The Court of King's Bench in Upper Canada, 1824-1827

Gray v. Willcocks

(An Old Cause Célèbre)

BY

THE HONOURABLE MR. JUSTICE RIDDELL,
LL.D., LL.D., Etc.

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By the Honourable Mr. Justice Riddell, LL.D., LL.D., etc.

I.

It is interesting to an Ontario practitioner to consider how the courts in his province have been conducted in the past.

I propose to give an account, incomplete as it must be—of the proceedings in Term of the Court of King's Bench in Upper Canada during the period covered by Term Book No. 9 at Osgoode Hall. This book has been selected almost at random: the preceding books contain proceedings quite as interesting, but this particular Term Book I have recently had occasion to consult to clear up an obscure point in our legal history.

The book covers the time from Easter Term, 5 George IV., April 19th, 1824, to Michaelmas Term, 8 George IV., Nov. 17, 1827. Until the end of Trinity Term, 6 George IV., July 2nd, 1825, the chief justice was William Dummer Powell, the two puisne justices were William Campbell and D'Arcy Boulton. Sometimes all three sat, sometimes only two and sometimes one. In Michaelmas Term, 6 George IV., Oct. 24th, 1825, Campbell was sworn in as Chief Justice and Levius Peters Sherwood as junior puisne. Mr. Justice Boulton did not sit from Easter Term, 6 George IV., April 19th, 1825, until Michaelmas Term, 7 George IV., Nov. 6th, 1826. He sat during that term and Hilary Term, 7 George IV., January 1st to 13th, 1827, but does not thereafter appear. He resigned, and Mr. Justice John Walpole Willis was sworn in, Michaelmas Term, 8 George IV., Nov. 5th, 1827; there was no further change during the period of Term Book No. 9.

The Clerk of the Crown and Pleas who acted as Registrar—from and after Oct. 24th, 1824, was Charles Coxwell Small who had been called in the April previous—he is No. 80 on the Law Society's Roll. The Clerk of the Crown and Pleas was of no slight importance—on Nov. 8th, 1827, the full court, Campbell, C.J., Sherwood and Willis, JJ., announced as follows: "The court ordered that as no business could be done on account of the illness of the Clerk of the Crown, the time should be enlarged for four day rules until to-morrow" and then adjourned till the morrow at 10 o'clock. On Nov. 9th, "the court being informed by letter from the Clerk of the Crown, Mr. Small, that he is too much indisposed to attend the court and requesting Mr. Cawdell may act as his deputy in court. It is ordered that the said Mr. Cawdell* do act in that capacity till the court shall make further order respecting the matter and either approve or disapprove of Mr. Small's appointment of a deputy." As nothing further is heard of the matter, it may be assumed that Mr. Small came back to his post, and that his deputy was in the meantime satisfactory.

Chief Justice Powell was born in Boston, Massachusetts, of an old Welsh family (Ap Howell). He was educated in Boston, in England and on the Continent; he was later (in 1784) called to the Bar of the Inner Temple. He took the Loyalist side and went to Montreal some years before peace was declared in 1783. In that year, he took to London a petition signed by many of the English immigrants against having the French Canadian Civil Law imposed upon them as had been done by the Quebec Act, 14 George III. c. 83 (1774). Returning to Canada he was employed by Lord Dorchester, the Governor-General, on several Commissions, and was in 1789 appointed sole judge of the Court of Common Pleas which Dorchester had instituted for the District of Hesse. The headquarters of this court were at Detroit which till 1796 was part of Canada. The court sat, however, only at L'Assomption which is now Sandwich, and the proceedings for

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*This, no doubt, is what is referred to in the Index to Taylor's Reports, p. 536, "The court required that the appointment of deputy clerks of the Crown should be sanctioned by the court, Caldwell *ex parte*." The decision nowhere appears in the body of the volume—and I have copied the official record, spelling and all.

a great part of the time the court was in existence are still at Osgoode Hall in the King's Bench vault. Powell was also made a member of the Land Board for Hesse, sitting at Detroit. When in 1794, by 34 George III, c. 2, the Courts of Common Pleas were abolished and a Court of King's Bench was created, Powell was made a justice of that court. William Osgoode was the first chief justice of Upper Canada, having come out in that capacity shortly after Simcoe, but he never sat in the King's Bench in Term. Powell sat either alone or with Hon. Peter Russell (who received a commission more than once for a temporary period) until Elmsley was appointed Chief Justice in 1796. Allcock was in 1798 appointed a puisne justice, and thenceforward with short intervals the court was composed of a chief justice and two puisnes, until it was merged in the High Court of Justice in 1881. Although the full court was in theory three judges, two or even one of them exercised the powers of the full court.

Powell was a diligent judge. Only one instance is known of his being absent from the Bench in Term for any protracted period; that was from July, 1806, till November, 1807, when he was in Spain in the successful attempt to secure the release from a Spanish-American prison of his son who had joined Miranda in his unsuccessful revolutionary incursion into Venezuela.* He was made chief justice in 1816 on the resignation of Chief Justice Scott, and was also appointed Speaker of the Legislative Council.

During the last few years of his judicial life he rather fell out of the good graces of the administration, and when he desired to resign upon a pension, the Executive Council reported against it. Notwithstanding this, he finally was granted a pension for life of £1,000 sterling. He lived the short remainder of his life—nine years—in Toronto, dying there in 1834.

D'Arcy Boulton was an Englishman who came before the beginning of the last century to Upper Canada, arriving in York

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*In the first Term after his return from Spain he took part with Scott, C.J., in discussing the only action of Scandalum Magnatum ever brought on this side of the Atlantic. The proceedings were taken by Mr. Justice Thorpe against Col. Joseph Ryerson: "Thorpe qui tam, v. Ryerson. (See an article by the present writer in the Journal of the American Institute of Criminal Law and Criminology for May, 1913 [4 Jour. Amer. Inst. Crim., p. 12], "Scandalum Magnatum in Upper Canada.")

(Toronto) in 1806 or 1807. After living in Augusta for some years, he received a license to practise in 1803 from the Administrator of the Government and became a member of the Law Society the same year (No. 22 of the Society's Roll); he became Solicitor-General in 1805. In 1810 sailing for England he was taken by a French privateer after being wounded in a gallant resistance; he was kept a prisoner in France till the temporary peace of 1814. On his return to Upper Canada he was made Attorney-General, when John Beverley Robinson (afterwards C.J.), who had acted as Attorney-General since the death at Queenston Heights of Col. John Macdonell, succeeded Boulton as Solicitor-General. Boulton was made puisne judge in 1818, when Robinson succeeded him as Attorney-General, and Henry John Boulton, his son, became Solicitor-General. Resigning in 1827, he survived for only three years, living all the time in York.

William Campbell was the first of our judges to be knighted. He was a Scotsman who came to this continent as a private soldier in a Highland regiment. He fought during the Revolutionary War, being taken prisoner at the surrender of Cornwallis; at the peace he went to Nova Scotia. Called to the Bar of Nova Scotia, he was in 1811 appointed to the King's Bench in Upper Canada. He became chief justice, as we have seen, in 1825, and resigned in 1829 to be succeeded by John Beverley Robinson. He, on his resignation, received the honour of knighthood.

Levius Peters Sherwood was Canadian born, the son of Mr. Justus Sherwood of Augusta (the name is sometimes given Mr. "Justice" Sherwood, leading to some confusion with his more celebrated son). The future judge was called in 1803 (No. 19), became a member and Speaker of the House of Assembly, and an ardent supporter of the Government.* In 1841, he was called to

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*William Lyon Mackenzie speaks thus of him, p. 337 of his "Sketches of Canada and the United States."

"Levius Peters Sherwood was at one and the same time collector of customs at Brockville and at Johnstown; judge of the district court of the two counties; registrar of conveyances for Grenville court and for Carleton county; Surrogate judge, Johnstown district; M.P. for a county, and Speaker of the House of Assembly."

the Legislative Council as Speaker and in 1825, appointed to the King's Bench. He survived till 1850.

John Walpole Willis deserves a section devoted to himself—I therefore say nothing of him at this time.

At the time now under consideration, the Law Society did not, as now, simply furnish to the court a certificate of fitness to be sworn in as an officer of the court for each aspirant to the position of attorney. The officers whom we now call solicitors were in the Common Law Courts called attorneys, and later, when a Court of Chancery was established (in 1837), in the Court of Chancery were called solicitors. Since the Judicature Act of 1881, the designation attorney has not been in use. The Court of King's Bench being a common law court, its officers were attorneys.

