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JUDGES IN THE PARLIAMENT OF UPPER CANADA.

When Pitt in 1791 introduced in the House of Commons the Canada Act or Constitutional Act, which he afterwards declared to be the object of his greatest pride, and under which the division of the old Province of Quebec into two Provinces of Upper and Lower Canada was to be effective, with almost his first word he declared that the Bill was intended to give Canadians "all the advantages of the British Constitution." Lord Grenville in the House of Lords used much the same language. Burke, Fox, and some others were not convinced that the Act in reality carried out the expressed intention; but there can be no doubt of the general object of the Bill.

The first Lieutenant Governor of Upper Canada (which with Lower Canada was organized under the Constitutional Act in 1792), John Graves Simcoe, in his Address to the Houses of Parliament of Upper Canada at their first meeting, September, 1792, spoke of the Act as establishing the British Constitution and its forms in the Province; at the close of the Session his address stated that the Constitution of the Province was "the very image and transcript of Great Britain."

In analogy to the British form, there were two Houses of Parliament in each Province, the Legislative Council and the Legislative Assembly.

1 See "The Parliamentary History of England" published by Hansard and often quoted by his name. Volume 28, p. 1377. (I shall use the convenient form of citation, "28 Hans. 1377.") The Act was (1791) 31 Geo. III Chap. 31 (Imp.).

2 29 Hans. 656, 657.

3 The debate in the House of Commons lasted five days; it was during this debate that the historic quarrel took place between Burke and Fox; it is difficult to make out the real cause of the rupture—probably there was much more than appears on the surface; if not, Burke acted most childishly. See 29 Hans. 103-113; 359-430.

4 Sixth Report of the Bureau of Archives for the Province of Ontario, Toronto, 1911, pp. 2, 3; Seventh ibid., 1911, pp. 1-3. (These very valuable reports will be cited "6 Ont. Arch. Rep., 2, 3," etc.)

5 6 Ont. Arch. Rep., 18; 7 ibid., 1-3.

6 Before this time there had been only one legislative body. In the Royal Proclamation of 1763 a promise was contained that an elective Assembly would be called when the time came; and the early Governors had instructions to call such an Assembly at the proper time. But this was not found practicable; the Quebec Act
The Legislative Council corresponded to the House of Lords, appointive, but without the hereditary feature. The Legislative Assembly elected by the people corresponded to the House of Commons and not unfrequently claimed the name and privileges.

In England there never was any objection to Judges becoming members of the Upper House. In early times, e.g., in the reign of Edward I, and for long afterwards, the Judges were regularly summoned to Parliament and had their places assigned among the Lords. Their summons differed, indeed, from that to the “Lords Spiritual and Temporal” (the Prelates, the Earls, and Barons), but they were none the less members of the House. Whether they lost their right to a place in Parliament when in the reign of Richard II the Council was separated from Parliament, or at what later time, is uncertain; but certainly it was gone before the reign of Henry VIII. When they lost their seats in the House of Lords, they were not relieved from the duty of attending the House to give their opinion on matters of law if and when called upon; and at length in 1660, at the time of the Restoration, the House of Lords decided that writs should be issued “to the Judges whereby they may attend in the House as Assistants.”

This was conclusive of the functions, with respect to the House of Lords, of the Judges as such; but it did not prevent a Judge from being a Member of the House or “Peer of Parliament.”

William Murray was in 1756 appointed Chief Justice of the King’s Bench and contemporaneously created a Peer by the title of 1774, 14 Geo. III, Chap. 83, put a stop to the scheme and made the Council the legislating body. The members of the Council were appointed by the Crown either immediately or through the Governor—see my paper on “Pre-Assembly Legislatures in British Canada.” Trans. Royal Society of Canada for 1918, Sec. II. pp. 109-134.

There was in the Act, indeed, a provision for hereditary seats on the Legislative Council, but it was never brought into force; and so Canada escaped the curse of hereditary legislators.

Journals of the House of Lords, Vol. XI, p. 52, June 4, 1660. This was, of course, the “Convention Parliament” which was ostensibly called merely to secure the return of the King; but it was found (or at least considered) necessary and expedient that it should undertake other labours, and its acts were afterwards recognized as lawful. The curious will find all the learning on the subject in Pyke’s “Constitutional History of the House of Lords,” London and New York, 1894, pp. 47, 48, 195, 196, 246, 247, 248. Anson points out in his “Law and Custom of the Constitution,” 2nd ed., Vol. 1, pp. 179, 180, that the common idea that the “Peerage” and the “House of Lords” mean the same thing is an error; there are Peers who are not Lords of Parliament and Lords of Parliament who are not Peers.
of Baron Mansfield, and from that time the Chief Justices of the King's Bench have generally been made Peers.\(^9\)

The first Chief Justice of the Common Bench to become a Peer was Sir Charles Pratt who was created Lord Camden in 1765; some of his successors have also been Peers of Parliament.\(^9\)

The first Chief Baron of the Exchequer who was a Peer was Sir John Singleton Copley, who became Lord Lyndhurst when he was appointed Lord Chancellor in 1827, but did not become Chief Baron until 1831; only one of his successors became a Peer.\(^10\)

Chief Justices Coke, Hale, and Holt are often styled Lord Coke, Lord Hale, Lord Holt, (especially by American writers—I have seen even "Lord Cockburn" in one American legal journal)—this was the custom of their day. Judges were at that time often styled "Reverend," "Very Reverend," "Most Reverend," etc., titles now reserved for the clergy. The address "My Lord," "Your Lordship," "Their Lordships" is still used in the English Courts and our own.

