

1919

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Recommended Citation

Riddell, William Renwick, "Judges in the Parliament of Upper Canada the Legislative Assembly" (1919). *Minnesota Law Review*. 2507.
<https://scholarship.law.umn.edu/mlr/2507>

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JUDGES IN THE PARLIAMENT OF UPPER CANADA*

THE LEGISLATIVE ASSEMBLY

WE have seen that the Common Law rule that Judges could not in England be Members of the House of Commons was based upon the fact that they were at first Members of and afterwards attendants on the House of Lords. *Cessante ratione cessat ipsa lex*.⁴⁸ The Canadian Judges not being called upon to attend any other House, there was no reason in law why they should not be elected to the House of Assembly.

In Lower Canada, which had precisely the same Constitution as Upper Canada, the Judges from the very beginning took an active interest in politics and were elected to the House of Assembly. This in the first decade of the nineteenth century created much dissatisfaction amongst the French Canadian portion of the community, as the Judges were all opposed to the majority of the House and their views of government by the people. In Upper Canada there was no instance of a Judge offering himself as a candidate for election until 1800. This was Henry Allcock, afterwards Chief Justice and Legislative and Executive Councillor. At the election for the third Parliament for the Province he was elected member of the House of Assembly for the East Riding of York and the Counties of Durham and Simcoe. He was nominated for the Speakership, but was defeated by the Honourable (afterwards Sir) David William Smith by a vote of 10 to 2, Allcock voting with the majority and afterwards with another member leading the new Speaker to the chair. There was little contentious business, and politics had as yet scarce made its appearance above the surface. But in any case Allcock did not have much opportunity to show his colours. The House met

*Continued from 3 MINNESOTA LAW REVIEW 180.

⁴⁸ "When the reason of any particular law ceases, so does the law itself." The maxim would be quite true were the word *aliquando* inserted—"sometimes." The story of Mr. Justice Allcock's career in the Lower House can be read in the *Proc. Leg. Assy. U. C.* 1801, 6 *Ont. Arch. Rep.* 1909, 176, 183, 186, 192-195, 237. The Petitioners against him were of the official set, which rather indicates reforming tendencies in Allcock, but nothing in his career before or after suggests such sentiments.

May 26, 1801; June 1, a petition was presented by seven of the Freeholders of his constituency that, while Allcock was a gentleman of acknowledged respectability, he had not been chosen by the Petitioners or a majority of the electors; June 10 and 11 the Petition was considered; on the latter day he was declared not duly elected and a writ for a new election was ordered. At this election Allcock was not a candidate. Angus Macdonell was elected and took his seat July 4, 1801, which he kept until his death by drowning in the "Speedy" disaster, 1804, to be succeeded by William Weekes, and Weekes by the Judge now to be spoken of.

The next Judge candidate was a Radical and took a stand against the Government and ruling classes from the beginning to the end of his very interesting and varied judicial career.

Robert Thorpe was a member of the Irish Bar who through the influence of his patron, Castlereagh, was in 1802 appointed Chief Justice of the Supreme Court of Prince Edward Island. Quarrelling with the Governor, he received an appointment in 1805 as a puisne Judge of the Court of King's Bench for Upper Canada.

The Province at that time was in an uneasy condition politically. For the first decade or so of the separate Provincial existence of Upper Canada, the settlers were too busy clearing land, building houses and barns, and making a living for themselves and their families to pay much attention to the government of the Province. The administration of affairs was in the hands of a Governor responsible to the Home Government and an Executive Council responsible only to the Governor. Legislation was made by the House of Assembly and the Legislative Council, the Legislative Council being appointed and always in accord with the Governor.

But settlers were coming in constantly. Land was given free to almost all comers till 1798 when the price was fixed for future grants at 6 pence Halifax (10 cents) per acre and the usual expense of survey.⁴⁹ At that very time thousands of acres were being granted to members of the Executive Council and other favourites of the administration free (except for expenses). A grant of 1,200 acres was by no means uncommon, and on one day

⁴⁹ See the Proclamation, October 31, 1798, Can. Arch., Q. 288, p. 192.

11,400 acres were so granted.⁵⁰ The official class had many squabbles over the division of the fees for the grant of land, and it was too often the case that the man with the money to pay fees for land would receive attention to the neglect of bona fide settlers less fortunate and even to the Loyalist entitled to a patent without payment of fees.