One desiring to be sworn in and enrolled as an attorney appeared in court in Term with evidence of his having served the prescribed time as a clerk; his papers had to be regular—for example, July 17th, 1824, before Powell, C.J., Campbell and Boulton, JJ., Mr. John Lyons was proposed by the Solicitor-General to be sworn in as an attorney. Upon producing his articles of clerkship, the certificate of his master appearing insufficient, the court refused to admit him. The Solicitor-General was Henry John Boulton, and it was he who was "his master," yet the court did not accede to the motion: *Ex parte Lyons* (1824), Tay. 171; *Ex parte Radenhurst*, (1824), Tay. 138. Next Term, Nov. 13th, before the same court, "Mr. John Lyons, having produced his articles of clerkship to Henry John Boulton, Esquire, for the faithful service of upwards of three years and the additional affidavits from these produced on his last application the court ordered that he be sworn in as an attorney of this Honourable Court." Nov. 7th, 1826, "The treasurer of the Law Society presented A. Wilkinson, Esquire, and John Lyons, Esquire, as being admitted barristers"; and Nov. 18, they were sworn in as barristers accordingly.

Those desiring to be admitted as barristers were, in most instances, presented by the treasurer of the Law Society, and sworn in at once, as in the present practice; but this was not always the case; for example, in Michaelmas Term, 2 Geo. IV., Nov. 7th, 1821 (Præs. Powell, C.J., Campbell and Boulton, JJ.), "Mr.

John Rolph having produced satisfactory evidence of his having been admitted to the English Bar—he took the usual oath and was admitted a barrister, and attorney of the honourable court." This was the well-known Dr. Rolph; he was admitted to the Law Society on the same evidence and is No. 64 on its roll.

In Michaelmas Term, 2 George IV., Nov., 1821 (Præs. Powell, C.J., Campbell and Boulton, J.J.), Robert Berrie, Esquire, applied to be admitted to practise as a barrister, under the provision of 43 George III. passed March 5th, 1803, "and having produced proof to their satisfaction of his having been admitted to practice at the court of the sheriff's depute of Lanarkshire held at Glasgow, and also of his character and conduct it is considered by the judges that the said Robert Berrie be admitted to practice in this province as a barrister and the said Robert Berrie took the oaths required and is hereby admitted accordingly." He was also admitted to the Law Society and is No. 65 on the roll. Nothing like these cases occurs, however, during the period of Term Book No. 9.*

While the court was very careful as to whom they would admit as attorneys (or to use the traditional orthography, attornies), no one who had not been admitted was allowed to practise as an attorney on penalty of being attached for contempt.

Barnabas Bidwell, father of the better-known Marshall Spring Bidwell, was charged with practising as an attorney in the name of Daniel Washburn of Kingston, who had been struck off the roll for misconduct. The following are the entries: Easter Term, 8 George IV., April 24th (Præs. Campbell, C.J., and Sherwood, J.), "in the matter of Barnabas Bidwell, on the complaint of John McLean, Esquire, sheriff of the Midland District, motion for a rule to shew cause why an attachement should not issue against the said Barnabas Bidwell for a contempt for acting and practising as an attorney in the name of Daniel Washburn, Esquire, in a certain cause wherein Samuel Brock was plaintiff and John White defendant, on affidavit of John McLean, Esquire, and of the said Samuel Brock; H. J. Boulton, for plaintiff. Stands for to-morrow; H. J. Boulton files three papers and motions; W.

*See In re Macara, 2 U.C.R. 114, Mandamus, In re Lapenotière, 4 U.C.R. 492.

W. Baldwin files two papers"; "April 25th, affidavit put in and filed by R. Baldwin"; May 5th, "Rule granted"; June 28th, "The court withholds giving an opinion on the present application at present, W. W. Baldwin, H. J. Boulton." June 30th, "Rule Discharged, W. W. B., Esq."

Nothing is more certain than if Bidwell had been proved to be practising as an attorney, he would have been attached for contempt of court, fined and imprisoned.*

The court exercised strict discipline over its attornies. Many cases are found of motions against such officers. I give some of them. In Easter Term, 8 George IV., May 3rd, 1827 (Præs. Campbell, C.J., and Sherwood, J.), "*In re Sam. Merrill*, one etc., motion for a rule to shew cause why an attachment should not issue against Samuel Merrill one of the attornies of this honourable court for a contempt on matters disclosed on affidavit, John B. Robinson, Attorney-General, granted." June 28th, "Attachment ordered, John B. Robinson, Attorney-General."

In Michaelmas Term, 7 George IV., Nov. 6th, 1826 (Præs. Campbell, C.J., Boulton and Sherwood, JJ.), "The Solicitor-General handed into court (as public prosecutor) a presentment of the grand jury of the Newcastle district against Marcus Whitehead, Esquire, together with certain affidavits to support the same for having charged, in the course of his profession excessive fees, and also for having charged and received monies under false pretence." Nov. 18th, "In the matter of certain charges preferred by the grand jury at the last Assizes for the district of Newcastle and by the Solicitor-General laid before the Court of King's Bench

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*See the King v. Bidwell, Tay. 487—Barnabas Bidwell was administrator of the estate of Washburn. His celebrated son, Marshall Spring Bidwell, had been a clerk in Washburn's office. The whole trouble arose from the fact that the elder Bidwell being managing clerk for Washburn, had, as such, given in Washburn's name a direction to sheriff McLean to release from custody a defendant who had been in execution under a ca. sa. The plaintiff, one Brock, denied the authority to give this order, and brought an action for an escape against the sheriff. The court held that Washburn had no authority to release the debtor, at least not without receiving payment of the debt; and Brock recovered judgment against the sheriff: Brock v. McLean, Tay. 310, 398. Thereupon McLean took these proceedings, with the object of compelling Bidwell to re-imburse him—but, as we have seen, failed.

against Marcus F. Whitehead and Thomas Ward, Esq., the former as clerk and the latter as judge of the district court in the said district of Newcastle—*In re Whitehead.* The Attorney-General moves for a rule to shew cause why an attachment should not issue against the said Thomas Ward and Marcus F. Whitehead respecting the former for having taxed to the latter as attorney and the latter for having charged and received illegal costs in certain cases in the said district court in which John Wilder, Christopher Lightle, Festus Burr, Richard Wright, Ephraim Farren, Joseph Cuthbert Townsend, were parties, J. B. Robinson, Esq., Attorney-General, granted."

Hilary Term, 7 George IV., Jan. 13th, 1827, same judges present, "Attachment ordered against both defendants" on motion of the Attorney-General. April 30th, "Defendants' answer put in and filed in this cause." Trinity Term, 8 George IV., June 18th (Præs. Campbell, C.J., and Sherwood, J.), "Judgment of the court that M. F. Whitehead do pay a fine of fifty pounds and remain in custody till paid and that Thomas Ward, Esquire, judge of the district court of the district of Newcastle do pay a fine of five pounds"; See *The King* v. *Whitehead and Ward,* Taylor 476.

Hilary Term, 7 George IV., Jan. 13th, 1827, "In the matter of complaint of Francis Beattie against M. F. Whitehead, one of etc., motion for a rule to shew cause why an attachment should not issue against M. F. Whitehead, one of the attornies of this court for exacting unauthorized and exorbitant fees of one Francis Beattie on account of costs alleged to be due him in a cause of the said Francis Beattie against one Kenneth Meriam in the district court of the district of Newcastle in which cause the said M. F. Whitehead was attorney for the said Frs. Beattie. J. B. Robinson, Attorney-General, granted."

On the same day, upon a motion of the Attorney-General, the same rule was granted against the same attorney on the complaint of Francis Parmentier, who had been sued in the same court by Adam Henry Meyers and had been represented by Whitehead as attorney. May 3rd, both rules were argued and "stand till next Term for judgment; J. B. Robinson, Esquire."

The same day a rule was granted against Whitehead at the instance of a suitor in the case of Henry Elliott v. John Badcock,

in the same district court of the Newcastle district to shew cause why he "should not be fined the sum of three pounds illegally taken by him as an attorney in that cause . . . why an attachment should not issue against him. H. J. Boulton, for complainant."

These seem to have been dropped when Whitehead was punished. No doubt he repaid the costs improperly obtained.