\(^{10}\) Sir John Eardley Wilmot and Sir William de Grey followed; the latter became Lord Walsingham, 1780, after his resignation. Then came Sir Alexander Wedderburn, Chief Justice and Lord Loughborough, 1780; Sir James Eyre; Sir John Scott, Chief Justice and Lord Eldon, 1799; Sir Richard Pepper Arden, Chief Justice and Lord Alvanley, 1801; Sir James Mansfield; Sir Vicary Gibbs; Sir Robert Dallas; Sir Robert Gifford, Chief Justice and Lord Gifford, 1824; Sir William Draper Best, Chief Justice, 1824, Lord Wynford on his resignation in 1829; Sir Nicolas Conyngham Tindal; Sir Thomas Wilde, Chief Justice, 1846, Lord Truro, 1850; Sir John Jervis; Sir Alexander J. E. Cockburn; Sir William Erle; Sir William Bovill; Sir John Duke Coleridge, Chief Justice, 1873, Lord Coleridge, 1874.

\(^{11}\) They were Sir James Scarlett, Chief Justice, 1834, Lord Abinger, 1835; Sir Frederick Pollock, Chief Baron, 1844; Sir Fitzroy Edward Kelly, Chief Baron, 1866.
The Masters of the Rolls were early in the House of Lords; Sir John Colepeper became Lord Colepeper in 1644, the year after his appointment to the Mastership, but he had no successors in the House for nearly a century and three quarters. Of late years it has rather been customary to raise the Master to the Peerage. But a number of Masters never became Peers, even for life.

There never has been an instance of a puisne Judge (or Baron) being raised to the Peerage, but there is a modern instance of a Peer of the Realm being appointed a puisne Judge. There never was any objection in law to either proceeding, and occasionally the puisne either when made Chief or later was elevated to the Peerage.

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12 Sir Lloyd Kenyon, M. R., 1784, became Lord Kenyon when he was appointed Chief Justice of the King's Bench, 1788. Sir Richard Pepper Arden, M. R., 1788, became Lord Alvanley when appointed Chief Justice of the Common Bench, 1801; Lord Gifford became M. R., 1788, after his elevation to the Peerage the same year; Sir John Singleton Copley, M. R. in 1826, became Lord Lyndhurst in 1827, when made Lord Chancellor; Sir Charles Christopher Pepys, M. R., 1834, became Lord Chancellor and Lord Cottenham, 1834; Henry Bickersteth became Lord Langdale when appointed M. R. in 1836. Sir John Romilly, M. R., 1851, became Lord Romilly, 1866; Sir William Balliol Brett, M. R., 1883, became Lord Esher, 1885; Sir Nathaniel Lindley, M. R., 1897, became a Baron for life when made Lord of Appeal in 1899; Sir Richard Everard Webster, M. R., May 10th, 1899, was made a Peer, Lord Alverstone, a month afterwards and became Lord Chief Justice in four months thereafter. Sir Richard Henn Collins, M. R., 1901, became a Baron for life when made Lord of Appeal in 1907; Sir Herbert Hardy Cozens-Hardy, M. R., became a Baron in 1914.

13 William Lenthall, 1643; Sir Harbottle Grimston, 1660; John Churchill, 1685; Sir John Trevor, 1685 and 1693; Sir Henry Powl, 1689; Sir Joseph Jekyll, 1717; John Verney, 1738; William Fortescue, 1741; Sir John Strange, 1750; Sir Thomas Clarke, 1754; Sir Thomas Sewell, 1764; Sir William Grant, 1801; Sir Thomas Plumer, 1818; Sir John Leach, V. C. E., 1827; Sir George Jessel, 1873 (perhaps the greatest of all the Masters of the Rolls); and Sir Archibald Levin Smith 1899.

14 Bernard John Seymour Coleridge, a practising Barrister, who on the death of his father, Chief Justice John Duke, Lord Coleridge, 1894, had succeeded to the Peerage, was on October 12, 1907, appointed a Justice of the King's Bench Division of the High Court of Justice.

15 There is one rather curious instance of promotion. Sir John Fortescue Aland, a puisne Judge of the Queen's Bench, 1718, was transferred, 1729, to the Common Bench and created Baron Fortescue of Credan in Ireland, 1746.
It will be seen that there was no objection to a Judge sitting as a Peer of Parliament in the House of Lords, but that he had as Judge no right to a seat.

In the English House of Commons the case was different. So long as the Judges sat in the House of Lords they were necessarily excluded from the Lower House. There is no known instance of an English Common Law Judge sitting in the House of Commons except during the time of the Commonwealth; they were considered disqualified at the Common Law, and a resolution was passed by the House of Commons in 1605 excluding them, “they being Attendants as Judges in the Upper House.”

