

THE LIFE
OF
WILLIAM DUMMER POWELL
FIRST JUDGE AT DETROIT
AND
FIFTH CHIEF JUSTICE OF UPPER CANADA

BY
THE HONOURABLE
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Unum est levamentum malorum ingentium,
pati et necessitatibus suis obsequi.
Seneca, De Irâ, III, 16

Bonus animus in malâ rē dimidium est mali.
Plautus, Pseudolus, I, 5, 37



LANSING
MICHIGAN HISTORICAL COMMISSION
1924

TO THE MEMORY
OF
THE CHIEF JUSTICES AND JUSTICES
OF
UPPER CANADA

Si vir es, suspice, etiam si decidunt,
magna conantes.

PREFACE

MY attention was first called to William Dummer Powell in the course of an historical inquiry into a purely legal matter not of general interest or importance. The curiosity, to give it no higher term, thus excited received a stimulus from my appointment in 1906 as Puisne Justice of the King's Bench Division, the lineal descendant of the Court of King's Bench of Upper Canada, of which Powell was, in 1794, appointed the first Puisne Justice; the King's Bench Division was abolished in 1913, so that I am the last of a long series of which he, a hundred and thirty years ago, was the first.

Powell was an inveterate and voluminous writer, and reams of documents in his unmistakable handwriting are in existence. Many of these are preserved in the Canadian Archives at Ottawa and in the Reference Library at Toronto. I am indebted to Powell's great-grandson, Commodore Aemilius Jarvis of Toronto, for no few others. I have read all these and have also read many contemporary private and official letters and other documents, including the documents of which the originals or copies are to be found in the Canadian Archives. Use could not be made in a volume for general reading of a tithe of these: but I hope at no distant day to write some account of Powell as a Lawyer. Powell deserved well of his country and he and his work should not be wholly forgotten.

WILLIAM RENWICK RIDDELL.

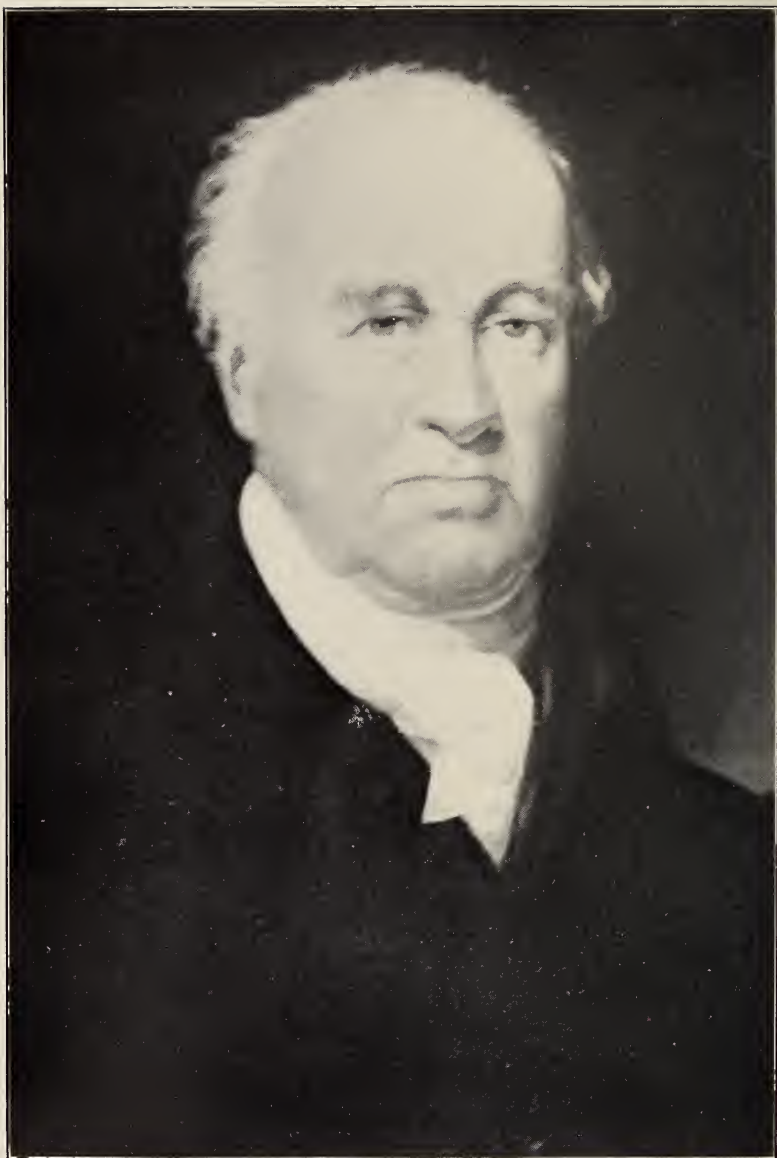
Osgoode Hall, Toronto, May 17, 1924.

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WILLIAM DUMMER POWELL

CHAPTER I

DESCENT AND EARLY LIFE

WILLIAM DUMMER POWELL, the fifth Chief Justice of Upper Canada, came of an old Welsh family, Ap Howel, which had its seat in Caer Howell in Montgomeryshire, Wales. A branch of the family emigrated to the adjoining County of Salop or Shropshire in England and was settled there as early as the seventeenth century. After this emigration to England, the name of the English branch was anglicised into its present form, Powell.¹

The earliest ancestor to whom reference is made in the family papers is Thomas Powell, who resided at Bank House near Shrewsbury. His son John was born there about 1682²—a younger son, he sought his fortune in the New World, coming out from England, as Secretary to Lieutenant-Governor William Dummer of Massachusetts.

Governor Dummer's father had been a wealthy merchant, a silversmith, in London, the younger son of a good Hampshire family near Southampton.³ He was a Roundhead and an Independent: after the Restoration in 1660, he emigrated to Boston, Massachusetts. He had three sons, of whom William was one; Jeremiah, the agent in London of Massachusetts, was another. Jeremiah graduated at Harvard in 1699 and then studied at the University of Utrecht; his "Defence of the New England Charters", written in England in 1728, had great vogue in its day. These two never married, and the third son Samuel died without issue: they had a sister Anne whom John Powell married.