There are several such motions. Sometimes the attorney satisfactorily explains the matter.* Sometimes the whole dispute is referred to arbitration.†

Easter Term, 8 George IV., May 3rd, 182? (Præs. Campbell, C.J., and Sherwood, J.), "In re F. X. Rocheleau, one of the attornies of this honourable court. Motion for a rule to shew cause why an attachment should not issue against Francois Xavier Rocheleau, one of the attornies of this honourable court, for a contempt on matters disclosed on affidavit: John B. Robinson, Attorney-General, granted." June 28th, "Enlarged rule."

On Nov. 7th, 1826, D. Bethune had obtained a rule against this attorney to shew cause why an attachment should not issue against him for not paying over monies collected by him as attorney for Robert Moore. But this rule, although taken out, does not seem to have been pressed: probably the attorney paid the amount and costs.

Other officers did not escape, for example, sheriffs.

An attachment having been granted against Rapalje, the sheriff of the London district, the following proceedings were had —on April 26th, 1826, a rule was procured by James E. Small in Rex v. Abraham A. Rapalje (sheriff) to George W. Whitehead, one of the coroners of the London district, to return the writ of attachment to him directed against Abraham A. Rapalje, sheriff of the said London district and returnable the first day of this term. On Nov. 10th, 182?, Abraham A. Rapalje, sheriff of the London district, "entered into a recognizance with James Fitz-

*As in Radcliffe v. Small, Taylor, 308, where the client had instructed the attorney to send the money by return of boat, and the attorney had sent it by a passenger of the boat who did not hand it over. The client was left to his common law remedy.

†As in Carruthers v. John Rolph (the celebrated Dr. Rolph), Taylor 243.

gibbon and Enoch Moore as sureties to appear in the court and answer, etc." Michaelmas Term, 8 George IV., Nov. 16th, 182? (Præs. Campbell, C.J., Sherwood and Willis, JJ.), "Interrogatories and answers read by Attorney-General. Sentence of the Court, Mr. Rapalje to remain in custody till money be paid."*

In Trinity Term, 8 George IV., June 30th, 182? (Præs. Campbell, C.J., and Sherwood, J.), "In the matter of John Spencer, Esquire, sheriff of the district of Newcastle. Motion for a rule to shew cause why an attachment should not issue against John Spencer, Esquire, sheriff of the district of Newcastle, for an abuse of his office in exacting excessive and illegal fees; John B. Robinson, Attorney-General."

Nov. 5th, 182?, "on application of Mr. George Boulton on behalf of the sheriff of the Newcastle district, the court consented that the rule returnable against him this Term should stand over to the first of the next Term." Nothing more is heard of the matter: probably the matter was amicably settled. It is more than likely that the excessive fees were taken under a misunderstanding of the tariff; or it may be that the deputy sheriff was the real offender.

In Easter Term, 8 George IV., May 4th, 182? (Præs. Campbell, C.J., and Sherwood, J.), "In the matter of Ebenezer Perry, deputy sheriff of Newcastle. Motion for a rule to shew cause why an attachment should not issue against Ebenezer Perry, deputy sheriff of the district of Newcastle, for a contempt in taking illegal

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*The full story is that Rapalje had in his hand a writ of fi. fa. He was ordered by the court to return this writ into court with an account of what he had done under the writ—he omitted to do so. Then followed the next step, Michaelmas Term, 5 George IV., Nov. 18th, 1825 (Præs. Campbell, C.J., and Sherwood, J.), "John Secord and Elijah Secord v. Thomas Horner. Motion for an attachment against A. A. Rapalje, sheriff of the London district, for not returning the writ of fi. fa. to him directed in this cause pursuant to a rule of the court on motion of Jas. E. Small, Esq., of counsel for the plaintiff. Granted and issued." This writ was, of course, directed to one of the coroners of the district, but the coroner, Mr. Whitehead, did not execute it. It therefore became necessary to move against him. Accordingly on June 30th, 1826, an attachment was issued directed to James Mitchell and....., Esq., elisors, against George W. Whitehead, one of the coroners of the London district for neglecting to return the writ of attachment issued to him and returnable in Easter Term last. Then, and only then, the sheriff gave himself up and appeared in court.

and extorsive fees in the following causes: John Nix v. Daniel Hendrick; Jabez Lynde v. John Pickle; Abraham Butterfield v. Thomas Spencer and Israel Ferguson; John Nix v. Benjamin Davidson; Henry Elliott v. John Badcock, and Elijah Burk v. Adam Scott, and James Waldron v. Adam Henry Myers. H. J. Boulton, rule nisi, granted and issued," June 21st, "Attachment ordered." Michaelmas Term, 8 George IV., Nov. 12th, 1827, "Interrogatories filed by H. J. Boulton." Nov. 14th, "Mr. Perry's answers to the interrogatories sworn to, read and filed in court."

Nov. 15th, "The court ordered that the said Ebenezer Perry should pay a fine of two pounds and to stand committed till paid."

II.

While watchful over the conduct of its own officers, the court did not omit to exercise strict supervision over the inferior courts.

The first courts in Upper Canada were the four Courts of Common Pleas, one for each of the districts into which what afterwards became Upper Canada had been divided by Lord Dorchester by proclamation, July 24th, 1788, viz.:—Luneburg, Mecklenburg, Nassau and Hesse. These courts were abolished in 1794 by 34 George III., c. 2, and new District Courts for each district were organised in the same session, c. 5; these later on, in 1849, became County Courts. Before this time, *i.e.*, in 1792, by 32 George III., c. 6, inferior courts called Courts of Requests had been constituted to be presided over by one or more justices of the peace and afterwards by Commissioners; these ultimately gave way to Division Courts. There were also courts of General Quarter Sessions of the Peace, composed in fact of the justices of the peace of the district, with large criminal jurisdiction, particulars of which may be found in Blackstone's Commentaries, Book IV. pp. 271 et seqq. These have become the General Sessions in which the County Court judge is in fact the only presiding officer, although in theory, the magistrates are sitting with him. Commissions of Oyer and Terminer and General Gaol Delivery also issued. Over all these courts, the Court of King's Bench, instituted in 1794 by 34 George III. C. 1, exercised authority.

We have seen how a judge of a District Court was punished

for taxing too high fees to an attorney; and there are many other instances of the court exercising its supervisory jurisdiction (see Blackstone's Comm. Book III., pp. 42, seqq.).

In Easter Term, 4 George IV., May 14th, 1824 (Præs. Powell, C.J., Campbell, and Boulton, JJ.), "*E. Edmunds* v. *Harnack;* Motion for a mandamus nisi to David McGregor Rogers, Esq., judge of the District Court of Newcastle, commanding him to enter final judgment upon the interlocutory judgment and assessment of damages in this cause now pending in his court; J. B. Macaulay, granted and issued."

No further proceedings were taken in court in this case; it is probable that judgment was entered up properly on service of the mandamus nisi. Mr. Rogers was also member of Parliament and registrar of deeds.

In Easter Term, 4 George IV., May 1, 1824, (Præs. Powell, C.J., Campbell and Boulton, JJ.): "*The King* v. *Bullock et al.* Motion for a rule to shew cause why an attachment should not issue against Richard Bullock and Sheldon Hanby, Esquires, Commissioners of the Court of Requests in the district of Newcastle, for corruptly giving judgment against the defendant in a suit of *Samuel Heath* v. *Isaac Brown*, for £2 1s. 10d., D. & C.; J. Macaulay; granted and issued." ("D. & C." means of course, "Damages and Costs.") Nothing further was done in this case; it is probable the defendant found he had made a mistake.

In Hilary Term, 5 George IV., January 27, 1825 (Præs. Powell, C.J., Campbell and Boulton, JJ.): "*Jas. & Wm. Allan* ats. *Henry Woodside* in the District Court. Motion for a writ of certiorari, directed to the judge of the Newcastle District Court to remove the proceedings in this cause into this court; G. Boulton; not granted." With this may be compared *In re Erb* (No. 2), 1908, 16 O.L.R. 597. ("ats." means "at the suit of.")

In Easter Term, 7 George IV., April 19th, 1826, (Præs. Campbell, C.J., and Sherwood, J.), "*In re Edward McBride, Esq.* Motion for a rule to shew cause why a mandamus should not issue to the justices of the peace in the Niagara district directing them to grant the usual order upon the treasurer of the said district for the wages of Edward McBride, Esq., a member representing the town of Niagara in the district of Niagara in Provincial Parlia-

ment; J. B. Macaulay, Esq., for E. McBride, Esq. The court not prepared to give any order on this motion:" April 29th, 1826, "Stands for judgment:" Nov. 14th, 1826, "Stands for further argument:" Nov. 14th, 1826, "Refused."