The Scottish Judges had no such duty in the House of Lords; and they continued to be qualified to sit as members of the House of Commons of Great Britain for several years after the Union in 1707, but they were excluded by Statute in 1734. Ireland had not been united to Great Britain with one Parliament when the Constitutional Act was passed in 1792; and consequently the constitutional rules of that Island were not considered in determining the constitution of the Canadas.

On the Chancery side, of course, the Lord Chancellor could not be a member of the House of Commons; but the Master of the Rolls, not being a member of or attendant in the Upper House, was not disqualified at the Common Law; it required a statute, and no statute was passed disqualifying him until the general Act of 1875.

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1 Commons Journal, p. 257; Anson’s Law and Custom of the Constitution, 2nd ed., 1892, p. 76; Porritt’s “The Unreformed House of Commons,” Cambridge, 1903, Vol. 1, p. 220. The recent legislation (1875) 38, 39 Vict. Chap. 77, Sec. 5 (Imp.) has taken the place of this rule.

17 7 Geo. II, Chap. 16, Sec. 4. “The legislation was then hurriedly brought about to meet a political emergency growing out of the Earl of Islay’s management of Scotland for Walpole.” Porritt, Vol. 1, p. 220.

18 It may, however, be said that Judges were allowed to become members of the Irish House of Commons; even after the Union and notwithstanding the far reaching statute of 1801, 41 Geo. III, Chap. 52, Irish Judges were not excluded until 1821 when the Statute, 1, 2, Geo. IV, Chap. 44 was passed which by Sec. 1 provided for their exclusion.

19 38, 39 Vict., Chap. 77, Sec. 5. See Taswell Langmead’s “English Constitutional History,” 1905, p. 339; May’s Parliamentary Practice, 11th ed., p. 30; also the Debates on the Judges’ Exclusion Bill, 1853, 125 Hans. (3rd ser.) p. 1080; 127 ibid., 993. The Judge of the High Court of Admiralty was excluded by (1840) 3, 4, Vict., Chap. 66.
By the Constitution of Britain, then, at the time of the institution of the Province of Upper Canada, there was no objection to any Judge, Common Law or Equity, sitting as a member of the Upper House; no Common Law Judge could sit as a member of the House of Commons, but there was no objection to an Equity Judge, if he was not connected with the House of Lords as Peer or Speaker.

There was, however, another body at Westminster, the Cabinet, to which anyone a member of either House could belong. In the Province the correlative of this was the Executive Council, but there was no necessity for an Executive Councillor belonging to either House of Parliament.

**Upper Canada—The Legislative Council.**—The Legislative Councillors were nominated by the Crown and held their office for life; from the beginning the Chief Justice of the Province was a member of this House and Speaker appointed as such by an instrument under the Great Seal of the Province. This was by analogy to the duties of the Lord Chancellor; the Chief Justice of the Province was, indeed, a Common Law Judge, but the Lieutenant Governor was himself the Chancellor of the Province, being entrusted with the Great Seal, and he could not sit in the Legislative Council. Accordingly the highest judicial officer in the Province was made Speaker. This practice continued during the whole of the separate existence of Upper Canada and until the union of the Canadas by the Union Act of 1840.

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20 It is sometimes said that the Chief Justice filled this office (and that of President of the Executive Council) ex officio—see, for example, General Robinson's "Life of Sir John Beverley Robinson, Bart.," etc., Edinburgh and London, 1904, at pp. 199, 200—but this is an error. The Constitutional Act (1791) 31 Geo. III, Chap. 31, by sec. 12 provides "that the Governor or Lieutenant Governor of the . . . Province . . . or the Person administering His Majesty's Government therein . . . shall have power and authority from time to time by an Instrument under the Great Seal of such Province to appoint and remove the Speakers of the Legislative Councils . . . ."

21 3, 4, Vict., Chap. 35. This continued the power of the Governor to appoint and remove the Speaker of the Legislative Council, Sec. 9. Sir John Beverley Robinson was Chief Justice of the Province until 1862, and by that time the Act of (1857) 20 Vict., Chap. 22 (Can.) prevented anyone (not being a Minister of Crown or a Member of the Executive Council) who held any office at the nomination of the Crown with an annual salary from being eligible as a Member of either House.
The first seven Chief Justices of the Province were Members and Speakers of the Legislative Council and were undoubtedly most useful in promoting useful legislation.

The first Chief Justice, William Osgoode, (1792) an English Barrister, was warmly praised by Lieutenant Governor Simcoe, although Simcoe had serious doubts "whether any of the gentlemen of the Law (excepting the Chief Justice) should have a seat in the Executive or even in the Legislative Council, unless in the latter it be necessary to prevent the Judges from being elected in the House of Assembly as is now the practice in New Brunswick."

Osgoode is believed to have drawn the Act for abolishing slavery in 1793; and it is certain that he drew the Acts introducing the English civil law, 1792, and establishing a Court of King's Bench in 1794; he also drafted a Marriage Act in 1792. When Osgoode left Upper Canada in the summer of 1794 to become Chief Justice of Lower Canada, Simcoe wrote to King, the Under Secretary at Westminster, "I shall feel an irreparable loss in Mr. Chief Justice Osgoode; I hope to God he will be replaced by an English lawyer."