His grandson, our William Dummer Powell, thus writes about the marriage: "An anecdote was handed about the Town of Boston: John Powell soon after his arrival in Boston, hearing that this lady was a good match, but a proud Presbyterian who had disdained many offers, laid a bet at his Club, that if he could effect an introduction to the family, he would marry her. He effected his purpose by a compromise arrangement that all the children after the first son should be bred up in the Independent Church. . . . My grandfather was an adventurer of the Cavalier Stock, a man of gayety and

pleasure, and from pure *gaieté de coeur* married my Grandmother, Anne Dummer."

And he adds: "My Grandmother was a little woman of very dignified presence and manner and sober conversation. She survived my Grandfather whose habits were too dissipated to secure him happiness." He died at Canso Bay in 1740, and his wife at Boston in 1763, aged 77.

The eldest son of this marriage was John Powell, born at Boston, May, 1716.

The first John Powell had other children,⁴ among them two sons, William and Jeremiah, the latter of whom became President of the Council at Boston; and both were of service to their nephew in after life. The arrangement as to the religion of the children was carried out. William Dummer Powell says: "This arrangement sixty years afterwards, produced the ruin of that part of the family, for in the contest with the Mother Country, my Uncles Jeremiah and William Dummer sided with the Country Party, which might be called Republican, and my Father, a High Churchman and a Tory, adhered to the Monarchy and became an emigrant."

John Powell the younger became a merchant and for thirty years he held the contract at Boston for victualling the Royal Navy. In this, he made considerable money, most of which he invested in a mortgage upon a plantation in the West Indies.⁵ He married Janet, the third daughter of Sweton Grant, a merchant in Rhode Island, a Baronet *de jure*⁶ who had declined to use his title, although after his death his successor in the title was known as Sir Alexander Grant. Her mother was Temperance Tallmadge,⁷ of a good English family which emigrated to America during the Civil War of the time of Charles I.

The eldest issue of this marriage was William Dummer Powell, born at Boston, November 5th, 1755. He was instructed carefully by his mother, "as much distinguished for her literary acquirements as her personal beauty," until the age of seven, then he attended the Boston Free Grammar School. This, as he says, was "according to the custom of the country", and he "made the usual progress in Latin Grammar for three years." Then his father in person took him to England and placed him in a school at Tunbridge, Kent, taught by Messrs. Cawthra and Travers; he was put in the special charge of the Reverend Jonathan Travers, a clergyman of the Church of England, and under the guardianship of his mother's

kinsman Sir Alexander Grant of Dalvey, then a wealthy merchant in London.⁸

He "progressed through the school in the ordinary way until . . . fourteen"; he says that he at the Tunbridge School "exhibited an early admiration for the manly exercise of cricket." In another manuscript he says: "I was not designed for any profession and did not distinguish myself in any way. I left school in 1769 with six months Greek, which I never afterwards cultivated and a tolerable acquaintance with the Latin classics which I have kept up. At Fourteen⁹ I was sent out to Holland to acquire the French and Dutch Languages. My consignee, Mr. D. Manners of . . . Rotterdam, placed me under the direction of a Bevois of the House of Boie. Any proficiency I made in the language was rather owing to my own ear and the attention of his wife and sister-in-law, who . . . spoke French correctly. Under this roof, I had for a year and a half a chum with whom I cultivated the most intimate friendship, Charles Boyd a nephew of the Earl of Errol.¹⁰ He was born in France where his Father married while he was in exile after the affair of Culloden. His object was to acquire the Persian Language to qualify him for the service of the East Indian Company. Boyd and D'Erlangen, the son of the French pastor of Middleburgh . . . were my only companions of the male sex, but occasionally visits to Mr. Manners at Rotterdam and the Hague to Count Calmar afforded me occasion to mix in Society and wear off part of the rust I should otherwise unavoidably have acquired from the Sieur Boie whose travels through Europe in his youth, had, I suspected, been made as a clerk to a Swiss Regiment."¹¹

The knowledge of French acquired in youth proved of immense advantage to Powell in after life, and not the less so that he acquired colloquial as well as literary French.

"At sixteen I returned to England, and during twelve months of unsettled life I cultivated the good graces of the ladies more than any other pursuit. Fortunately for me I fell into good hands and was free from any sort of mesalliance. When aged seventeen, I was summoned to attend my Father whose life was despaired of from a lingering but acute complaint in his head from rheumatic fever.¹² I embarked for Boston in 1772."

The troublous times culminating in the Revolution had already begun; but serious warfare had not yet broken out.

Powell employed the summers of 1773 and 1774 in visiting Canada and the Middle Provinces¹³—in his visit to Canada in

1773 he made acquaintances at Montreal who were to be of advantage to him some years later.

In the winter, he applied himself to the study of law under the Attorney General of Massachusetts,¹⁴ not (as he is careful to explain) to fit himself for the practice of law as a profession but to qualify himself for public life. He, however, at one time hoped to go into business in New York; and his mother left Boston with him in the Fall of 1774 to use her influence in finding a place for him in business conducted by friends of hers in that city. It is apparent that one of the reasons impelling him to leave Boston was the increasing disloyalty of that city and the surrounding country. In December, 1773, the "Boston Tea Party" threw into the harbour the tea exported to Boston by the East India Company,¹⁵ and matters grew steadily worse, Boston taking the lead in insurgency. New York remained in a great measure loyal and consequently attracted the Loyalists—there was not then the enormous preponderance of New York over Boston in population and trade which now obtains.