These and some others were legitimate subjects of complaint; but there was much factious agitation, due to a certain extent to restiveness under autocratic rule, but also to some extent (not now determinable) to treason. Joseph Willcocks who had been a member of the "United Irishmen" and who, emigrating, had been made Sheriff of the Home District by Chief Justice Allcock, and William Weekes, also Irish, who had been a student of Aaron Burr and who was the first law student called to the Bar by the young Law Society of Upper Canada, being now a member of the Lower House, were the leaders of the Radicals. But the House was itself restive and no longer looked with equanimity upon acts which would not be tolerated in England. An opposition was evolving: one example will suffice to show the trend. Governor Hunter in 1803 and 1804 used some of the money raised by the Parliament for public purposes indeed, but without the assent of Parliament. Administrator Grant, his successor in 1805, followed his example, and in 1806 the Assembly made a formal protest and demand that the money should be replaced.

Thorpe "agin' the Gover'ment" as always, joined himself to the Radicals and on the meeting of Parliament in February, 1806, took the leadership of the group of that way of thinking.⁵¹ He

⁵⁰ I. e., on January 9, 1797, *Can. Arch.*, Q. 289, pt. 1, pp. 3-8, January 3, 1797, the wife and children of Mr. Justice William Dummer Powell received 9600 acres, 1200 acres each, *Can. Arch.*, Q. 289, pt. 1, p. 1. January 9, Chief Justice Elmsley got 5000 acres, and Mrs. Gray, mother of the young Solicitor General, "1200 acres as a small mark of respect for her own character and that of her deceased Husband." *Ibid.*, pp. 3, 47. January 17, the six sons of the Hon. Robert Hamilton (of course a Councillor) "All born in this country" got 1200 acres each, with an expression of regret that more cannot be given, "considering the great benefit Mr. Hamilton has been to this infant Colony and the high Rank he holds." *Ibid.*, p. 10. The list is by no means exhausted.

⁵¹ Writing to Edward Cooke, the Under-Secretary for War and Colonies from York, Upper Canada, under date January 24, 1806, after five months in the Province, he says in a Postscript of date February 5 (Parliament met the previous day): "The Houses of Assembly are sitting and from want of a person to direct, the Lower one is quite wild; in a quiet way I have the reins so as to prevent mischief though like Phaeton I seized them precipitately. I shall

seems to have been the moving spirit in much of the opposition shown to the Administration and probably incited the protest against the unauthorized expenditure by Grant.⁵² He inveighed against the Government in his addresses to Grand Juries and welcomed addresses from Juries in the same sense.⁵³ Weekes having been killed⁵⁴ in a duel which he forced on his fellow-barrister, William Dickson, his seat in the House became vacant, and Thorpe became a candidate for the representative of the East Riding of the County of York and the Counties of Durham and Simcoe in the Assembly. The election coming off December 29, 1806, Thorpe obtained 269 votes and his opponent, Thomas Barnes Gough, 159. The returning officer, William Allan, a thorough Tory if there ever was one, returned Thorpe as elected.

not burn myself and hope to save others." *Can. Arch.*, Q. 305, p. 86, et seq. Report of *Can. Arch.* for 1892, p. 39. "Never prophesy unless you know" is a maxim he forgot.

⁵² It was his intimate friend, William Weekes, who reported, February 25, 1806, from the Select Committee appointed February 10 to examine the Public Accounts that £617.13.6 had been expended without the authority of Parliament. 8 Rep. Ont. Arch. (for 1911), pp. 79, 90-92.

⁵³ An attack by Colonel Joseph Ryerson, a Tory United Empire Loyalist, upon Thorpe for his address to the Grand Jury for the London District at Charlotteville in October, 1806, resulted in the only action of *Scandalum Magnatum* ever taken on this Continent. It is an action based upon the Statute of Gloucester (1378) 2 Richard II, Stat. 1, cap. 5, which forbids "false News, Lyes and other such false things" to be said against "Justices of one Bench or the other" and certain others. Although the action had become obsolete in England,—the latest known case was in 1710—Thorpe brought proceedings against Ryerson for *Scandalum Magnatum*, but failed. See my article "*Scandalum Magnatum* in Upper Canada," 4 *Jour. Am. Inst. Crim. Law* (May, 1913) pp. 12-19. Dent (*U. C. Rebellion*. Vol. 1, p. 87), with that want of common fairness which disfigures a work otherwise valuable, says: "His brother Judges, however, some of whom were members of the Executive Council and all of whom were subject to strong influences from that quarter, ruled that the proceeding could not be maintained . . ." A more offensive and unfounded insinuation could hardly be made. The case was argued twice and was finally decided by Scott, C. J., and Powell, J., January 15, 1808, on the simple and obvious ground that the Statute of Gloucester was speaking of the Judges of either Bench in England and not of a Bench in Upper Canada which did not come into existence for over four hundred years later. I have never heard a lawyer express a contrary view; and it is monstrous to suggest that the judgment was the result of influence from any quarter.