John Elmsley (also an English Barrister) was appointed in 1796; he came to Upper Canada after Simcoe had left the Province and before his successor, General Peter Hunter, arrived in 1799; until the arrival of Hunter, Peter Russell, the President of the Executive Council, was Administrator of the Government and he appointed Elmsley to the Legislative Council and as Speaker thereof. Elmsley also took an active part in framing legislation and guiding it through the Upper House. During his time the Executive Council decided that

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22 Letter, Simcoe to Secretary Dundas, London, August 12th, 1791, Can. Arch., Q. 278, pp. 283 et seq. He lived up to his views; while he appointed several to the Councils none of them was a lawyer except (Sir) David William Smith and he was a lawyer only in name, having received his licence to practise as an Advocate under the Act of 1794 which authorized the Lieutenant Governor to license not more than sixteen persons to act as Advocates and Attorneys. He had no legal training and was one of the four Advocates who did not become Barristers when the Law Society of Upper Canada was organized in 1797.

Simcoe also appointed Richard Cartwright, John Munro, Richard Duncan and Robert Hamilton who were judges of one or other of the Courts of Common Pleas, and also Peter Russell who afterwards acted as a Judge of the Court of King's Beach, but none of them was a "man of law."

23 Letter, Simcoe to King, Navy Hall, June 20, 1794. Can. Arch. Q. 280 pt. 1, p. 176; he did not want a Chief Justice from the American Colonies—such as were Peter Livius and William Smith in Lower Canada with whom the Governors found it hard to get along.
the Reports of Legislation for the Home Government should be prepared by the Chief Justice and the Attorney-General, concerning the Bills originating in the Legislative Council and the Legislative Assembly respectively. Elmsley's reports are most instructive and should be read by all who would understand our early legislation.²⁴

When in 1802 Chief Justice Elmsley left the Province to become Chief Justice of Lower Canada, he was succeeded as Chief Justice of Upper Canada by Henry Allcock,²⁵ another English Barrister who had been appointed a puisne Judge of the Court of King's Bench of Upper Canada in 1798 on the recommendation of Elmsley.²⁶ Allcock was summoned to the Legislative Council in January, 1803, and made Speaker.²⁷ While Allcock was puisne Judge, a scheme of establishing a Court of Chancery was in the air. He desired to be Master of the Rolls in the Court to be established, the Lieutenant Governor of course

²⁴ See, for example, his report, July 23, 1799, of the Acts of 1799, Can. Arch., Q. 287, pt. 1, pp. 1-6. The Report is made to his Honour the Administrator, Peter Russell (General Peter Hunter, the second Lieutenant Governor, did not arrive until August 1799), and points out that one of the Acts had been prepared by him "in obedience to verbal instructions from" His Honour; another was "verbatim the same as that drawn by the Attorney General (John White) and transmitted to Europe in 1797 except that the passages objected to by His Grace the Duke of Portsmouth are omitted," etc., etc.

²⁵ The name is almost invariably spelled "Alcock" by our historians and legal writers. He always spelled it "Allcock," as will be seen on the Records of the Court of King's Bench. He was remotely related to the family of Pepys, the well-known diarist.

²⁶ In a letter to King, the Under Secretary, dated from Upper Canada, October 25th, 1797, Elmsley recommends for the third seat on the King's Bench (he himself occupying the first, and William Dummer Powell the second) "Henry Alcock of Lincoln's Inn, formerly a pupil and still an intimate friend of your Brother Edward; Richard Grisley of the Midland Circuit . . . ; Samuel Rose of Chancery Lane, Editor of the late edition of Comyn's Reports; Benjamin Winthrop and John Williams, both of Lincoln's Inn and both well known to your brother Edward." Can. Arch., Chap. 283, p. 302. Of these Samuel Rose is the only one known to fame; he was Cowper's friend. Williams was not the John Williams who with Burn brought out the 10th and 11th editions of Blackstone's Commentaries. That John Williams was of the Inner Temple and was a Serjeant from 1794.

²⁷ The Journal of the Legislative Council notes that at York on Thursday the 27th, January, 1803, "the Honourable Henry Alcock produced his Writ of Summons to attend the Legislative Council under the Great Seal of the Province" and that he was sworn in. Then "he also produced a Commission under the Great Seal of the Province appointing him Speaker of the Legislative Council. Which was likewise read and he took his seat accordingly." 7 Ont. Arch. Rep., (for 1910) p. 175.
being the Chancellor.\textsuperscript{28} He drew up in 1801 an admirable plan for such a Court which was submitted to and approved of by the Chief Justices Osgoode and Elmsley; the Home Authorities did not look upon the scheme with enthusiasm and it was not carried into effect.\textsuperscript{29}

Chief Justice Allcock went to England in 1804 and in his absence the Honourable Richard Cartwright, a layman, but who had been one of the Judges of the Court of Common Pleas for the District of Mecklenburg (renamed the Midland District in 1792), was given a Commission as Speaker and officiated for the Sessions of 1805 and 1806; Allcock did not attend at either session.

In the latter year, Allcock succeeded Elmsley as Chief Justice of Lower Canada and was succeeded as Chief Justice of Upper Canada by the Attorney General, Thomas Scott, a Scotsman, but a member of the English bar.\textsuperscript{30} Having employment under the Crown in Lower Canada, he was in 1800 on the death of John White, the first Attorney General of the Province of Upper Canada, appointed his successor.\textsuperscript{31}
On being appointed Chief Justice, he received a summons to attend the Legislative Council as a Member, and also a Commission under the Great Seal from the new Lieutenant Governor, Francis Gore; and he continued to be Speaker until his resignation in 1816.