Powell and his mother left Boston and went to Newport on their way to New York, visiting at Newport, relatives of hers; they, then, in October sailed to New York. Unfortunately, Mrs. Powell became infected with smallpox, and notwithstanding the tender care of her son she died at the early age of 39; he was alone with her at the time, and friends did not even assist in her interment for fear of infection.¹⁶ Her son was very proud of her, and fifty years after her death spoke thus of her: "My mother is still remembered for her charms of person and mind. She was the most perfect beauty of the brunette character I ever saw, and at the age of 39, when she died, though somewhat corpulent, was constantly taken for my sister, as we travelled together from Boston to New York where she died of Smallpox in the year 1774."¹⁷

Congress met in Philadelphia in 1774 and again in 1775. It rapidly became imperative for every man to take his stand as Loyalist or Continental; and young Powell showed no hesitation. He took the lead in the Declaration of Loyal Citizens against the Revolutionary Party, April 19th, 1775, agreeing to support the Government with their lives. He joined the British Garrison at Boston as a volunteer, and was during the blockade under arms for a time; but he does not seem to have taken part in actual fighting.

In this year he married Anne Murray, daughter of Doctor John Murray of Norwich, England, President of the Society of Universal Goodwill and a close friend of the celebrated Dr.

Jenner. The bride was very young, having been born in 1758. Her letters, still extant, show her to have been a woman of great strength of character, fine principle and strong common sense; she was well educated, and wrote in a good if somewhat sententious style—the Richardson, Grandisonian style.¹⁸

She was, at the time of meeting young Powell, upon a visit to her aunt, Mrs. Inman, at Boston, and did not return before marriage to her father's house. The young wife's health became somewhat impaired so that her husband determined to take her to England; and when General Gage gave place to Howe in October, 1775, they sailed with him.

In the following year, his father, discouraged by the state of affairs in America, with many other Loyalists accompanied Howe when he retired and took refuge with his family in Halifax; before the end of the year John Powell took them to England.¹⁹ He bought property at Ludlow in Shropshire, but his real estate in Massachusetts being declared forfeited by the insurgent authorities,²⁰ and the agents entrusted with the care of his West India investments becoming bankrupt, his means were seriously diminished.

The young couple had on their arrival in England taken up their abode at Norwich near the wife's relatives. John Powell continued to support them, but his means becoming straightened, he was compelled to diminish his bounty, and prospects were not bright for a change for the better. There were premonitions that the expense of keeping up the home would rather increase than decrease; and it was more and more apparent that the son must make his own living. He accordingly entered his name upon the books of the Middle Temple as a student-at-law.²¹ This was done early in the year 1776 before the arrival of his father in England. The admission to an Inn of Court did not necessitate residence in London: the readings in law formerly in use in the Inns had long been discontinued. While it was very usual and very advisable for the student to be placed in the office of a Special Pleader for two or three years, this was not at all obligatory. There was no pretence of the Inn of Court furnishing instruction itself or compelling the student to receive instruction elsewhere—there was no examination before Call and no supervision existed over the student. To be entitled to Call to the Bar, the student must "keep twelve terms": this meant, in theory, attending the Sittings of the Courts in Banc for twelve terms (four terms in the year), but in fact taking so many dinners (six days in each term) in the Hall and paying for them. The diligent student did attend these Sittings of the Courts and

picked up such of the law laid down by the Courts as he might.

Young Powell continued to reside at Norwich but attended the Sittings of the Courts in Term in Westminster Hall. As soon as his wife recovered from her first confinement, August, 1776, he removed to London and lived for a time in Lambeth; afterwards he lived at Norwich and Sudbury, but always kept his Terms at Westminster.

His father continued to support him and his family in decency but not in luxury. The funds, however, were dwindling and his family was increasing, a second son being born in 1778 and a third in May 1779. In this state of affairs, the young student applied for a situation under the government. But London was full of Loyalists who had fled from America, and for every vacant post there were scores of applicants, so this attempt to make a livelihood failed.

He finally made up his mind "to seek shelter in America." A plan half-formed to emigrate to Jamaica where lived John Grant the sincere friend of his family and his own, came to nought. Another opening presented itself. William Grant, the young Attorney General of the Province of Quebec (then including the present Provinces of Ontario and Quebec) became tired of the Colony and returned to England.²² Grant was a very remote relative of Mrs. John Powell, and his success in Canada where he became Attorney General the year after his arrival in the Country when only twenty-two years of age and two years from his Call at Lincoln's Inn, furnished an alluring picture of the great opportunities of the new land. Many of Powell's friends advised him to emigrate to Canada to practise law, and he sailed for Quebec, arriving in August of 1779.

By reason of the expense which would be necessary he did not take his Call in England as most of the young lawyers who have come to Canada from the Mother Country have done.²³

After much anxious consideration and with a heavy heart, he left behind him his devoted wife and his three boys.²⁴

Powell was not quite a stranger in Canada, having as we have seen in 1773 visited that Colony. A number of old Boston friends also were there and he had provided himself with letters recommendatory from several military men of rank, who had been hospitably entertained in Boston by his family. Moreover he carried a letter from Lord George Germain, the Secretary of State, to Sir Frederick Haldimand, Governor of Canada, requesting him to countenance the views of Powell in the Province.



ANN POWELL, WIFE OF CHIEF JUSTICE POWELL

CHAPTER II

EARLIER YEARS IN CANADA

IT will be well to say a few words concerning the Canada to which the young immigrant had come.

After the conquest of Canada by Britain in 1759-60 had become legalized by the Treaty of Paris, February, 1763, a Royal Proclamation was issued October 7 of that year stating that the King had erected *inter alia*, a "Government of Quebec" extending westward to a line drawn from the Southern end of Lake Nipissing to the point on the River St. Lawrence where it is crossed by the 45th parallel of latitude. The same proclamation directed that the English law, civil and criminal, should prevail in that "Government."

Yielding in some degree to the discontent of the French Canadians, an Act was passed in 1774, 34 Geo. III, c.85, the well known Quebec Act, which reintroduced the former Canadian law in civil matters, allowing the English Criminal Law to remain in full force. The same act extended the limits of Quebec (now made a Province) to the South to the Ohio River (west of Pennsylvania) and West to the Mississippi.