We shall see that the view that Judges of the Court of King's Bench in Upper Canada are not in the same case as the Judges of the Bench, King's or Common, in England is that held by the House of Assembly in the petition against Thorpe's return as a member of the House.

⁵⁴ See my article "*The Duel in Early Upper Canada*" (1915), 35 *Can. Law Times* pp. 726 et seq.; also in the *Jour. Am. Inst. Crim. Law* of the previous month.

When Parliament opened its next session February, 1807, Gough promptly petitioned against the Return, as did a number of the Freeholders of the Constituency. The grounds alleged are the same in both Petitions: "That Robert Thorpe at the time of such election was and still is one of His Majesty's Judges of the Court of His Bench in this Province," "that in England none of the Judges of the Court of King's Bench, Common Pleas, Barrons of the Exchequer who have judicial places, can be chosen Knight, Citizen or Burgess in Parliament . . . that this procedure is unconstitutional, inasmuch as being an attempt to clothe, arm and blend in one person the conflicting powers authorities and jurisdiction of the Legislative and Judicial functions, contrary to the spirit of good government and the immemorial usage and custom of the Commons of England."

The Statute of 1805⁵⁵ had provided that on the consideration of a Petition complaining of an undue Election or Return, the House should be cleared and all the members (except him against whose return the Petition was made), with the Speaker, should be sworn and then, the Speaker taking the chair, the doors should be opened and the trial proceed. But there was always the preliminary question, viz: "assuming the facts alleged to be true, should the election be voided and the return set aside?"

Accordingly, the House went into Committee of the Whole on the Petition of the Freeholders to determine "whether the grounds contained in the Petition. . . if true are sufficient to make the election of the sitting member void?" After three sessions, the Committee of the Whole reported that the grounds alleged, if true, were not sufficient to make the election void. The Petition of Gough was given three months' hoist; Gough petitioned that his Petition should be heard, as he had "at great expense procured a Counsel from a distant part of this Province to support the grounds and prayer of his Petition." An attempt to give this new petition the three months' hoist failed. The House went into Committee of the Whole on it and reported that the further consideration of it should be deferred for three months. The Solicitor General, Mr. (afterwards Mr. Justice) D'Arcy Boulton, moved that the report be not received, but was voted down on a division 8 to 6. The division list is instructive as indicating the politics of the members. All the six were Tories,

⁵⁵ (1805) 45 Geo. III, Chap. 3 (U. C.).

one of them afterwards a Judge of the King's Bench; most of the eight were Radicals and at least one of them afterwards strongly suspected of actual treason.⁵⁶

There can be no doubt of the correctness of the decision. Thorpe, no mean lawyer himself, had pointed out to Lieutenant Governor Gore that in England "Judges are considered in the Legislature for which reason many are created Peers, and all Judges have sat in the Commons except such as are constitutionally to attend the Lords to assist when a Court of Justice." He also pointed out that "the Master of the Rolls, the Judges of the Admiralty and Ecclesiastical Courts, the Chief Justices of Ely, Chester and the Welsh Judges, etc., etc., the Judges in Canada and in the other Colonies have constantly sat in the House of Assembly."⁵⁷

Thorpe took a very active part in the Legislative Assembly during the whole of this session, but failed to obtain a majority in any of his attempts to embarrass the Government. He was too radical for the Upper Canada Radicals and sometimes could not obtain a single supporter.

The Lieutenant Governor complained of him to William Windham, the Secretary of State;⁵⁸ and Castlereagh, who re-

⁵⁶ The proceedings in this unique case will be found in the Proceedings of the Leg. Assy. U. C. for 1807, most conveniently in 8 Rep. Ont. Arch. (1911) pp. 127, 128, 129, 134, 135, 154, 155; the Division List on p. 155. See also Doughty & McArthur Documents relating to the Constitutional History of Canada 1791-1818 pp. 325 et seq.