Thus far it cannot be said that the Judges who were members of the Legislative Council played any part in the government of the Province except as carrying out the policy determined on by the Governor; except in mere matters of detail there is no evidence that any of them had any influence with the Governors in determining their policy. They were all members of the Executive Council, which to a certain extent corresponded to the Cabinet in England; but "Governor" was not a lucus a non lucendo; the Governor actually governed and his Executive Councillors were responsible to him and to the King only.

Of the next incumbent of the Chief Justiceship of the Province, William Dummer Powell, the same cannot be said. Born in Boston, Massachusetts, before the Revolution, of Loyalist stock, educated in Boston, in England, and in the Low Countries, a practising lawyer in Montreal, he was in 1789 appointed First Judge of the Court of Common Pleas for the District of Hesse (Detroit) and in 1794 became the first puisne Judge of the Court of King's Bench. A man of great ability and learning, of more energy and ambition, he in 1816 after many years of waiting, when often hope deferred made the heart sick, attained one of the objects of his desires, the Chief Justiceship of the Province. He was summoned to the Legislative Council and received a Commission as Speaker. His appointment as Chief Justice was due to the recommendation of Lieutenant Governor, Francis Gore,
who had a high opinion of his merits and to whom he had been useful as a member of the Executive Council—especially in the storm in a mustard pot of the quarrel with William Firth who had succeeded Scott as Attorney General.  

confiscated property. A more precise accusation was afterwards made against him at Detroit, based upon a letter found in his room which he always (and apparently with truth) contended was forged. He, however, went to England to clear himself of the suspicion. Powell also was first on Dorchester's list of Legislative Councillors, but did not appear on the list of Executive Councillors recommended by Sir John Johnson (son of the celebrated Sir William Johnson) Superintendent of Indian Affairs in Canada, who expected himself to be appointed the first Lieutenant Governor of Upper Canada. When Powell was absent in Spain in 1807 Lieutenant Governor Francis Gore was urged to appoint him to the Executive Council; but Powell did not accept at the time because there was no seat with a salary attached; later on he received an appointment with a salary.

Some account of this row is given in Kingsford's History of Canada, Vol. VIII, pp. 113, 114. The following is an account given by Powell himself, taken from a MSS in the Toronto Public Library:

"From this period (i.e., from his appointment to the Executive Council) Mr. P. was much in the confidence of the Lt. Governor, who engaged him in various attempts to correct abuses which had been long sanctioned. The first was a gross injustice to the Secretary of the Province, who was the organ for issuing Patents to the Grantees of Land, and who, as a remuneration, had been assigned a due proportion of the fee allowed by the King to be taken on each Patent.

In this distribution of the fee, the Atty. General's claim to any was questioned by the Secretary of State, as all the Patents were printed from one form, but at the same time, upon a representation by the Atty. General that it was his duty to Engross on each Patent, his Grace consented that an adequate fee for that Service should be carved out of the various proportions of the other Patent Officers. Under pretext of this Sanction one-half the fee assigned to the Secretary of the Province was taken from him for the Atty. General, and a further deduction was made from the Secretary's Share, for the Clerk of the Council, who had really no privity with the Patent, his duty being concluded with the order made on the Petition for a Grant. The Attorney had not long enjoyed the claim to engross the Patent, for which duty he received half the Secretary's fee, before he represented to his friends in the Council that the engrossing the Patent, which he claimed as a right, was in fact the Duty of the Secretary, and prayed that it might be transferred to that Officer. The Secretary made no Objection to the Service, but very naturally demanded that his full fee should be restored to him; this just demand was refused, and he was peremptorily required to engross the Patents and leave the half fee with the Attorney. The undivided fee on ordinary Grants was small, and scarcely compensated the Stationer. but the major part of the Patents were gratuitous from the Crown, and the half fee only was accounted for to the Secretary, who was out of pocket by each half fee Patent four shillings, for in addition to the hurt proceeding on the division of the fee, the Patent was required to be engrossed on parchment by the Secretary though the Attorney General had been allowed to use Paper. This Course could not escape animadversion, and the Executive Council strongly recommended relief to the Secretary, declaring that the further imposition upon that officer must be ruinous, as he actually lost six shillings by each half fee Patent, and they amounted to many thous-
Powell was of great assistance to Gore also in his controversy with Wyatt, the Surveyor General, which was to a great extent on a line with the Firth squabble. Gore was not easily led, but generally he was guided by Powell's advice, which caused Powell to be regarded as the real master of the administration; and consequently he has been credited with some proceedings as to which he was wholly innocent.

and in each year. It will scarcely be credited that the Officer to whom this report was made, Lt. Governor Hunter, who actually profited by each Patent in the proportion that the Secretary lost, took no other notice of this representation than to procure from the Secretary of State permission to augment the gross fee on the Patent, leaving the division as before. Lt. Gov. Gore was sensible of this Injustice, and the first duty in the Executive Council imposed on Mr. P. was to probe the Evil and devise a remedy. In the progress of his Obedience to this Command, it was unavoidable that offence should be given to some, but finally the whole Council acquiesced that in issuing of Patents the Secretary had incurred very great loss out of Pocket, amounting to about £2,000, that there remained of engrossed Patent not issued from the office from various causes as many as amounted to £400, for his share of the fees, which last sum was advanced to him by Lt. Gov. Gore, and the gross loss recommended to the notice of His Majesty's Government, who paid to the Secretary £1,000 on account; and for his relief in future Mr. P. suggested a very simple mode of relief, which was to estimate the actual charge on each Patent for stationery and deduct that amount from the gross fee before division amongst the Patent Officers, which it was surprising had not been recurred to before, for the Secretary only disbursed anything towards the Patent.