The government of this immense territory was in the hands of a Governor and a nominated Council.¹ For the purpose of the administration of justice, the Province was divided into two Districts, the District of Quebec and the District of Montreal to the east and west respectively of the Rivers Godfroy (South of the St. Lawrence) and St. Maurice (North of the St. Lawrence).

The Superior Court of Criminal Jurisdiction was the Court of King's Bench presided over by the Chief Justice of the Province²—this Court held two Sessions each year in each of the Cities of Quebec and Montreal for the two Districts respectively.

The Governor also had the power to give Commissions of Oyer and Terminer and General Gaol Delivery to try criminal cases at any time.

The other Inferior Courts of Criminal Jurisdiction were the Courts of Quarter Sessions of the Peace for each District presided over by the Magistrates of the District, who sat four times a year and tried cases not capital—the Magistrates had also jurisdiction out of Sessions in certain petty offenses.³

On the Civil side each District had a Court of Common Pleas sitting practically continuously in Quebec and Montreal respectively, each Court having three judges, two forming a *quorum* and one alone being sufficient in cases up to £10 sterling.

A Court of Appeal from the Courts of Common Pleas was formed of the Governor and Council, the Chief Justice of the Province (who was always a member of the Council) presiding—except in special cases. Appeals however were not allowed unless the amount in dispute exceeded £10 sterling.⁴

There was also a Prerogative Court in each District for the proof of Wills, &c., but these were little frequented, the French law not requiring Wills to be proved. They were also applied to for the appointment of guardians to infants, curators of estates of deceased or non-resident debtors, &c. These Courts were presided over by Judges of the Courts of Common Pleas.⁵

A Court of Chancery also existed in theory with the Governor as Chancellor but at this time it was not active.⁶

That Powell had a very accurate and extensive knowledge of English law in later years is certain; and it may fairly be assumed that he was skilled in that law when he came to Canada. It is known that he studied two winters in the office of Jonathan Sewell, the last Loyalist Attorney General of Massachusetts—the law of that Province being almost identical with that of England; indeed, if we except a few Statutes, it was identical. It does not appear that he had been in the office of a Special Pleader in London; but some of the letters extant speak of his reading or at least borrowing law books; he himself says that he attended the twelve terms at Westminster and consequently he had the opportunity to acquire a considerable knowledge of law in England.

In the Court of King's Bench in England there were the great Lord Mansfield, the father of our commercial law, Willes the greatest master of the Common Law in his century (and there was no greater at any period) Aston and Ashurst, not so well known to fame but sound lawyers. In 1778, Buller succeeded Aston; and Buller was looked upon by Mansfield as superior to them all, so much so that he picked him for his successor.

In the Court of Common Pleas, De Grey (afterwards Lord Walsingham) was Chief Justice; he had for his Puisnes, Gould, Nares and the celebrated Sir William Blackstone, all of good

repute, but all except the last named suffering in fame because of the want of reporters—we have no reports of that period in either Common Bench or Exchequer although Henry Cooper and Douglas (Lord Glenbervie) have given us valuable reports of the cases in the King's Bench. In the Exchequer were Sir Sidney Stafford Smythe and Sir John Skynner—the chief Barons—their Puisnes were Eyre (afterwards C. B. and C. J., C. B.) Hotham, Perryn and Maseres as Cursitor Baron—all of good repute, Eyre being an exceedingly able lawyer and Maseres a former Attorney General for Quebec equally eminent in law and mathematics. At the bar were such giants as Dunning, Bearcroft, James Mansfield, Davenport and others.

Any student who wanted to learn, could not fail to acquire a good knowledge of law under such masters.

It does not appear certain that Powell crossed to the other side of Westminster Hall and attended the Chancery Courts there. If he did he would hear the rules of Equity expounded and applied by Lords Chancellors Bathurst and Thurlow and at the Rolls by Sir Thomas Sewell.

Powell was always a diligent student; like Erskine, the fingers of his infant children were plucking at his garments, and there is no reason to doubt his competency in the English law.

The French Canadian law was theoretically in force in civil matters, but most of the judges in the Courts of Common Pleas were English speaking; and it was notorious that they were wont to decide cases on their own view of what was just and equitable.

Moreover there was not much difference between the two systems of law except in a few titles such as real estate and family relationships; and Powell himself informs us that his two years on the Continent were spent in the study of the Civil Law as well as of modern languages.

The greatest difficulty in the way of one accustomed to and skilled in one system of law taking up the practice of law under another system, is the adjective law, what is called "the practice of the Courts"—the methods to be pursued to obtain rights, not the determination of the rights themselves. In Criminal matters, the law and the practice were the same as in England, and in civil matters a simple practice had been provided by an Ordinance⁷ which any one of ordinary intelligence could read and apply.

There was no obstacle, then, in substantive or adjective law, which stood in the way of Powell practising in the Courts

of Canada; he need have no doubt as to his competency to advise clients and to carry on litigation. There was no stipulated qualification, no troublesome apprenticeship, no examination, in Canada; all he had to do to be permitted to practise was to find favour in the eyes of the Executive.

In England, then, as now, the profession was divided into Barristers and Attorneys (now called Solicitors)—no such distinction existed in Canada—at least to such a degree as to prevent the same person practising as both barrister and attorney.

In England, a barrister was created by Call by one of the four Inns of Court, an Attorney by admission by one of the Superior Courts; but in Canada the lawyer still received a licence from the Crown according to the original practice in England.

During the French Regime, practitioners of law were required to obtain a licence from the Governor; advocates so licensed are known to have appeared in the Courts presided over by the British Military Officers during the Military Regime, 1760-1764. When by the Proclamation of 1763 and the Ordinance of September 17, 1764, a civil administration of justice was inaugurated (some French-Canadian writers indeed insist that this was only *un simulacre de gouvernement civil*, but this characterisation savours of injustice and prejudice) the Courts were not given the power to admit Attorneys or to call Barristers—that power remained in the Governor representing the Crown.