⁵⁷ Can. Arch., Q. 310, p. 83; also letter Castlereagh to Craig, September 7, 1809, *ibid.*, p. 36 in D. & McA. Documents, etc., p. 326, note 2. It is hard to see how men like Boulton and Sherwood could justify their votes.

⁵⁸ Letter, Francis Gore to William Wardham, Secretary of State for War and Colonies from York, Upper Canada, March 13, 1807. Can. Arch., Q. 306, pp. 59 et seq.; D. & McA. pp. 327 et seq.; Can. Arch. Rep. for 1892, pp. 61 et seq. His offences are detailed thus:

"Very soon after the arrival of Mr. Thorpe in this Province, his Public Conduct attracted the notice of all considerate men: the Publication purporting to be an Address from the Grand Jury of the Home District on the first Public exercise of his Functions as a Judge, evinced a strong disposition to make the Courts of Justice, the Theatres for Political harangues, and a subsequent one from the Petty Jury (a thing heretofore unknown in this Country) afforded a sufficient proof of a desire in the Judge, to encourage Strictures on the Government from every description of persons, however incompetent they might be to form any correct opinion upon the subject, or however foreign such a subject might be from the occasion for which they were convened. . . .

"Mr. Thorpe's conduct, since he has been elected a Member of the House of Assembly, has been most inflammatory—and however it is to be lamented that the Government have not greater influ-

placed Windham, directed Gore to suspend him.⁵⁹ In anticipation of such a direction, Gore with the approval of his Executive Council had left Thorpe's name off the Commission of Assize and Nisi Prius, inclusion in which was at that time necessary to enable Judges to try cases at "the Assizes," their commission as Judges of the Court of King's Bench not extending to the trial of cases civil or criminal at the Assizes or elsewhere than in Banc.⁶⁰ This course was absolutely necessary to prevent Thorpe spreading discontent, the charge made against him being none too strong from the Governor's stand-

ence in the House of Assembly, during the Session which has just closed, he had been unable to carry any one point, to embarrass the Government. He moved an Address, which was most insidious, and inflammatory, on the subject, of those Persons who had adhered to the Unity of the Empire—which was rejected. In his proposal for vesting the Power of Appointing Trustees to the Public Schools, in the House of Assembly instead of the Lieutenant-Governor, after a violent Declamation, and abuse of the Executive Government, he asserted, that it was . . . the privilege of The House of Assembly to nominate to office. In this attempt, he was supported by two only. And on a Question relating to the Duties, imposed by the 14th of the King (which Mr. Thorpe contended was at the disposal of the Provincial Legislature) he stood alone! and I am happy to observe, that in the instance of a Judge of the Court of King's Bench, making an attempt to derogate from the authority of the British Parliament, he could not in a popular Assembly, prevail on a single person to join him, notwithstanding, his Pathetic allusion to the Revolt of the American Colonies.

"When the business of the Session was nearly concluded, an address was moved in the House of Assembly, to relinquish their claim to about six hundred pounds, which had been taken out of the Provincial Funds, and appropriated, by the late General Hunter (to particular Colonial purposes) without the concurrence of the other branches of the Legislature, this measure was opposed by Mr. Thorpe with his usual violence, but without effect."

⁵⁹ Robert (Stewart) Viscount Castlereagh, who had been Secretary of State for War and Colonies in 1805 was followed by William Windham, February 14, 1806, but regained his place March 25, 1807; this he kept till forced out of the Cabinet by Canning in 1809, when he was succeeded by the Earl of Liverpool.

Castlereagh's letter to Gore, June 19, 1807, is in D. & McA., p. 330. Can. Arch., G. 55, pt. 1, p. 115.

⁶⁰ See my articles in the Yale Law Journal, "New Trial at the Common Law," November, 1916, and "New Trial in Present Practice," January, 1918:

"It was not until 1855 (18 Vict. c. 93, s. 43, Can.) that commissions of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery were rendered unnecessary, Parliament providing that such courts should be held at such times as the judges of the courts of common law (by this time a Court of Common Pleas had been formed by (1849) 12 Vict. c. 63 (Can.) with the same powers as the Court of Queen's Bench) should appoint. The judges of the courts of common law were to sit in these courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery with the same powers as though they had commissions as formerly.