The result of this Effort was not favorable to Mr. Powell's popularity at the Council board, however it might recommend him to the Head of the Government, who had most excellent dispositions towards a just and impartial administration. He was susceptible to a degree to any Insinuation of personal Disrepute, which subjected him to be played upon by pretended friends who knew his weakness. Upon more than one occasion such ridiculous suggestions interrupted for a time the harmony between him and Mr. P.”

35 This is also referred to by Kingsford, Hist. Can., Vol. VIII, p. 94. At our Bar it is remembered by the fact that in the report of the trial of an action for libel brought by Wyatt against Gore in the King’s Bench in England, Holt's Nisi Prius Cases (1816) p. 299, the Province of Upper Canada is at p. 300 called “the Island.” The case is still a leading case on privilege and publication.

36 For example, Gore’s extraordinary Act of proroguing the House in February, 1817, (as to which see Kingsford, Hist. Can. Vol. IX. p. 206) was certainly against Powell's advice. “This Gentleman (i.e., Gore) in the last act of his Government, which was not satisfactory at home, had acted in direct opposition to the most urgent advice and Intreaty of Mr. P., in dismissing his Assembly from apprehension of some expected Resolutions. He had from this very Assembly received the most handsome Expression of Regard and Confidence in several Votes, one of three thousand pounds for a Service of Plate, to himself, and the vote of one thousand pounds on his recommendation to Mr. Powell for services long since rendered extra-judicially, and which had never been compensated.”
When Gore left for England, June, 1817, he was succeeded for a time by Samuel Smith (as Administrator); and he by Sir Peregrine Maitland in August, 1818. Maitland remained Lieutenant Governor until 1828, though Smith acted as Administrator for a few months in 1820 during his absence. Maitland never placed any confidence in Powell, but Powell has been charged with some of his acts which have been considered most reprehensible. Powell on more than one occasion differed from the administration of Maitland and, although he was Speaker of the Council, he caused "Dissents" to be entered on the Records.  

37 In my "Robert (Fleming) Gourlay as shown by his own Records," published by the Ontario Historical Society, 1916, in their Papers and Records Vol. XIV, I have given the story of his alleged persecution of Gourlay. The fact is that Powell had nothing to do with the passing of the legislation under which Gourlay was prosecuted; he advised Gore against prosecuting Gourlay; and after Gore's term when he was prosecuted by Maitland's Government, Powell was not even consulted. By that time Powell was wholly out of favour, and the trusted advisers of the Government were Dr. Strachan (the Anglican divine) and the able and vigorous Attorney General, John Beverley Robinson.  

38 His story of these "Dissents" is as follows: "In 1821 . . . he perceived a spirit of intrigue had obtained access to the Legislature, and had been constrained to enter on the Journals his dissent to certain measures carried in opposition to him. . . .  

The various dissents so entered on the Journals are here transcribed, that they may speak for the truth and justice of him, who in the conflict of opinions stood almost alone in the House he presided in. His chief opposer was the Reverend friend who had influence to persuade the Governor that the measures dissented to by the Speaker on the Journals were most wise, useful, and loyal; and that the Speaker was moved thereunto by base and personal considerations, reflecting not only upon the majority in both Houses but on his Excellency and his legal advisers, who signified his assent to the Law; but as the Journals were transmitted to the Secretary of State, it was thought proper to remove from them the obnoxious dissents, lest they might have more influence in Downing Street than York; and as inducement to remove them before they reached England His Excellency was persuaded to command the Speaker to withdraw from the Journals the several dissents he had entered while Speaker, as being a breach of privilege of that office to oppose the majority of that House whose servant he was.  

He, having discharged his duty, as he thought, in those dissents, consented to their abolition rather than quit his station as Speaker and Chief Justice—the threatened penalty of his refusal, and the Governor engaged two Members to move and second their removal from the Journals, which was carried without opposition.  

Such a transaction, it may be supposed, did not conduce to harmony or kind feeling among the leading parties; but he, conscious of no offence to his King or Country, still struggled to preserve his station to the age of seventy, to which he had ever limited his public services, and which was fast approaching.
Nevertheless he continued to be Speaker until his resignation in 1825. 

He was succeeded by William Campbell, the first of our Judges to be knighted. He was a Scotsman who had come to this continent during the American Revolution, as a private in a Highland Regiment, and was taken prisoner at Cornwallis' surrender of Yorktown in 1781. On peace being declared in 1783, he went to Nova Scotia, was called to the Bar and became a Member of the Legislative Assembly of that Province and Attorney-General of Cape Breton; he was appointed a puisne Judge of the Court of King's Bench, Upper Canada, in 1811 and proved himself a

**DISSENTS OF 1821.**

Dissentiet—From the Bill passed yesterday entitled “An Act to repeal the Laws now in force granting poundage to the Receiver General of this Province and to provide a salary for that officer in lieu of such poundage.”