March, 1765, seems to be the earliest date upon which a licence to practise was granted by the British authorities; and for at least twenty years, practitioners were real functionaries, limited in number and with a Commission from the State. A score or so of Petitions are extant from those wishing to become advocates—the qualifications advanced are sometimes ludicrous. While during the French period, an advocate must at least show up well in an investigation into his character and conduct, as well as produce “*un billet de confession*” from his curé, under the British Governors, favouritism and favouritism alone was the sole guide. As M. Roy graphically says: “*On ne consultait ni les aptitudes ni les talents, ni la science de l’appliquant—aucun stage n’était exigé.*”

Licences are known to have been granted to bankrupt merchants and others for no apparent reason but solely through influence of the applicants or their friends; this state of affairs continued until 1785.⁸

The Governor at the time of Powell's arrival in Quebec was Sir Frederic Haldimand, a Swiss by birth, a soldier of fortune, with strong views and strong prejudices, honest but not unlikely to be misled; he was fully imbued with the view not uncommon at any time among gentlemen of his profession (perhaps also some others) that law and lawyers are a nuisance and the less of either, the better for the State.⁹

Haldimand's hatred of the American rebels, too, was notorious; he never attempted to conceal his contempt for those who could carry arms against their king; and he did not always discriminate between the rebel and the Loyalist. Certainly that part of the population of his Province which came from the American Colonies were in general very independent and troublesome to the Governor who was inclined to be autocratic; and they prevented his duties from being light or his life, one of ignoble ease. In his view, an American born was *primâ facie* a rebel, and the accuracy of this conception depends upon the definition given to the term.

When Powell had his first interview with Haldimand, the Governor made it quite manifest that the native country and the profession of the newcomer were odious to him; his favourite saying was *Il faut plutôt des soldats que des avocats*. In those times of War the "Old Swiss Satrap" thought with Napoleon, "*un hussar aujourd'hui vaut bien un avocat*"; and it was obvious that not much advantage was likely to accrue from Lord George Germain's recommendation—Secretary of State for the Colonies as he was—although Haldimand wrote Lord George, September 13th, promising his protection to Powell as asked. Haldimand was perhaps the more emphatic as most of Powell's friends, new and old, were to be found among the malcontents who were opposed to Sir Frederick's government and who made trouble for him; Colonel Carleton¹⁰, the Quarter Master General, is said to have been at the head of this faction. A letter from Governor Wentworth,¹¹ however, to Lieutenant Governor Cramahé¹² procured for Powell a licence to practise in the courts; he received this licence but in the face of the Governor's prejudice despaired of success in the Capital and made up his mind to settle in Montreal where he was not quite a complete stranger. Isaac Winslow Clarke,¹³ the Commissary General, was a former friend at Boston, and Powell had on his visit to Montreal in the summer of 1773 met the Deputy Paymaster General Jardine and some others.

James Monk,¹⁴ Attorney General at Quebec, who was one

of those to whom Powell brought letters of introduction, was consulted concerning the proposed move, and he did not discourage the project.¹⁵

Canada was numerically and by a great majority, French; but there was a small and exceedingly active body of English and American inhabitants, the latter being refugees from the revolted Colonies. Canada had been in the possession of the American troops a few years before with the exception of the City of Quebec itself¹⁶ and no small number of French Canadians were more than suspected of disloyalty to British rule. There were also other sources of trouble to the Government at Montreal, one of them being the notorious Pierre Du Calvet; and as he was Powell's first client in Montreal, and, according to Powell's account, of great assistance to him in obtaining a practice, it will not be out of place to give him some prominence here.

Pierre Du Calvet, whom Powell calls "a high tempered Huguenot" was born in Quercy, Province of Guienne, near Toulouse in France, of a good Protestant Family; he came to Canada in 1758 and remained there after the Conquest. Coming to Montreal in 1760, he carried on business as a Merchant beginning early as 1762; after a trip across the Atlantic in 1764, he returned to Montreal and was made by Governor Murray a Justice of the Peace in 1766—the Justice of Peace having at that time certain civil jurisdiction.¹⁷ In 1770, he complained to the Chief Justice Hey, of a judgment given against him in the Court of Common Pleas at Montreal by Mr. John Fraser, one of the Judges of that Court; and this according to Du Calvet was the beginning of his quarrel with the Judges.

Fraser who had been a Captain in the 60th Regiment of Foot (Du Calvet describes him as "L'Excapitaine Frazer du sang du dernier Lord Lovat . . . aujourd'hui M. Juge Frazer") and who was appointed Judge of the Court of Common Pleas at Montreal by Murray in 1764 appears to have borne a grudge against Du Calvet possibly aggravated by religious rancour. Fraser being of the Catholic faith—shortly afterwards, they came to blows, Fraser attempting the physical chastisement of Du Calvet but coming off second best.

"From this forwards" Du Calvet writes "Mr. Du Calvet never could succeed in any of the suits he instituted in the Court of Common Pleas at Montreal before Mr. Fraser of which as he was then engaged in trade there was a considerable number." He complains that de Rouville, another of the

Judges of that Court, was also poisoned against him and "he gave many proofs of enmity."

Finding the Court so very partial against him in every suit he brought, he "could not forbear addressing them in a letter of complaint published in the Gazette of Montreal of the 26th of May, 1779, in which he mentioned some of the proceedings of the Judges which he conceived to be most unjust towards him and which in truth have a very extraordinary appearance and seem difficult to be accounted for in any other way."

As was to be expected in those times, a criminal information¹⁸ was brought against him by the Government through James Monk, the Attorney General, for libel against His Majesty's Judges of the Court of Common Pleas. The case was in this stage when Powell was about leaving Quebec; and Monk spoke to him by way of warning and advice, apparently in good faith but with a poor conception of the duty of a barrister. Powell says: "He informed me that the whole force of the Government was then levelled against an Individual at Montreal, in a prosecution for a libel on the Judges, which was under his Direction, and he advised me on no account to accept a retainer from this person, who would doubtless wait upon me for that purpose on my early arrival. Nothing escaped from Mr. Monk to govern me on this occasion but the friendly hint that the advocate of Mr. Du Calvet would be marked for the resentment, not only of the Judges but the Governor, on which account no English barrister would be retained by Mr. D. C."