point—"That the progress of one of His Majesty's Justices of the Court of King's Bench through the Province in his routine of duty should be dangerous to the peace of the colony may indeed seem strange but it is most certainly true with regard to Mr. Thorpe who appears to consider his character as a Judge but a matter of secondary consideration and to be chiefly ambitious of the character of a Factious Demagogue."⁶¹

On Thorpe being informed of his omission, he thought he should ask permission to go to England and lay the matter before the Privy Council; but afterwards repented and determined to remain. A meeting of some of his constituents was held at York, which presented an address to him expressing unfeigned sorrow that thereby the eastern part of the Province would be deprived of the instructive lessons and philanthropic instructions flowing from his lips. They also offered, if any attempt should be made to lessen his income, to contribute to alleviate the sufferings of their benefactor. Thorpe declined the present, said that his conduct had been approved of by the Secretary of State and his labours rewarded by the Sovereign, and confidently expected a favourable termination of the matter.⁶²

Powell, who had been in England on the way to and from Madrid where he obtained the release from a Spanish American prison at Omoa of his son Jeremiah, had there heard that it was intended to suspend Thorpe. With Gore's perfect approbation, Powell before the arrival of Castlereagh's despatch called

"By the Common Law Procedure Act of 1856 (19, 20 Vict. c. 43, ss. 152, 153, Can.) the times of the sittings of these trial courts were to be fixed by the judges, and the judges might sit with or without commissions, as the Governor (i. e., the Ministry) should deem best. In 1874 the Administration of Justice Act (37 Vic. c. 7, Ont.) provided for Courts of Assize and Nisi Prius to be held without commissions and that any judge or Queen's Counsel presiding at any court of Assize, Nisi Prius, Oyer and Terminer and General Gaol Delivery should have all the powers which he would have had under commissions under the former practice.

"It may be said that since the act of 1856 we have not had in Ontario commissions for trial courts, except special commissions of Oyer and Terminer, etc., the power to issue which is still continued and has been exercised."

⁶¹ Letter, Gore to Castlereagh, York, Upper Canada, August 21, 1807, Can. Arch., Q. 306, p. 212; Can. Arch. Rep. for 1892, p. 81. The report of the Executive Council is *ibid.*, p. 82.

⁶² Can. Arch., Q. 306, pp. 212, 222, 223, 224. Some of Thorpe's constituents did not approve, *ibid.*, p. 328, and indeed they strongly doubted that any such meeting had ever taken place—in which doubt Gore shared, *ibid.*, p. 312. See Can. Arch. Rep. for 1892, pp. 81 et seq., Can. Arch., Q. 310, pp. 87 et seq., 100, 101.

on Thorpe and told him what was coming. He also told him that if he would ask Gore for leave of absence before the matter became public, he would receive it and money to convey him to Europe. That he at once refused, said that he could not be removed without a hearing before the Privy Council, and claimed that everything he had done was by direction of the Secretary of State. He left the Province without leave of absence and without the knowledge of the Governor, believing firmly that Castlereagh would justify him. In an address to his constituents written at Niagara just as he was leaving the Province to go to New York on his way to England, he expressed the hope that his return should be as rapid as his departure was unexpected.⁶³ His hopes were vain: his suspension was made final and he was succeeded in his Judgeship by Campbell: he never again appeared in Canada; and no other Judge has ever offered himself for election to the Lower House of Upper Canada.⁶⁴

⁶³ Can. Arch. Rep. for 1892, p. 89; Can. Arch. Q. 310, p. 24, a contemporary letter (Powell MSS) speaks of him forlorn and in despair leaving Niagara and wonders what will become of his poor wife and children—his wife and helpless children he had expressed his willingness to sacrifice only with his life in doing his duty to England, to the Colony and to the patronage of Sir George Shee, Bart. (Under Secretary for the Home Department 1800-1803). Letter, Thorpe to Shee, Can. Arch., Q. 310, p. 34; Can. Arch. Rep. for 1892, p. 89.

⁶⁴ In my article "Scandalum Magnatum in Upper Canada," 4 Jour. Am. Inst. Cr. Law, May, 1913, pp. 12 et seq., already referred to, I give the subsequent career of Mr. Justice Thorpe in the following words:

"Mr. Justice Thorpe, returning to England, was appointed Chief Justice of Sierra Leone; after a residence there for some years he brought from that Colony to London a budget of complaints from the people there. He was cashiered for this, and he passed the rest of his life in obscurity and neglect, dying a poor man.