(Signed) W. D. P.

Entered on the Journals 21st December, 1821.

Dissentiet—To the Bill entitled “An Act to appoint Trustees to the Will of William Weeks, late of York, Esquire, deceased, to carry into effect the provisions thereof;” because there is not before the House sufficient inducement to justify such an Enactment.

(Signed) W. D. P.

Entered on the Journals 4th January, 1822.

Dissentiet—From the vote to concur in the Resolution sent up to this House from the Commons House of Assembly to address His Excellency the Lieutenant Governor to transmit, by a particular individual, to the foot of the Throne the joint Address of the Legislative Council and House of Assembly to His Majesty, because, however glossed I consider it an undue interference with His Majesty's Representative in the exercise of a Right admitted and declared to exclude all participation by any other branch of the Legislature.

(Signed) W. D. P.

Entered on the Journals 8th January, 1822.

Dissentiet—To the Bill entitled “An Act to authorize the appointment of a Commissioner for the purposes therein mentioned;” because the provision of the Bill is unusual, and unnecessary to enable the Executive branch of the Constitution to exercise its powers in such manner as its own discretion may direct.

(Signed) W. D. P.

Entered on the Journals 16th January, 1822.

Dissentiet—To the Bill entitled “An Act granting to His Majesty a sum of Money to provide for the appointment of a Commissioner for the purposes therein mentioned;” because it is unasked, and unnecessary to enable His Majesty's Representative to transmit duly to the foot of the Throne the sentiments of the other branches of the Legislature.

(Signed) W. D. P.

Entered on the Journals 16th January, 1822.

His correspondence with Gore after the latter's removal to England should be read by everyone wishing to understand the inner politics of the period. The letters are in the Toronto Public Library.
sound lawyer. On Powell's retirement, Campbell was appointed to the Legislative Council and received a Commission as Speaker.

At that time, in great measure owing to an almost entirely erroneous impression of Powell's influence and to some extent to the influence of a similar movement in Lower Canada, there was an agitation against the Chief Justice of the Province being a member of the Executive Council; but there was no objection taken to his being a member of the Legislative Council. Notwithstanding this agitation, Campbell was appointed to the Executive Council as well as to the Legislative Council. His incumbency of these positions was during a period of considerable public turmoil. He seems to have kept aloof from prominence in the contentions raging about him; to a certain extent this was due to age and ill-health, but not wholly. While he was a man of resolute spirit, he was also cautious and conciliatory.

The agitation against the Chief Justice being a member of the Executive Council did not die down with Campbell's appointment. We find the House of Assembly, January 13, 1826, passing a Resolution against the practice. It is likely that the corresponding agitation in Lower Canada had its influence on the Upper

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40 He was sixty-six when appointed Chief Justice, and it was common knowledge, at the time, that he was appointed to keep the place warm for John Beverley Robinson, the Attorney-General and quite the ablest man in the Province—who was supposed to be too young for the appointment.

The Rev. Dr. Strachan, writing to Lord Bathurst from London, November 10, 1826, speaks of Campbell thus: "The Chief Justice is an old man and though of resolute spirit and apt to labour far beyond his strength is liable to sudden attacks of the most alarming nature and from which persons of less energy of mind would not soon recover." Can. Arch., G. 63, pt. 1, p. 54.

41 Campbell presented his Commission as Speaker November 7, 1825 (Journals Leg. Col. U. C. p. 3); he became a member shortly afterward—this being the only instance of a Speaker who was not a member of the Legislative Council. The House of Assembly January 13, 1826, passed a Resolution by a large majority "that the connection of the Chief Justice . . . with the Executive Council wherein he has to advise His Excellency upon Executive measures, many of which may bear an intimate relation to the Judicial duties he may have thereupon to discharge is highly inexpedient tending to embarrass him in his Judicial functions and render the Administration of Justice less satisfactory if not less pure." Carried, 23 to 14. A resolution was also carried to render the Judges of the King's Bench "as independent of the Crown and of the people as are the Judges of England." Carried unanimously.

The final Resolution was that an humble address should be presented to His Majesty "to discontinue to impose on the Chief Justice duties so incompatible with his judicial character and so ill suited to the present state of this Province; and that the Judges in this Province may be rendered . . . as independent of the Crown
Province; but the Home Authorities were not convinced, and the system continued until the period of responsible Government. A similar address passed in the House of Assembly, March 15th, 1828, met the same fate as its predecessor. On Campbell's resignation in 1829, he received the honour of knighthood and was succeeded by the first Canadian-born Chief Justice, John Beverley Robinson, the Attorney-General. He also succeeded to the Speakership in the Legislative Council and the Presidency of the Executive Council.