Monk proved a true prophet—on the morning of the arrival at Montreal of the young lawyer, Du Calvet called upon him; and to the credit of his profession be it said¹⁹ Powell accepted the retainer. We shall let Powell speak for himself: "I made no promise (i. e. to Monk) but my mind resented the argument, and on my Journey was so fortified, that when on the morning after my arrival Mr. D. C. confirm'd to me that no Gentlemen at the Bar would accept a fee from him, on account of Dread of the Consequences²⁰ I engaged heartily in his defence, having first been assured that the libelous matter was true, was written by him, and sent to the Judges by his own servant in livery, which he would not deny otherwise than by the general issue to be admitted to a Defence."

Peter Livius,²¹ the Chief Justice, was at the time absent from the Province, and his Office was being executed by three Commissioners,²² Adam Mabane,²³ Judge of the Court of Common Pleas at Quebec, the Honourable Thomas Dunn,²⁴ a mem-

ber of the Legislative Council, and Jenkin Williams,²⁵ Register of the Council.

Du Calvet claims that Mabane was as much prejudiced against him as Fraser, and suggests that Dunn was equally so; and that is probably true; Jenkins Williams, the third Commissioner, was unquestionably a lawyer of standing and ability; but he was the only Commissioner who was a lawyer and he was still practising.

A Special Jury²⁶ was impanelled, composed of the principal English inhabitants of Montreal; and they acquitted the accused without hesitation: both defendant and his counsel say that the acquittal was on the merits. One can scarcely imagine how it could be otherwise—the publication was admitted; unless the allegations were true, they were clearly libellous; and to secure an acquittal, proof must be made of the truth of what was alleged.²⁷

The client says that “the jurors were clearly of opinion that the complaints of the conduct of the Judges of Montreal which were contained in the supposed libel or letter; . . . were not false and injurious but true and notorious.” The barrister says in a document written for posterity forty years afterwards, and when he himself was or had been a Chief Justice—“I was so fortunate as to obtain an acquittal from the Jury, chiefly from their own knowledge of the conduct of the Judges in respect of Mr. Du Calvet’s causes before them, which was the subject of the charge of partiality spread through the written libel addressed to themselves.”²⁸

There can be little if any doubt that the defence was conducted with skill and ability; for at once Powell began to get retainers on behalf of the various interests in the city.

He was much assisted in his profession by a triumph over the Government and the Crown lawyers early in 1780. Although there was no great scarcity of grain in the spring of 1779, a successful attempt at “engrossing”—i. e., what we now call “cornering”—the wheat was made. Many were the complaints against the profiteers—the name had not yet been framed but the genus is primeval and eternal—and Haldimand cast about for a remedy. The Legislative Council refused to fix the price of grain at his request. Consulting the Attorney General and Solicitor General, he was informed of an English Criminal statute against such practices, the old statute of 1552, 5 and 6 Edward VI, c. 14; and he issued a Proclamation declaratory of that law and warning transgressors. He directed certain proceedings to be taken in Montreal; and Powell was retained to defend one of the engrossers. The prosecutions were di-

rected to be taken before the Justices of the Peace at the Quarter Sessions without the intervention of a jury for, as Haldimand says, "the Old Subjects who give the Ton on Juries are Traders and few of them have any objection or scruple to get money whether by ingrossing, forestalling or regrating."

At the sitting of the Court of Quarter Sessions at Montreal in January 1780, Powell, defending his client, sprung upon the astonished Court the fact that the statute under which the prosecution was brought and all amending statutes had been repealed some years before in 1772, by the Act 12 Geo. III, c. 71. It was not long before he was employed by the various Departments of the Government. This led to much other business; Montreal was a thriving, busy and litigious city, then as now. The Bar was not at that time very crowded; it had probably not more than half a dozen practitioners, French or English;²⁹ and Powell rapidly attained a leading position financially and otherwise. So successful was he that in 1780, he thought it safe to send to England for his wife and three boys. She arrived at Quebec in the Autumn of 1780 "after a long and adventurous voyage, in which she had been captured and carried into the fort of the enemy, by whom however she was treated with hospitality and afforded the means of pursuing her voyage the same season." In these few words Powell gives his account of a very interesting occurrence. Mrs. Powell, with her children, leaving her people at Norwich, took ship for Quebec, braving not only the terrors of the deep but also the hostile armed vessels, privateers and others, of the revolted American Colonists. These had from as early as 1776, haunted the Gulf of St. Lawrence and adjoining waters to intercept British transports and storeships with ordnance and supplies³⁰ while endeavouring to keep a safe distance from the Ships of War. A New England privateer captured the ship upon which the young wife was coming to her husband and brought ship, passengers and cargo to Boston, then wholly under the control of the insurgents.

William and Jeremiah Powell, the uncles of her husband, were men of influence in Boston, the latter being President of the Council. Mrs. Powell went with her boys to her aunt, Mrs. Inman, and she used her influence in favour of her niece. The Powells added their efforts in the same direction; and at length, Mrs. Powell and her children were sent to Quebec under a cartel, with such English prisoners as she selected. The husband and father met his family, and a happy reunion took place at Beauport, near Quebec, at the house of an old and valued friend of the Powell family, Peter Stewart.

CHAPTER III

FURTHER INCIDENTS AT MONTREAL

BY 1780, Powell was becoming well established in his practice; he had won the favour of the "Civilians" i. e. the principal merchants, by his skilful and fearless defence of Du Calvet. Austere, stiff, almost stilted in manner and appearance, not given to open display of affection or dislike, he during all his long life, won the implicit confidence of those best able to judge of character; and in the main, he was eminently worthy of the trust. His capacity and reliability were early recognized by the class of the community which furnish by far the greatest part of a lawyer's practice.¹ Powell does not seem to have applied for or obtained a commission as Notary Public,² but to have confined himself to a commission which permitted him to practise in the Courts and to transact all kinds of legal business except those formally notarial.³

But the official class still stood aloof—the Government circles, the Military, the Judiciary—the last named had indeed been taught a bitter lesson of the estimate in which their partial conduct was held by the respectable people by the verdict of acquittal in the Du Calvet prosecution: and we hear of no further complaint of partiality in the Courts for some time. Impartiality in official position, however, is quite consistent with personal coldness or aversion—and this Powell experienced from the official class. By the end of the year, had happened "an incident of a romantic cast" which he says "secured the good will and respect of the Military"—and this incident is now to be told.