This was a very curious case; in 1793 the Act, 33 George III., c. 3, provided for the payment of wages to the members of the House of Assembly by the district in which their riding was situated. At the time of the passing of this Act, no town had any member in the assembly. By the Act of 1820, 60 George III., c. 2, towns of 1,000 population or over, in which the Quarter Sessions were held, were given a member. Niagara elected Edward McBride—the magistrates refused to give an order to the treasurer to pay him the wages he claimed, and he applied to the court: but after two arguments and much consideration, his application was refused. The reasons will be found in Taylor's Reports, p. 512. It was not till 1835 that members for towns were paid wages like their fellow-members who represented counties, 5 William IV., c. 6.

In Trinity Term, 7 George IV., June 20th, 1826, (Præs. Campbell, C.J., and Sherwood, J.) "*The King* v. *John Eagleston, Elizabeth Slingsland and Peter Ball;* Indictment for a nuisance in stopping the King's highway. Motion for a rule to shew cause why a mandamus should not issue to the magistrates of the Niagara district in Quarter Sessions assembled, commanding them to pass judgment against defendants upon the above indictment on the verdict rendered at the last Court of General Quarter Sessions of the Peace, holden in and for the Niagara district; J. B. Robinson, Esq., for prosecutors. Granted and issued to J. B. Macaulay, Esq." In Michaelmas Term, 7 George IV., Nov. 14th, 1826, this rule was made absolute on motion of J. B. Macaulay, Esq., (Præs. Campbell, C.J., Boulton and Sherwood, JJ.).

Macaulay was the son of Dr. Macaulay, Inspector-General of Hospitals; himself an ensign in the 98th Regiment of Foot, he took part in the war of 1812, as lieutenant in the Glengarry Fencibles. He was present at Ogdensburg, Lundy's Lane and Fort Erie. Called to the Bar in 1822, he afterwards became a Justice of the King's Bench; and when the Court of Common Pleas was organized in 1849, he was the first chief justice of that court. He re-

signed in 1856, and next year was knighted, and appointed a judge of the Court of Error and Appeal. He died in 1859, at Toronto, at the age of 66.

The result of the rule being made absolute was that the magistrates were compelled to pass sentence upon those convicted of a public nuisance.

A case a little earlier, in July, 1823, may be mentioned here. There was a Presbyterian congregation at Lancaster or Williamstown, which desired a pastor. A number of the members signed a subscription paper promising to pay $6 each per annum towards a minister's salary. A minister came out from Scotland on the faith of this promise, but some did not pay. Thereupon the elders and committee of the church sued one of them, Wood, in the Court of Requests; McIntyre was one of the commissioners who sat in the court; he was one of the elders of the church and one of those to whom the promise was made. McKenzie was another commissioner; he also was interested to the extent that he was bound to pay the minister's salary. McMaster the third commissioner was also interested, but refused to sit. McIntyre and McKenzie sat and gave judgment against Wood. An attachment was moved for against all three along with Alexander Fraser, a fourth commissioner, who did not sit at all. The court ordered an attachment to issue against McIntyre and McKenzie. They were brought from the other end of the province to Toronto at their own expense, a distance of nearly three hundred miles, and, making due submission, were discharged, but made to pay all the costs of the proceedings. See Taylor's Reports 1823-1824, pp. 21, 85, seqq.

There are many instances of certiorari for the purpose of quashing convictions; but these are not different, in substance, from what we see every day at Osgoode Hall at the present time.

Certain of the proceedings look exceedingly strange to a modern barrister. Many entries are found like the following:

In Easter Term, 7 George IV., April 17, 1826, (Præs. The Chief Justice, Powell). "*Isaac Swayze* v. *John Bissell;* Motion for the usual allowance of five shillings, defendant being an insolvent debtor in the gaol of the Niagara District; J. B. Macaulay, Esq., for defendant. Granted and issued."

The unfortunate defendant had had a judgment entered against him, and the plaintiff had caused a writ of ca. sa. to be issued under the then existing practice, under which the defendant was arrested by the sheriff and committed to the common gaol till he should pay the debt—this "arrest on final process" was a not unusual proceeding. The District should not be called upon to support a debtor in gaol and often the debtor himself could not. Much suffering was the result as any reader of Dickens will have seen; Mr. Jingle's lot was not unique. Accordingly the Provincial Act was passed (1805), 45 George III., C. 7, which provided "that if any prisoner in execution for debt shall apply to the court whence such execution issued and make oath that he or she is not worth five pounds, the plaintiff at whose suit, he or she is detained, shall be ordered by the court . . . to pay to the defendant . . . the sum of five shillings weekly maintenance . . . in advance . . . on failure of which the court . . . shall order the defendant to be released." Many stories were told of releases under this Act—one of the favourites and one I have heard from old Canadians a score of times, is that after an order of this kind had been made, the plaintiff one morning unfortunately paid as part of the five shillings, a bad half-penny, whereupon the defendant, being in the Cobourg gaol, applied to the court, and the court was forced to release him from custody. There is much virtue in a "shall."

The court went so far as to decide that it was no excuse for the non-payment of the allowance that the defendant had become possessed of property subsequent to his obtaining his order for allowance; *Williams* v. *Crosby* (1823), Taylor 16. But where a defendant had applied to the court for his release, and, expecting to succeed in this application, had while the application was pending, refused to accept the weekly allowance, he was not allowed the arrears when his application failed: *Moran* v. *Maloy* (1827), Taylor, 563: *ignorantia legis neminem excusat*. It appears from the Term Book, Hilary Term, 7 George IV., Jan. 2nd, 1827, that this judgment was given by the full court, Campbell, C.J., Boulton and Sherwood, JJ., and that the defendant lost six weeks' allowance by his caution.

The Statute of 1822, 2 George IV., C. 8, allowed interrogatories to be exhibited to a defendant in execution, which he must answer on oath shewing his property and his disposition of it, etc. This put a stop to a certain amount of fraudulent concealment of property.

III.

It is now proper to speak of Mr. Justice Willis. John Walpole Willis was an Englishman of good family, but not much money. He was the son of (Rev.) Dr. Willis, who with his son, also a Dr. Willis, took charge of King George III. during his periods of mental aberration. Willis became a barrister and devoted himself chiefly to equity, writing several books which display both ability and learning. He married Mary, the daughter of the Earl of Strathmore, a client of his; the bride had not much more money than the groom.

About 1827, the project was in the air to establish a Court of Chancery in Upper Canada to "mitigate the rigour of the common law," a project which was held in more favour at Westminster, England, than at York, Upper Canada. Willis no doubt was led to believe that this Court would soon be created; and he accepted an appointment as puisne judge of the Court of King's Bench in the meantime, expecting to be made Chancellor at no very distant date.

As we have seen, he was sworn in on Nov. 5, 1827, succeeding Mr. Justice Boulton. He soon found that neither the Lieutenant-Governor (Sir Peregrine Maitland) nor the Attorney-General (John Beverley Robinson) was favourable to the formation of a Court of Equity at that time in the Colony. There was trouble, too, when his wife arrived, over the relative rank and precedence of the daughter of the Earl of Strathmore and the wife of the Lieutenant-Governor, the beautiful Lady Sarah Lennox. Willis, moreover, had his fair share of the traditional and proverbial sentiment of superiority felt by the new-come-out Englishman over the "Colonial." He entertained some contempt for the Chief Justice and his colleague, and did not hesitate to express it. Considering himself wronged by the official class, he rather

affected the opposition, or Radical, element. The "hope deferred which maketh the heart sick" he felt in no small measure; and he was led to do some very unwise acts. At a somewhat early stage in his judicial career, he exhibited his want of judgment—I had almost said of common sense and common decency.*

George Rolph, who is described by Mackenzie as "an English Barrister," and who was called to the Bar of Upper Canada, Trinity Term, 2 George IV., 1821, was practising in Dundas: he was a brother of the more celebrated Dr. John Rolph. One night in June, 1826, a number of persons broke into his house, with

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* Dent, in his "Story of the Upper Canadian Rebellion," vol. 1, p. 168, says that the judgment of Mr. Justice Willis in *Rolph* v. *Simons et al.* was "the very first judgment ever rendered by him." This is an error: in addition to what appears in the official Term Books we have the following statement in Willis' Narrative: "On the 19th of November (1827), the last day of Michaelmas term, judgment was given in two cases: in the first I differed with both my brother judges." And he shews that it was an action for malicious prosecution brought by a tailor against an employer who had prosecuted him for theft, and adds, "this was the first in which I gave any judgment that was not quite of course." In the other case the two puisne justices, Sherwood and Willis, were of the same opinion, but the Chief Justice (Campbell) dissented.