The life of Sir John Beverley Robinson for thirty years, from the time he fought as a young man of 21 at Queenston Heights, may almost be said to be the history of the politics and government of the Province. An absolutely honest and consistent Tory of the old school in Church and State, he never failed to uphold the cause of his Church and his conception of the State. He consistently fought Responsible Government, equality of religious denominations, democratic innovations. His life has been writ-

and of the people as are the Judges in England. Journals of Assembly p. 72. The Petition will be found at p. 76 and also Can. Arch. Q. 340, p. 39. Maitland agreed to transmit the address, but said, "I am not enabled to explain to His Majesty's Government what there is peculiar in the present state of this Colony which you allude to in the conclusion of your address as inducing you to desire the change which you solicit." In his letter to Lord Bathurst, March 7, 1826, Maitland says, "It is scarcely necessary to remark that if the Chief Justice were not a member of either Council, the Government and the Province would lose the advantage of the experience and legal knowledge of an officer who it must be presumed is in general best qualified to advise in measures of importance ..." Can. Arch. Q. 340, p. 41.

42 Bathurst wrote to Maitland from Downing Street June 6, 1826, that "it is highly expedient that the Governor should have the advice and assistance of the first Law authority of the Province for his guidance in the administration of his Government; that the greatest advantage has been derived throughout the Colonies from this assistance and it does not appear that there is anything peculiar in the state of the Province of Upper Canada, which should make it advisable that this system should be changed." Can. Arch. G. 62, p. 158.

The movement to exclude the Chief Justice from the Executive Council was parallel to and in a sense a part of the wider movement for Responsible Government.

43 This may be conveniently found in Read's "Lives of the Judges of Upper Canada and Ontario," Toronto, 1888, pp. 127, 128; it was carried 16 to 6.

44 A little before the resignation of Campbell, the Hon. James Baby was commissioned Speaker. He presented his Commission January 8, 1829. (Jour. Leg. Col. U. C. for 1829 p. 6). He was Speaker during that Session, January 8-March 20, 1829. At the opening of the next Session the new Chief Justice presented his Summons and Commission, January 3, 1830.
ten from one point of view by his son; various parts of it from another point of view by the historians, Kingsford, Dent and others, and no attempt will be made here to retell it.\textsuperscript{45} He continued to be Speaker of the Legislative Council until he went to England in 1838, at the request of Lord Glenelg who wished to consult him on Canadian affairs; and he never again took his seat in the House.

When the Legislative Council began its session in 1838, the Honourable Jonas Jones, puisne Judge of the Queen's Bench, presented his Commission as Speaker.\textsuperscript{46} He had been appointed to the King's Bench in March, 1837, while King William IV was still alive.

Jones was, like Robinson, of United Empire Loyalist stock, a Tory of the stern, unbending, even violent kind. He had played a prominent and in the main useful part in the House of Assembly from 1821, and was a keen-minded, clear-headed man, who had the courage of his convictions and never had any doubt as to what they were.

The Legislative Council under his speakership bent every energy to prevent the impending union of Upper and Lower Canada, and the Speaker fully approved; but it was in vain. The Union Act of 1840 became law, and Upper Canada lost its independent provincial existence.

Jonas Jones was the last Speaker of the Legislative Council of the Province of Upper Canada; and also the only puisne Judge ever summoned as a Member.\textsuperscript{47}


\textsuperscript{46} Jour. Leg. Col. U. C. 1839, p. 5.

\textsuperscript{47} While it is beyond my present thesis, I may say that when the Legislative Council of the new Province of Canada met for the first time, June 14, 1841, Robert Symson Jameson, Vice Chancellor of the Court of Chancery of Upper Canada presented his Summons as a member and his Commission as Speaker of the Council (Jour. Leg. Col. Can. 1840, pp. 13, 19). He continued to be Speaker till the Session of 1843; his resignation tendered early in the Session the Governor Sir Charles Metcalfe refused to accept and Jameson took his seat to secure a regular adjournment of the House and give the Government time to consider (Jour. Leg. Col. Can. 1843, p. 42, Monday, Oct. 16, 1843). This was part of the general agitation over Responsible Government; but what impelled Jameson to insist on resigning was the proposal to remove the Capital to Montreal, which he opposed in common with most of the other Councillors.
Of every one of the Judicial Members of the Legislative Council except the last named it may be said that he was most useful and efficient in framing and correcting ordinary legislation. Of not one without any exception can it be said that he ever suggested or promoted any measure looking to reform or to a more democratical government. Without exception they were conservative and aristocratical to a degree and none could find anything wrong in the existing state of affairs. All men of fine minds, good intentions, they all were reactionaries and at least passively, if not actively, set themselves against the current of democracy and popular government which must needs prevail if Canada was to be saved for the Empire.

(To be concluded)

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from Upper Canada. His resignation tendered again was accepted; Monday, November 6, 1843, he announced the resignation and acceptance and two days afterwards, the Hon. René E. Caron presented his Commission as Speaker (Jour. Leg. Col. Can. 1843, p. 75). Jameson continued to be a private member of the Council till his death in 1854, but as vice-chancellor he was not considered a Judge; e. g., he was a Bencher and Treasurer of the Law Society of Upper Canada for years after being appointed Vice-Chancellor. The Statute of 1857, 20 Vict. Chap. 22 (Can.), made all Judges, Chancellors, Vice-Chancellors, etc., ineligible to vote, and all persons (except certain Ministers of the Crown) who accepted or held any office, commission, or employment at the nomination of the Crown, with an Annual Salary, ineligible as a Member of either House.