Before Powell tells the story in his own way, some explanation should be given of the *mise en scène*.

Even before but especially after the Declaration of Independence in 1776, thousands of loyal citizens in Virginia and the Carolinas, some from Pennsylvania and other northern provinces, left their homes to avoid the persecution of their rebel countrymen. Canada was not at first the goal of most of those

who loved
The cause and kept their faith
To England's Crown;

they for the most part went westward into the wilds of the

hinterland. Kentucky—or Kentuck as it was often called—the “dark and bloody ground”, had been explored in the seventh decade of the eighteenth century by the celebrated Daniel Boone, and others of the same type: a few settlers had made their way into this wilderness before 1776.⁴ It was in Kentucky and the hinterland of North Carolina that many Loyalists determined to seek a refuge and a quiet habitation⁵—they were not alone, for many disloyal were soon to be found scattered throughout this vast territory. This was the Indians’ best hunting ground, and the settlements, however few and scattered, disturbed the game—moreover the settlers had continued the inveterate frontier custom of whites in America, and killed “every defenceless Indian they met with.”⁶ They lived up to the hideous maxim, “There is no good Indian but a dead Indian”, formulated it may be in our time but felt long before.

The Indians felt deeply the loss of their hunting grounds upon which they depended in part for food and almost wholly for furs to barter with the Whites. Massacres took place on either side; torture and death or slavery were the lot of the unfortunate prisoner, male or female, infant or adult. The Indians were soon convinced that they could not drive out the intruder by their own efforts, and they demanded help from the British posts at Detroit and Michilimackinac. Each of these places had a small garrison of the regular army and a considerable number of fur traders, fearless and adventurous. At first the Commandants or “Lieutenant-Governors” of the Forts turned a deaf ear to the suppliants⁷—they had no desire to take part with the Redman against their own kin, and moreover the posts themselves were not too secure and required for their defence all the available military force. A few volunteers joined the Indian expeditions, for such expeditions were at that time looked upon by the semicivilized, and even by some who believed themselves to be civilized, as an interesting vacation not unlike our own present hunting trips, and not much more dangerous. But the American became aggressive: the safety of Detroit, Michilimackinac, Niagara, became still more doubtful, the Indians began to be disaffected and threatened to take the side of the rebels: and when Henry Hamilton, Lieutenant-Governor of Detroit,⁸ was captured by “the backwoodsman of Kentucky”, Colonel George Rogers Clark, at Vincennes early in 1779, it was obvious that something must be done to hold the Indians as well as to check the rebels.

Not much was done in that direction in 1779; but in 1780,

Captain Henry Bird⁹ of the 8th Foot who had acted with the Indians in 1779 was placed in command of a force of about 150 White soldiers and some Indians by Major Arent Schuyler De Peyster, who had succeeded Hamilton as (acting) Lieutenant-Governor of Detroit—Bird was to gather Indians about him and with them attack the Fort at the Falls of the Ohio, i. e., Louisville, which had been built and was garrisoned by the Americans: if successful in this, he was to attack other Forts in Kentucky.

With him went "the three Girtys", Simon, George and James of "Injun story" fame;¹⁰ and at the Miami, he was joined by Captain Alexander McKee, then the Deputy Indian Agent at Detroit.¹¹ The expedition was at first successful—Fort Liberty or Ruddle's Station fell, then Martin's Fort or Martin's Station followed; and Louisville was next to be attacked. But Bird ran out of provisions, because of the wanton destruction of cattle by the Indians,¹² his prisoners were in danger of starving, the Indians were getting wholly beyond control—they had captured a few small forts or stockades of settlers and had slain at will and constantly hankered after the delights of the torture-stake—nothing was open to the perplexed Captain but to return as quickly as possible to Detroit with his prisoners and the remains of his force.

As was the case in many former raids, some negro slaves were taken;¹³ they were divided among the Indians and the whites and some were sold. Of the white prisoners taken, some were put to hard labour in retaliation for the cruelty practised on Hamilton. Some, including several of those who claimed to be loyal, were sent east by way of Niagara to Montreal¹⁴ and some of these to Quebec.

Now we shall allow Powell to tell his story in his own words:

THE TRAGEDY OF THE LA FORCE FAMILY¹⁵

"The Story so much resembles romance that if some documents did not support it there might be ridicule in the relation.

"Meeting in the Street of Montreal an armed Party escorting to the Provost Guard several Female prisoners and Children; curiosity was excited and upon engaging the Non-Commissioned Officer commanding the Escort Mr. P. was informed that they were Prisoners of war, taken in the Kentucky country and brought into Detroit by a Detachment from the Garrison and now arrived from thence. Further Enquiry after

procuring necessary relief to the first wants of the party, drew from Mrs. Agnes La Force the following Narrative:

"That her husband was a loyal Subject in the Province of North Carolina,¹⁶ having a good Plantation well stocked and a numerous family. That his political Sentiments exposed him to so much Annoyance from the governing Party, that he determined to retire into the wilderness, that he accordingly mustered his whole family, consisting of several Sons and their Wives and Children, and Sons-in-law with their Wives and Children; a numerous band of select and valuable Slaves Male and female, and a large Stock of Cattle, with which they proceeded westward, intending to retire into Kentucky.