Dent is equally in error in saying, "no hint of partiality had ever been heard against him. There had been no opportunity for any display of partiality by him, for he then took his seat upon the Bench for the first time." He had in May, 1828, been upon the Bench for two full terms, he had had on April 11th an open dispute with the Attorney-General and had charged him with neglect of duty in not prosecuting those who had destroyed Mackenzie's press—and generally had shewn himself not well disposed to the Government. Public comment was not wanting.

Dent's mistake probably arose from a misapprehension of a passage in Lieutenant-Governor Sir Peregrine Maitland's dispatch to the Colonial Secretary of June 6th, 1828. It says: "In the first cause ever tried by him he began an excitement to which our Courts of Justice have never before given occasion, by proceedings which have been already referred to your consideration."

The Lieutenant-Governor is apparently supposed by Dent to be referring to the case of *Rolph* v. *Simons et al.*, but such is not the fact. What he refers to is the first time Willis ever presided in a trial court, civil or criminal, in Upper Canada or elsewhere, which was April 11th, 1828, when Patrick Collins, editor of the *Canadian Freeman*, was to be tried for libel. On this occasion Willis allowed Collins to make a vicious attack upon the Attorney-General, and himself went out of his way to administer a rebuke to that officer wholly undeserved and effectively resented on the spot.

† George Rolph was not an English Barrister, as Mackenzie thought. Dr. Rolph was called to the bar of Upper Canada upon his standing as a member of the Inner Temple, in Michaelmas Term, 2nd George IV.; but George was admitted on the books of the Law Society as a student-at-law, Saturday the last day of Trinity Term, 56 George III., 1816, as being under articles of clerkship, and he was called Saturday the 6th day of Trinity Term, 2 George IV., 1821, having proved his service for five years as a student-at-law in Upper Canada.

their faces blackened and otherwise disguised, and took Rolph out of the house and tarred and feathered him. He brought an action against Titus Geer Simons, (Dr.) James Hamilton and Alexander Robertson for assault and battery. The action was tried at the assizes for the Gore District, Saturday, 25th August, 1827, before Mr. Justice Macaulay and a jury.* The judge's note-book is still extant and gives a full account of the shameful affair. Dent says ("The Upper Canadian Rebellion," vol. 1, p. 168), that "the outrage arose out of private complications and no political question arose in the course of the trial." But no one who is acquainted with the political situation of the time, and the personnel of the parties, can read the judge's notes without seeing that the outrage was very largely political. Perhaps the assailants justified themselves to their own minds and consciences, but it is notorious that a sin in a political opponent seems blacker than in any other. It was, at the trial, proved that the gang had blackened their faces at Dr. Hamilton's, that tar was taken from near there, and generally it was sufficiently shown that Simons and Hamilton had been ringleaders of the mob.

Andrew Stevens, who had been subpœnaed, was called as a witness by the plaintiff, "he declines being sworn, says he can answer no questions but may criminate himself. After argument," the judge says: "I think him competent and that he is bound to be sworn, but not to answer questions that will implicate himself criminally. He refuses to be sworn. Were it a criminal case the refusal is a contempt for which he might be committed; in a civil case, I consider it a contempt also, the witness having appeared in court, but as the refusal may be tantamount to a disobedience of the subpœna, 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 by the judge. Witness refuses to be sworn; Mr. Stevens seemed to want to be sworn in a qualified way, and not to receive the

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*James Buchanan Macaulay, who became a justice of the King's Bench in 1829, Chief Justice of the Court of Common Pleas in 1849, and who was afterwards in 1857 knighted, had been, 3rd July, 1827, appointed temporary Justice of the King's Bench in the room of Hon. D'Arcy Boulton.

general oath, but knowing of no such precedent, I did not permit it. I think he should be sworn generally and the court should protect him under his privilege not to implicate himself criminally. But the witness refused to be sworn." George Gurnett took the same objection. "I explained to him my opinion of the law—of his rights and duty and of his privilege when a witness, but not from being a witness. There is no proof of his being an accomplice further than he himself states; taken for granted." Dr. Baldwin in his argument in term says Gurnett "impudently addressed" the judge as follows: "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" —but the judge's notes do not set this out. Allan N. McNab, an attorney of the court and of counsel for the defendants, took the same objection. "Means to say that he can give no evidence that has not a tendency to implicate himself criminally."

The attorney for the defendants, Mr. Chewett, was also called and took the same position; none of the last named three had been subpœnaed. None of these witnesses was sworn or committed, as it was argued they should have been. There were four witnesses for the defence, and the jury found against Col. Simons and Dr. Hamilton, assessing damages at £40 ($160.00), and acquitted Robertson. The plaintiff was not satisfied with the result, but moved in term. The following is the official record:—

Michaelmas Term, 8 George IV., Nov. 9, 1827 (Praes. Campbell, C.J., Sherwood and Willis, JJ.): "*Rolph* v. *Titus G. Simons, James Hamilton and Alexander Robertson.* Motion for a rule to shew cause why the verdict rendered in this cause at the last assizes in the district of Gore should not be set aside and a new trial granted, the plaintiff having lost important testimony from the contumacy of certain witnesses in refusing to be sworn when required so to be by the learned judge who tried the cause, and having been refused the reply. Robt. Baldwin, Esq., for plt. Granted and issued."

(Praes. Campbell, C.J., Sherwood and Willis, JJ.), Nov. 17. "Rule enlarged."

The Chief Justice (Campbell) went to England on leave of absence, leaving Sherwood and Willis alone as justices of the

court. The commission of Macaulay, of course, had lapsed when Willis was appointed in Boulton's place.

The case came on for final argument in Easter Term, May 1828, before these two judges; the Solicitor-General, Henry John Boulton, against the motion, Dr. Baldwin and his son Robert Baldwin for it. The object of the new trial was stated to be two-fold: (1) a verdict against Robertson and (2) an increase in the amount of damages awarded. Neither judge attached any importance to the second ground of appeal, viz., that the plaintiff had been refused the right of reply—and they differed as to the other ground, Mr. Justice Sherwood holding that there was no breach of duty in the trial judge not committing Stevens, that either the Court in Term should do so or the plaintiff might bring an action against him. As to the other three witnesses he held that as they were not subpœnaed they could not be compelled to give evidence even if present in court. He concluded that the plaintiff should have taken a nonsuit, and that as he did not, but took a verdict against two defendants, he could not have a new trial.

Mr. Justice Willis held that McNab and Chewett were in contempt, Stevens also contumacious, whatever might be said as to Gurnett, inclining to the opinion, however, that he was in the same case as Stevens. He considered that there should be a new trial. He rebuked the Solicitor-General for taking the brief for the defendants instead of prosecuting them criminally, as was his duty—a rebuke instantly resented and replied to with much spirit and asperity by the Solicitor-General, who defended his conduct with vigour and point.

In the course of his judgment Willis said: "In forming my opinion of 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:" and he winds up by quoting Horace, Odes, Bk. 3, Carm. 3:—

> "Justum et tenacem propositi virum
> Non civium ardor prava jubentium
> Non vultus instantis tyranni
> Mente quatit solida . . ."

of which he gives a translation for the benefit of the vulgar:—

> "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*."

However admirable these sentiments may be and are in the abstract, this was a most injudicious method of speech, plainly suggesting as it did, that other judges acted from political motives or through fear of the Governor. But the Radical papers took up the newcomer and extolled his sentiments—largely, one may be permitted to conjecture, that they might thus harass the Government of the day.

Mr. Justice Willis, when he could not get his Court of Equity through promotion of a bill by the Government, himself drew up a bill and endeavoured to have it passed through the agency of the Opposition. Chief Justice Campbell was in poor health and was known to be about to retire, and Willis applied for the Chief Justiceship; but Attorney-General Robinson also desired the position, and had the better claim to it. Willis fell out with the Attorney-General and charged him officially with neglect of duty. Complaint was made against Willis to the Home authorities; while he on the other part, seems to have acted in everything in such a way as most to irritate the Government. He had, or affected to have, the most profound contempt for the legal attainments of his colleagues, especially Mr. Justice Sherwood; and when the Chief Justice, as we have seen, left for England on leave of absence, which he did after Hilary Term, 1828, the court, composed of the two puisnes, was the scene of continual and unseemly wrangling. At the beginning of Trinity Term, Willis announced that the court was not properly constituted, as the Act, 34 George III., c. 2, required three judges; and he declined to sit in Term, leaving to Mr. Justice Sherwood the whole work of the full court. He then left for England to lay his wrongs before the Home authorities.