"It was not the mere bringing of complaints to London which proved fatal to Thorpe. He made a most vigorous, if not virulent, attack in print against the African Institution and its predecessor, the Sierre Leone Company, organized for the benefit of free blacks on the west coast of Africa. Neither Director nor Manager escaped the lash of his pen. Wilberforce was by implication charged with hypocrisy, Zachary Macaulay (father of Lord Macaulay) with making money out of the pretended charity, and all implored to let the unfortunate blacks alone. Perhaps his worst offense was making public that while a poor old black settler, Kisil, could not get his pay for work and labor done long before for the Company, Macaulay (then lately Secretary and always Director) received fifty guineas for importing ten tons of rice into England from the West Coast of Africa; and while £14.5.4 was spent "for clothing African boys at school," £107.12.0 went "for a piece of plate to Mr. Macaulay." Thorpe was unwise enough to expose the seamy side of charitable institutions; and when we consider that H. R. H., the Duke of Gloucester, was president; Lords Lansdowne, Selkirk, Grenville, Cal-

I speak only of the Judges of the Supreme Courts, the Courts or King's (Queen's) Bench, Common Pleas, and Chancery. There were two Judges of the old Courts of Common Pleas who became members of the first House—Nathaniel Pettit and Benjamin Pawling, of Niagara (Nassau District), and possibly a third, John Macdonell, of Luneburg District. After the abolition of these Courts in 1794, one of the former Judges, Edward Jessup of Luneburg, became a member of the Assembly in the second Parliament and John Macdonell was re-elected.

Of the District Courts (now County Courts) instituted in 1794 and of the Surrogate Courts, there were many Judges Members of the House, many of them laymen. There never was an agitation against Judges being elected at all like that which raged in Lower Canada. The first legislation in this respect in Upper Canada did not pass until 1837 when it was enacted that any member of the House who should become Judge of the Court of King's Bench, of a District Court or any Court of Record to be established (or accept other named offices), should vacate his seat, but it should be no bar to re-election. The curious clause was added that nothing in the Act should be construed to author-

thorpe, Gambier, and Teignmouth were vice presidents; members of parliament like Wilberforce, Babington, Horner, Stephen, Wilbraham, etc., were members of the Institution; and that Wilberforce was a bosom friend of Pitt's, we need not wonder at Thorpe's dismissal—Don Quixote had quite as good a chance with the windmills. Nevertheless it must be said that his charges in some respects are very like those made a short time before by Dr. and Mrs. Falconbridge.

"Thorpe's pamphlet went through at least three editions; my own copy (of the third edition) is dated 1815.

"Perhaps one moral of this story is that judges should keep out of politics."

It was Lord Bathurst, Secretary of State for War and the Colonies in Liverpool's "purely Tory" Administration of 1812, who gave Thorpe his congé. Gourlay in his "Statistical Account of Upper Canada," Vol. II, pp. 322 et seq., has something to say about Mr. Justice Thorpe. Dent in his *U. C. Rebellion* Vol. 1 pp. 86-90 gives an account of this "honorable and highminded man whose only fault was that he was too pure for the times in which he lived and for the people among whom his lot was cast." (The author could not have read Thorpe's own letters, copies of which are in the *Can. Arch.* printed in the *Can. Arch. Reports* for 1892), Kingsford, *Hist. Can.* Vol. VII, p. 524; Vol. VIII, pp. 87-103, is less favorable. There is no doubt as to Thorpe's actions. His motives are differently interpreted—*sub judice lis est*. Those interested in Thorpe's charges about Sierra Leone will find them discussed in the *Imperial House of Commons* (1815) 29 *Hans. Deb.* 1005, (1815) 30 *Hans. Deb.* 612.

ize the election to the House of a Judge of the Court of King's Bench, thus leaving the eligibility of such a Judge at large.⁶⁵

After the Union; the Parliament of Canada in 1843 passed a statute which rendered ineligible as members of the Assembly all Justices and Judges of any Court of Queen's Bench or of King's Bench, the Vice-Chancellor of Upper Canada . . . all District Judges or Circuit Judges . . . the Official Principal of the Court of Probate and the Surrogate Court in Upper Canada and many others.⁶⁶

