideration his own lengthy and laboured Arguments upon the Alien Question. Was not the Right of Aliens to hold Lands and enjoy the Privileges of British Subjects uniformly acted upon and confirmed by the Court, and considered as settled by all the Community? Yes; and that supposed Right has been overturned; and the Question which led to its Overthrow was raised by the very Gentleman who makes use of the above Arguments, or by his most intimate political Friends! Although at the Time of bringing forward the Question, they knew full well that it might disturb and uproot, not only a *great Portion*, but the Whole of the Titles to the Landed Estates in this Province.

He speaks of the *Certainty and Safety of the Laws*, and we shall meet him with the Language of Chr. Fitzgibbon, when commenting upon the Infamy of a Baron of the Exchequer.

"Where is the Certainty, where is the Safety of the Laws? Where can they be found? Surely not in this Country, where Laws, which were intended to be equal for all, are warped to the private Convenience of those who have been made the Administrators of them. Instituted at first for the Protection of all, they are made to defend the Usurpations of a few; and as the People continue to respect them, while those to whose Guardianship they are intrusted make little account of them, they, at length, have no other Effect than that of supplying the Want of real Strength in those few who have placed themselves at the Head of the Community, and rendering regular and free from Danger the Tyranny of the smaller Number over the greater, the Oppression of the rich over the poor, the Encroachments of the powerful over the weak.

"To remedy, therefore, Evils which thus have a Tendency to result from the very Nature of Things; to oblige those who are, in a Manner, Masters of the Law, to conform themselves to it; to render ineffectual the silent, powerful, and ever-active Conspiracy of those who govern; requires a Degree of Knowledge and a Spirit of Perseverance which are not to be expected from the weak, the poor, or the Multitude; but can only be found in that Kernel of Knowledge—a pure and independent Bar, and a virtuous and watchful Press."

The

The Attorney says, "an Infinity of Actions might be sustained for Acts done in accordance with the uniform Practice of the Court; and a Scene of Confusion would ensue, of which the Extent cannot be foreseen."

In answer to this we say, do not by a Perseverance in Error add to the Infinity of Actions; do not increase the Scene of Confusion; but do, Mr. Attorney, as Judge Willis would have done, bring a Bill into Parliament, and cure the Evil. Common Sense points out this as the only effectual Course to put a Stop to Confusion; and there is nothing but weak Argument and legal Quibble opposed to it.

The Attorney General cites Authorities for our Guidance in the Construction of Statutes under Consideration, and we find "Plowden" is his Favourite.

As far as we have gone in this Argument, the only Weapons we have made use of to demolish the Fabric attempted to be raised by the Attorney are his own Arguments upon other Questions, and what Blackstone terms the Foundation of Law, Common Sense. But we shall now turn to his Favourite. Plowden says, "the best Way to expound a Statute is to consider what Answer those who made the Act would have given the Questions made if proposed to them."

Well then, suppose the following Questions had been put to them:

Have you established a Court "for the general and regular Administration of Justice throughout this Province," in which Court Three Judges shall preside?

Did you intend by the Words, "A Chief Justice together with Two Puisné Judges shall preside in Court," that Two or One of the Three Judges so appointed to preside should not preside? Or that the Attendance of any Two or One of them is sufficient for the general and regular Administration of Justice?

Was it your Intention that a Judge who presides at Nisi Prius, and who may act ignorantly or corruptly, should preside alone in the Court above, and determine upon his own corrupt or ignorant Proceedings?

We leave these Questions to be answered by any Person; and if the Answers given do not support our Arguments and break down the Attorney's, we shall strike our Colours.

The Attorney says, "to assume that every Provision in an Act of Parliament, or every Commission or Writ, or Clause in a Commission or Writ, is of absolute Necessity, is a very unsafe Principle to argue upon." Why then Mr. Attorney have you dabbled so much in the minor Clauses of the Acts under Consideration, and fled from the Preambles and first enacting Clauses, which convey in plain and forcible Language the Objects of the Acts and the Intentions of the Framers? Why adopt what you yourself term an unsafe Principle to argue upon?