It is to be remembered that from the very beginning, the Court of King's Bench in Term was frequently composed of only two judges, and sometimes of only one. Take what occurred at the very first. The court was instituted in 1794 by 34 George III., c. 1, of three judges. William Osgoode,

the first Chief Justice, never sat in the King's Bench in Term; up to Hilary Term, 37 George III., Jan. 16, 1797, William Dummer Powell, the puisne judge, sat occasionally alone, but usually with Hon. Peter Russell, who had a special commission. At length (Jan. 16, 1797), John Elmsley presented his patent as Chief Justice and was sworn in. Peter Russell also presented his patent as one of the justices for that term, and he also was sworn in. The ceremony is described in detail in the Term Book and the description is copied in Read's "Lives of the Judges," p. 44. Russell was appointed also for Easter Term, 1797, and for Trinity Term, 1797; and these two, i.e., Elmsley and Russell, sat for these terms. Powell, J., came back in Michaelmas Term, 38 George III., November 6, 1798, and sat with the Chief Justice thereafter. Willis had himself, the first term he was judge, sat with Sherwood, J., to make a full Court in two days of the term, and the next term for more, while the two formed the Court for the whole of Easter term, 1828.*

The Lieutenant-Governor removed Willis; "Amoved" is the term invariably used in our records. The Privy Council decided Willis was wrong in his law. He was appointed judge at Demerara and afterwards at New South Wales. He had trouble with the Governor there and was again amoved; this time, however, irregularly, and the Privy Council allowed his appeal (1846, *Willis v. Gipps*, 5 Moo. P.C. 379). But he was forthwith regularly removed and failed to obtain further employment; he died in 1877.

The statement of the Lord Chancellor (Lord Lyndhurst) at p. 388 of the report in 5 Moore that on the previous occasion "the order on a motion then appealed from was set aside because the appellant was not heard in Canada" is an error. Sir George Murray said in his place in Parliament, May 11th, 1830, when the matter was brought up by Lord Milton on the occasion of Willis

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*From a list made up on June 19th, 1828, by Mr. James E. Small, Deputy Clerk of the Crown, for the information of the Executive Council, it appears that up to that time out of the 135 terms of the Court of King's Bench, 56 only had been held by the Chief Justice and two puisne judges; that 59 terms had been held by a Chief Justice and one puisne judge; that 15 had been held by two puisne judges, and 5 by one puisne judge alone.

petitioning for redress on the ground that he had acted in good faith: "The Government had taken the expense (of an appeal to the Privy Council) on itself. The case was argued before the Privy Council . . . Mr. Willis' complaint amounted to this, that his removal was unwarranted, illegal and ought to be void; and the decision of the council was that it was not unwarranted, not illegal and that it ought not to be void.*

There has been only one other instance of amoval of a judge of a Superior Court in Upper Canada (Ontario)—that of Mr. Justice Thorpe in 1807. Other troubles of Mr. Justice Willis may be seen in the report of *Willis* v. *Bernard*, 5 C. & P. 342; 8 Bing. 376. His wife, left behind in Canada, consoled herself with Lieutenant Bernard; and the injured husband brought a successful action of crim. con.

When Willis, J., refused to sit, Dr. W. W. Baldwin, his son Robert Baldwin, Dr. John Rolph and Simon Washburn declined to act as counsel before the court. But when the decision of the Privy Council became known, they all returned to the court except Dr. Rolph, who never again appeared in term, and shortly afterwards sold out his practice to his brother in Dundas.

We have gone far away from *Rolph* v. *Simons et al.;* the result was such that Mackenzie was almost justified in saying in 1832 in his "Sketches of Canada and the United States," p. 400: "Mr. Rolph . . . had been tarred and feathered a few years before by some of the Government officers . . . but the law in Canada could yield him no redress, although a lawyer, and his brother, one of the most popular and estimable men in the colony." It may have been A. N. McNab's success in disobeying the judge at this trial which emboldened him in 1829 to defy a Committee of the Assembly, to refuse to answer their questions and aggravate his offence by the terms of his written defence. This conduct landed him in custody for ten days, but was the beginning of a prosperous career as a politician, culminating in the premiership of Canada and a knighthood. George Rolph seconded the motion for committing him to the gaol at York for contempt. "Time brings about its revenges."

*Hansard's Parliamentary Debates, New Series, vol. 24, pp. 551, et seq. (1830).

IV.

Many of the motions made before the Court are such as have recently been made in the Divisional Court, e.g., motions for a new trial on the ground that the verdict is against evidence, or against the weight of evidence, or for wrongful rejection or admission of evidence, the verdict excessive, etc. There was a difference indeed in the manner of making such motions; the complaining party would move for a Rule Nisi to set aside the verdict, etc.; if a primâ facie case was made, a Rule Nisi would be granted. This would be served upon the other side, and counsel appeared on the day fixed and argued the matter. If the appeal was allowed, the rule was made absolute; if dismissed, the rule was discharged.

But there were many matters which are no longer heard of in "Full Court." Submissions to arbitration were made Rules of Court in order to enable one who was not satisfied to move against the award; actions were stayed until the attorney for the plaintiff should produce his warrant and authority for bringing the action; sci. fa. obtained to revive judgments; rules granted to the sheriff to return writs of fieri facias; to set aside cognovits; attachment for non-performance of award and appointment of a guardian to sue for an infant, etc., etc. None of these do we find in the court at all at the present time. There are other matters which were in those days solemnly passed upon by the full court, which are now disposed of in Chambers, by a judge or the Master; e.g., leave to discontinue; change of venue; order for security for costs, the plaintiff being out of the jurisdiction; entering up satisfaction; leave to amend pleadings; leave to have further time to plead; to amend writs of execution; particulars of demand, etc., etc.

There are a few matters to which particular reference may be made. The plaintiff might give notice of trial and fail to go to trial at the assizes for which notice was given. In that case, the court might, and generally did, order him to pay the defendant's costs as a punishment for not going to trial; but the defendant could not give notice of trial, himself.

Demurrers were not uncommon, due chiefly to the strictness with which pleadings were construed. In those days the court

did not call upon the plaintiff to set out the facts upon which he relied so much as the legal consequences of the facts. If the declaration (statement of claim) did not disclose a cause of action, the proper and usual course was for the defendant to demur, i.e., to say in effect that granting the truth of all that is alleged, the plaintiff had no legal right to relief. Nowadays we should raise a point of law and have it decided under C.R. 259; but in those days counsel would demur and then apply for a "dies concilii," "dies consilii," or "concilium," i.e., for a day upon which the court would hear argument upon the demurrer; and upon the day so fixed, counsel on both sides would be heard and the question decided, the demurrer being "allowed" or "overruled," as the case might be. Demurrers were abolished by Rule 1322 in 1894.* (See 16 P.R., p. xv.)

Perhaps what would strike the modern practitioner most forcibly was the practice in ejectment. To anyone ignorant of the history of the English law, the old action of ejectment would seem a monument of wrongheadedness and technicality; but the history discloses that this form of action was in reality an ingenious device for doing justice without altering the old forms of law. The late Goldwin Smith was wont to remark that to expect lawyers to reform legal procedure was to expect the tiger to abolish the jungle. This gibe is repeated from time to time by those who should know better. Nothing is more false than what is suggested; all the improvements and reforms which have ever been made in legal procedure have been made by lawyers—the old technicalities were not the work of lawyers—primitive law had no lawyers.

And accordingly the action of ejectment, odd as it now seems

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* I believe I argued the last demurrer at Osgoode Hall: it was before Galt, C.J., just before the rule came in force.

What has been so far spoken of was the general demurrer. In addition there were special demurrers of all kinds. For example, I remember while a student drawing a declaration and in it laying the venue, "The County of Lennox and Addington." The solicitor for the defence had been brought up in Cobourg in the United Counties of Northumberland and Durham; and he supposed that Lennox and Addington were in the same condition. He accordingly filed a special demurrer, saying that the venue should have been "The United Counties of Lennox and Addington." I had an easy triumph by referring to the Statute R.S.O. 1877, c. 5, s. 1, ss. 20, p. 22. We have had no special demurrers since the Judicature Act, and get along very comfortably without them.

by reason of improvements brought about by lawyers, was a distinct advance on the previous practice.