In 1857 the final blow was given to judicial legislators.⁶⁷ Of the other Judges appointed during Upper Canada's separate existence, Thomas Cochrane, 1803-1804, is not known to have taken part in politics. D'Arcy Boulton, 1818-1829, was successively Solicitor General and Attorney General and a strong supporter of the Government; Levius Peters Sherwood, 1825-1840, had been a Member and Speaker of the House of Assembly, a Tory—neither of these was an active, or at least an open, politician after his elevation to the Bench. John Walpole Willis, 1827-1828, deserves a chapter to himself. He came from England and quarrelled with everyone in authority, meddled with the House of Assembly, and generally made so much trouble with the Government and its officers that he was "amoved."⁶⁸ James

⁶⁵ (1837) 7 Wm. IV, Chap. 114, Secs. 1, 2 (U.C.) reserved for the Royal Assent, promulgated April 20, 1838.

⁶⁶ (1843) 7 Vict. Chap. 65 (Can.), reserved for the Royal Assent and proclaimed May 25, 1844. There were subsequent enlarging and explanatory acts (1853) 16 Vict. Chap. 155 (Can.) and (1855) 18 Vict. Chap. 86 (Can.).

⁶⁷ (1857) 7 Vict. Chap. 22 (Can.).

⁶⁸ "Amoved" is the technical expression always used in this connection. Willis was afterwards sent as a Judge to Demerara and then to 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 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.' (24 Hans. N. S., pp. 551 et seq. [1830]).

Buchanan Macaulay, 1829-1849 (J. K. B.), 1849-1856 (C. J. C. P.), while an Executive Councillor before his appointment to the Bench, was not at all a partisan. Archibald McLean, 1837-1850 (J. K. B.), 1850-1856 (J. C. P.), 1856-1862 (again J. Q. B.), 1862-1863 (C. J. Q. B.), 1863-1865 (Prest. E. & A.), who had been long a member and twice Speaker of the House of Assembly, was then a strong Tory and gave his whole-hearted support to the policy of the Attorney General John Beverley Robinson. Jonas Jones, 1837-1848, was also a member of the House, a still stronger Tory and much more virulent than McLean. Christopher Alexander Hagerman, 1840-1847, had been successively Solicitor General and Attorney General; in the House he had been the protagonist of rule by Executive Council, denial of Representative Government, donation of the Clergy Reserves to one favoured church, and of conservative measures generally. It is said of him that he was so much of a Tory that he would not

"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."

See my articles, "The Court of King's Bench, 1824-1827," 49 *Can. Law Jour.* 45, 98, 126, 209 (1913).

An incident in the Court of King's Bench in England exhibits Thorpe in a more favorable light:

"The King vs. Francis Gore Esq., 1820.

This was an indictment against Francis Gore, late Lieutenant Governor of Upper Canada, for publishing a libel affecting the character of Judge Thorpe. On motion of Mr. Scarlett, the defendant was brought up for judgment.

The evidence of publication was the fact of the defendant, having submitted the libellous pamphlet in question, to the perusal of Mr. Sergeant Firth, then Attorney General of Upper Canada for his official consideration. The Solicitor General said he understood the case was to go before the Master, in consequence of the affidavits, which the defendant agreed to file. These affidavits stated that the defendant, in submitting the pamphlet to Mr. Sergeant Firth, did so solely in order to consult him officially as a public officer touching the matters it contained; that he had no intention of circulating the libel; that he was not the author of it; that he had no intention of injuring the character of the prosecutor; and that he had not in any manner given his sanction or authority to any publication, prejudicial to the reputation of that gentleman.

Mr. Scarlett, after communicating with his client, announced that the latter was perfectly satisfied with the defendant's declaration, and wished it understood that he had never entertained the slightest personal ill-will towards the defendant.

The defendant was consequently dismissed."

(*Quebec Gazette*, 3 April, 1820.)

allow himself to be called a Conservative, but a *Tory out and out*, and he undoubtedly lived up to his appellation. None of these when on the Bench interfered in political matters; and no one but extreme partisans has ever seriously charged any of them with partiality arising from political creed or alignment.⁶⁹

WILLIAM RENWICK RIDDELL.*

TORONTO.

*Justice of the Supreme Court of Ontario.

⁶⁹ I have gone over the names of all the Judges of the three Superior Courts and of their successor, the Supreme Court of this Province, who have passed over; and I find only very few who had not taken a prominent part in politics before their elevation to the Bench; Sir John Hawkins Hagarty, John Douglas Armour, Sir John Alexander Boyd, Vice-Chancellor James C. P. Esten are perhaps the best known.