When A. is in possession of land to which B. claims to be entitled, the modern practice is for B. to issue a writ against A.; but it took many centuries for our simple and direct method to be adopted. The course pursued at the time we are speaking of was this:—

B. pretended to make a lease to John Doe, or Henry Goodtitle, or James Righteous—the name was immaterial, there was no such person—then it was pretended that John Doe, etc., went into possession of the land under the lease and that one Richard Roe, or William Badtitle, or Nicholas Badman—again the name was immaterial—put the tenant off. Then John Doe, etc., sued for damages for trespass this Richard Roe, etc., the "Casual Ejector." He might get judgment against casual ejectors by the dozen without doing himself any good so long as the real occupant A. was not notified or before the court. But the courts evolved a practice, said to be the device of Rolle, C.J., in the time of the Commonwealth, that if the actual tenant on being notified did not apply to the court to be admitted defendant in the room and stead of the Casual Ejector, he was to be held to have no right at all. The practice was to draw a declaration in "John Doe, on the demise of B. v. Richard Roe," setting out (1) title in B., (2) lease by him to John Doe, (3) entry by John Doe under the lease, and (4) ouster by Richard Roe; serve this on A. with a notice, as from Richard Roe, that he, Richard Roe, has no title at all to the land and shall make no defence, advising A. to appear in court and defend his own title, otherwise he, the Casual Ejector, will suffer judgment to go against him, and A. will be turned out of possession. If A. does not appear in court, judgment will be given against the Casual Ejector and possession will be given to B. If A. desires to defend his title, then he will appear in court by his counsel, and apply to be admitted to defend in the place of the Casual Ejector. He will be permitted to do so only on condition that he will confess lease, entry and ouster, so that the only question to be tried will be the title of B. Thus a string of legal fictions was invented, so that the title of the claimant B. should alone come in question at the trial.

There were many cases of motion for judgment against the Casual Ejector and some of motion to be allowed in to defend in the place of the Casual Ejector. Defendants were held to their undertaking; in an Assize book of Mr. Justice Macaulay (still extant and at Osgoode Hall), in 1827, there are contained the judge's notes of a case in the Western District at Sandwich, in which Dr. Rolph, counsel for the defendant allowed in to defend, refused to make the admissions required. The judge held that, having taken out the "common rule" he was bound to make the admissions; he proceeded to try the case as though the admissions had been made. See Blackstone, Comm., Book 3, pp. 204, 205.

Questions of law were frequently reserved at the trial for the decision of the court; for the argument of these a dies concilii had to be moved for.

In those days, in many actions the defendant could be compelled to give special bail or remain in custody until the trial of his action, etc., etc. What was done was for the plaintiff to issue a writ of capias ad respondendum and place it in the hands of the sheriff. The sheriff was bound to execute the writ by arresting the defendant. The theoretically regular practice was then for the sheriff to produce the defendant in the Court of King's Bench, with a return "cepi corpus," i.e., "I have seized the body of the defendant and have it ready." The defendant will have present two sureties and they enter into a recognizance that if the defendant be condemned in the action he will pay the amount and costs, or render himself a prisoner, or they will pay for him. If he did not pay, they could deliver him into custody and for that purpose were entitled to a warrant for his arrest.

Wednesday, November 9, 1825, Michaelmas Term, 6 George IV. (Præs. Campbell, C.J., and Sherwood, J.), "John Donaghue delivered to bail upon a Cepi Corpus to Matthew Donaghue, of the Home District, Yeoman and David Bates of the same place, yeoman, at the suit of Israel Ransome." This tells the story.

There were still echoes of the war of 1812. Wednesday, April 26th, 1826. Easter Term, 7 George IV. (Præs. Campbell, C.J., and Sherwood, J.), "*Rex.* v. *John McDonell.* Motion for leave to take a certified copy of the indictment for high treason filed in the crown office against the above defendant John McDonell, James

E. Small, Esq., for defendant, Granted." In the previous Term Book are several instances of motions made by the Solicitor-General, for copy of jury panel to give to prisoners about to be tried for high treason—those curious about the existence of treason at that time may look at the Provincial Statute (1828), 9 George IV., c. 18.

The last matter I shall notice is the proceedings taken in cases of alleged smuggling. The court was given the power of the Court of Exchequer in England in revenue cases, in the case of goods seized or contraband, in 1795 by 35 George III., c. 4—and it was kept pretty busy in such cases. There will be found a long list of entries such as this which appears in Hilary Term, 6 George IV., December 28, 1825 (Præs. Campbell, C.J., and Sherwood, J.), "*The King* v. *Persons unknown*. Information on seizure at Chippewa, of sundry articles of merchandise on 1st December, 1825; 1st. Proclamation made. *The King* v. *Ditto*. Information on seizure by collector of Dover on 27th September, 1825; 2nd. Proclamation made." Sometimes the kind of merchandise is mentioned, from which it would appear that what was generally smuggled was liquors of various kinds, tobacco and tea.

No one can say that the court in those days was not kept full of work. The main difference in our present practice is simplification, decision of minor matters by a master or a single judge and disregard of petty technicalities—no slight gain.

GRAY v. WILLCOCKS.

An Old Cause Célèbre.

I.

Ontario solicitors who issue writs of fi. fa. as of course do not in general know of the troubles of their predecessors in issuing process during the first years of the existence of Upper Canada. When the Court of King's Bench was first instituted by the Provincial Statute of 1794, 34 Geo. III., c. 2, no subject had any transferable property in land within its jurisdiction; but that was soon a thing of the past, and the Court ordered a writ of fi. fa. against goods and lands as, of course, in any judgment, under the provisions of the Act of 5 Geo. II. which made lands in the Plantations or Colonies subject to simple contract debts, and provided (sec. 4) that in satisfaction of all debts established by judgment of the courts such execution as would go against goods and chattels should operate also against lands and tenements. This was, of course, a marked departure from the English writ of Elegit.

Then came the Provincial Act of (1803), 43 Geo. III. (U.C.) c. 1 (assented to by the King on January 4, 1803, after being reserved) which provided that a writ of fi. fa. should issue in the first instance only against goods, a fi. fa. (lands) should not issue till after the return of the fi. fa (goods) and the sheriff was not to sell until after 12 months from the time he received his fi. fa. (lands). After this Act the clerk issued a fi. fa (goods), as of course, without consulting the court, but deemed it requisite to receive further order before he issued the execution against lands.

John Gray had obtained judgment against William Willcocks. In Michaelmas Term, 46 Geo. III., Nov. 6, 1805, Mr. Scott (afterwards Attorney-General and Chief Justice) obtained from the court (Powell and Thorpe, JJ.) a rule calling upon the defendant to show cause why a fi. fa. (lands) should not issue, on the judgment in debt, the fi. fa. (goods) being returned, and it was directed

that the Rule should be personally served on the defendant. After an enlargement, the matter was argued, and on Jan. 13th, 1806, the court divided, Powell, J., being in favour of the issue of the fi. fa. (lands), but Thorpe, J., holding that such a writ could not validly be awarded. This was the third time the point had been argued. The first time, Allcock, J., had held that the writ should not, Powell, J., that it should issue. The second time, Allcock, C.J., and Cochrane, J., considered that it should not, Powell, J., that it should issue.

This time the matter went to the Court of Appeal. This court sustained Thorpe, J.; and the plaintiff appealed to the Privy Council. The Board of February 15, 1809, reversed the Court of Appeal. On July 13, 1809, the Court of Appeal remitted the record to the Court of King's Bench, in order that a writ of execution "should issue against the lands and tenements of the defendant for satisfaction of the plaintiff's debt and judgment," and on July 14, 1809, Mr. Justice Powell had the satisfaction of sitting in court (composed of Scott, C.J., and himself) when a fi. fa. (lands) was directed to issue in accordance with his opinion.

And so *Gray* v. *Willcocks* is a leading case, of which not one Ontario lawyer in a hundred has ever heard.

There never has since been any question as to the liability of lands to execution; the only question has been, "what is land?"*

Mr. Justice (afterwards Chief Justice) Powell's reasons for judgment are to be found in a very rare pamphlet (not dated) printed by R. Stanton who became King's Printer at York, U.C., about 1824.†

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* Perhaps this is not quite accurate. The question arose as to whether lands in the hands of the heir were liable to execution for the debt of the ancestor, on a sci. fa.—and it was held in the negative. *Paterson* v. *McKay* (1823), Taylor's Rep. 43 (Praes. Powell, C.J., Boulton and Campbell, JJ.).

† In a letter dated at York, February 5th, 1826, from Miss Anne Jane Powell to Mary Powell, her cousin, she says, "Mr. Fothergill has been dismissed the printing business and young Mr. Robert Stanton appointed in his stead."

II.

This was the first case in which the decision of the judges of the Court of King's Bench in Upper Canada was reported in the press.

In the issue of *The Oracle,* published at York (Toronto), January 18, 1806, being No. 39 of Volume XV. (total number 767) is found the following:

"The judges of the Court of King's Bench gave their opinion last Monday on the question mooted in the preceding term: Whether lands and tenements holden in free and common soccage could for the payment of debts be sold under an execution of the court.

Mr. Justice Powell being of opinion that the writ ought to issue, and Mr. Thorpe against it, the plaintiff took nothing by his motion. We understand that an appeal is intended to the King and Council. As the question excited much anxiety, as well in the landed as in the commercial interest, a number of the most respectable persons in the town and its vicinity attended to hear the judgment of the court, and Mr. Justice Thorpe, on delivering his sentiments entered into the consideration of Soccage Tenures, and the exposition of the statutes in a manner which afforded the highest gratification to every admirer of the English language and law.

Mr. Attorney-General and Mr. Solicitor-General were counsel for the writs issuing for the sale of lands. Mr. Weekes and Mr. Stewart against it. We understand that the case will be reported by a Gentleman of the Bar."

The case in the Judicial Committee has never been reported, and I owe the report to the Registrar of the Privy Council. It is subjoined:

"At The Council Chamber, Whitehall.

The 9th of February, 1809.

By The Right Honourable the Lords of the Committee of Council for hearing Appeals from Plantations.

Present: Master of the Rolls, Sir William Scott, Sir Evan Nepean, Bart., Mr. Dundas.*

Committee report on the appeal of John Gray, Esq., against William Willcocks, Esq.

Your Majesty having been pleased by Your Order in Council of the 16th November last to refer unto this Committee the humble Petition and Appeal of John Gray, Esquire, of Upper Canada, against William Willcocks, Esquire, setting forth, that the said William Willcocks being indebted to the Appellant in the sum of

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* The Master of the Rolls was Sir William Grant, a Scotsman, educated at Aberdeen. Born in 1752, he was called to the Bar at Lincoln's Inn in 1774; next year he emigrated to Quebec, where he commanded a body of volunteers during the siege by Arnold and Montgomery. He was created Attorney-General of Canada in 1776, but returned to England in 1779. There he became somewhat prominent in Parliament: he was appointed Solicitor-General and knighted in 1799, member of the Privy Council and Master of the Rolls in 1801. This office he continued to fill till 1817, when he resigned, dying in 1832. Powell tells us that it was his belief, that Grant's return to England made an opportunity for a lawyer in Quebec that induced him (Powell) to come to Canada in 1779, although he had not yet been called to the Bar.

Sir William Scott, afterwards Lord Stowell, was an elder brother of Lord Eldon. Born in 1745, he became an advocate at Doctor's Commons in 1779, and was called to the Bar the following year; he was knighted and created King's Advocate-General in 1788, and in 1798 made Judge of the Admiralty, and sworn of the Privy Council. In 1821, he was created a Peer; resigning his judgeship in 1828, he survived till 1836.

Sir Evan Nepean was the well-known Secretary of the Admiralty, "a hard-working official." Born in 1751, he became successively a clerk in the navy, a purser, secretary to an Admiral, and Under-Secretary of State, Commissioner of the Privy Seal, Under-Secretary of War and Secretary of the Admiralty. Created a Baronet in 1802, he became Chief Secretary for Ireland in 1804, and the same year a Lord of the Admiralty. At the time of this judgment he does not seem to have held any office of emolument.

Mr. Dundas was not the first Viscount Melville, Henry Dundas, the well-known friend of Pitt, but his only son, who became the second Viscount Melville. Born in 1771, he became a member of the Ministry formed by the Duke of Portland, and was sworn of the Privy Council in 1807. He continued in active political life, much of the time in office, till 1830, and died in 1851.

£500, he on or about the 26th day of September, 1800, entered into a bond to the Appellant in the penal sum of £1,000 conditioned for the payment of £500 and interest at the time and in the manner therein mentioned and at the same time he executed a Warrant of Attorney authorizing certain Attornies therein named to enter up judgment against him on the said bond: That in Hilary Term in the 44th year of Your Majesty's reign judgment was entered up and docqueted against the said William Willcocks in Your Majesty's Court of King's Bench for the Province of Upper Canada, and a writ of Fieri Facias having issued thereon in Easter Term following the Sheriff returned nulla bona to such writ: That in the same Easter Term the Appellant apprehending himself to be intituled by virtue of the Act of the 5 of His late Majesty, Geo. 2, ch. 7, whereby houses, lands, negroes and other hereditaments and real estate situate within the British plantations in America belonging to any person indebted are made liable to and chargeable with all just debts and demands whatsoever owing by any person to His Majesty or of any of His Majesty's subjects, to have a writ of execution against the lands and tenements of the said William Willcocks, applied to the said Court of King's Bench for a Rule to shew cause why such writ should not issue, which Rule was accordingly granted by the court, but the same was upon argument afterwards discharged: That the Appellant having appealed to the Court of Appeals of the said Province from the said Order of the said Court of King's Bench refusing to award the said writ of execution against the lands and tenements of the said William Willcocks, the same came on to be heard before the said Court on the 13th day of April last when that court was pleased to affirm the judgment of the Court of King's Bench, from which judgment of the Court of Appeals the Appellant prayed leave to appeal to Your Majesty in Council, which was granted to him on the usual terms, and the Appellant humbly prays that the said judgment may be reversed or for other relief in the premises: the Lords of the Committee in obedience to Your Majesty's said Order of Reference this day took the said Petition and Appeal into consideration, and having heard Counsel on both sides thereupon, their Lordships do agree humbly to report as their opinion to Your Majesty that the judgment of the Court of King's Bench for the said Province

entered up in Hilary Term of the 44th year of Your Majesty's reign and also the judgment of the Court of Appeals of the said Province of the 13th of April last, should be reversed and that the cause should be remitted back to the said Court of King's Bench in Upper Canada in order that a writ of execution may be awarded to the Appellants against the lands and tenements of the Respondent."

The order of the King in Council, appears from the following report:—

"At the Court of the Queen's Palace.

The 15th of February, 1809.

Present: The King's Most Excellent Majesty, Lord Chancellor,* Lord Chamberlain, Lord President, Lord Privy Seal, Duke of Montrose, Lord Steward, Earl of Liverpool, Lord Mulgrave, Viscount Castlereagh, Mr. Secretary Canning.

Whereas there was this day read at the Board a report from the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations, etc., dated the 9th of this Instant in the Words following, viz.:

[Report of Committee copied and inserted.]

His Majesty having taken the said report into consideration, was pleased by and with the advice of His Privy Council to approve thereof, and to order, as it is hereby ordered, that the same be duly and punctually complied with, and carried into execution; Whereof the Governor or Lieutenant-Governor of the Province of Upper Canada for the time being, and all others whom it may concern, are to take notice and govern themselves accordingly."

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*The Lord Chancellor at the time was Lord Eldon; Viscount Castlereagh was the noted Castlereagh so much cursed by patriotic Irishmen. Mr. Secretary Canning was *the* Canning. He was at the time Foreign Secretary, but was not wholly satisfied with the policy of the government. The trouble became acute later on; in 1809, Canning fought a duel with Castlereagh and resigned September, 1809.

Mr. Justice Thorpe* was persona grata with the Radical party; and was, not long after, cashiered by the Lieutenant-Governor, Francis Gore, by the direction of the Colonial Secretary—this was in November, 1807. Mr. Justice Powell subsequently became Chief Justice of Upper Canada, and survived until 1831.†

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*Some account of Mr. Justice Thorpe will be found in an article by the present writer in "The Journal of the American Institute of Criminal Law and Criminology" for May, 1913 (4 Jour. Am. Inst. C. L. & Crim. pp. 12 et seqq.) "Scandalum Magnatum in Upper Canada," cf p. 3 *ante*.

†See (1913) 49 Can. Law Jour. pp. 46 et seqq. pp. 2, 3 *ante*.