"That after they had passed the inhabited Country, they preposed to rest a few days; and having formed their camp, towards Evening a fat beeve was selected and two of his Sons undertook to kill him; one fired and the ox fell, when the other laid down his Rifle near the Tent and ran in to assist in flaying and dressing the Carcase. In the meantime the old Gentleman, fatigued with the day's march retired to his Bed in his Tent and was asleep when upon the loud report of a Gun, she found he was wounded mortally as he lay by her side. Her unhappy Son, when retiring to rest, recollected his rifle, and in feeling round in the dark among the Tent Cords, it went off and killed his father. This melancholy Event did not however arrest their Progress more than one day; but pursuing their Route to the westward, they made a Pitch in the wilderness considered to be five hundred miles from any civil establishment. Here they surrounded a Piece of Ground with Pickets as a Defence against the Indians and built their hutts for themselves with their Slaves within it. With the strength they possessed in their own party, the wilderness soon changed its appearance, and promised amply to repay their Labours; but after a residence of three years without communication with the world, a Party of regular Troops and Indians from the british Garrison at Detroit appeared in the Plain and summoned them to surrender.¹⁷ Relying upon british faith, they open'd their Gate on condition of Protection to their Persons and property from the Indians; but they had no sooner surrendered and received that promise than her sons and sons-in-law had to resort to arms to resist the Insults of the Indians to their wives and Slaves.¹⁸ Several lives were lost and the whole surviving Party was marched into Detroit, about six hundred Miles, where the Slaves were distributed among the Captors and the rest marched or boated eight hundred miles

further to Montreal and driven into the Provot Prison as Cattle into a Pound.

"This relation will be credited with difficulty but accident some time after put into the Hands of Mr. P. a document of undeniable credit, which, however, was unnecessary; for on Mr. P.'s representation of the Case to Sir F. Haldimand the most peremptory orders to the Commandant at Detroit to find out the Slaves of Mrs. Le Force in whose ever possession they might be and transmit them to their Mistress at Montreal; but Detroit was too far distant from Headquarters and Interests prompting to disobedience of such an order too prevalent for it to produce any effect; and the Commandant acknowledged in answer to a reiterated order that the Slaves could not be produced; although their names and those of their new masters were correctly ascertained and a list transmitted with the order, and is as follows:

"List of Slaves formerly the property of Mrs. Agnes Le Force now in possession of:

Negro	Scipio	in possession of	Simon Girty
do	Tim	.....	Mr. Le Duc ¹⁹
do	Ishener	.....	Do Do
do	Stephen	.....	Captn. Graham ²⁰
do	Joseph	.....	Capt. Elliot ²¹
do	Keggy	.....	Do Do
do	Job	.....	Mr. Baby ²²
do	Hannah	Mr. Fisher ²³
do	Candis	Capt. McKee
do	Bess, Grace, Rachel, and Patrick	—Indians.	

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"Many years after on a Question of Property the singular Document of which follows a Copy was produced to Mr. P. and recognized as an original.

COPY.

Detroit, May 14, 1784.

I, Henry Bird do declare that the wench Esther became my property in Consequence of an article of Capitulation of Martin's Fort, whereby the Inhabitants and Defenders agreed to deliver up their Blacks, Moveables and Arms to the Indians as their property, on Condition that their Persons should be safely conducted to Detroit; which article was punctuly com-

plied with and fulfilled by the Captors. The said Esther became my property by Consent and permission of the Indian Chiefs ²⁴

(Signed) H. BIRD,
Captain.

Present and Witness {
to the Capitulation }

(Signed) A. McKee, D.A. { I do hereby make over and give
Indian Affairs } my Right and Property in the

said Wench and her male Child to William Lee in consideration of having cleared for me sixteen acres of Land.

(Signed)
H. Bird,
Captain."

The Petition of Mrs. La Force is extant in the Haldimand Papers and is as follows:²⁵

"To His Excellency Frederick Haldimand Esqr Captain General & Commander in Chief of His Majesty's Forces of the same, and the Frontiers thereof Vice Admiral &c.&c.&c.

"The humble Petition of Agnes La Force, Widow of René La Force, late of Virginia, now a prisoner in Montreal.

"Your Petitioner most humbly sheweth:

"That your Petitioner about three years past had the affliction of losing her said husband and was left a widow with five children: That her late husband together with his Family: and thirteen negro slaves had been obliged to remove two hundred miles into the inner uninhabited part of the country; to be out of the way of all Troubles; That her said husband always had been a very loyal subject of His Majesty, on which account he was at different times greatly distressed by heavy fines, which were Layed on him, and at last obliged him to remove from his habitation where he and his Family lived at their ease. That on the 25th of June last past your Petitioner together with her five children and said thirteen negro slaves belonging to her the Petitioner were disturbed in their (as they thought) safe retirement by a party of Soldiers and Indians of His Majesty, and were by them taken Prisoners and carried to detroit where on their arrival said negro slaves were sold & disposed of without your Petitioners consent or receiving any benefit thereby to her very great Detriment said slaves being her only resource she had and only property left

in this country, and now your Petitioner and Family being in the utmost distress and considered her Farr advanced age not being able to do anything towards the support of her Fatherless children in a strange country destitute of everything she the Petitioner most humbly has resource to Your Excellency, and prays that your Excellency with a paternal eye will look on her very great affliction and take her case into consideration and give her said Petitioner Liberty to reclame the above mentioned her negro slaves or to order the purchasers of them to pay unto her your Petitioner whatever sum or sums of money as your Excellency will think in Justice and equity to be due to her the Petitioner as being the sole proprietor of said slaves: And your Petitioner as in Duty bound will ever pray.

Agnes Laforce."

Whether from Powell's energetic championing the cause of the unfortunate widow or more probably from his skilful and successful conduct of cases entrusted to his care, he was now retained by the official class, the military being the most important. Towards the end of 1780, he was retained by the Military authorities to prosecute those who had disobeyed the orders for *corvée*. This gives us an idea of the state of affairs in the Province at the time.

The great Chief Minister of Louis XIV, Cardinal Richelieu, planned to found a military colony on the shores of the St. Lawrence: he certainly succeeded in forming a feudal community. Under the rules and customs prevailing in New France before the British Conquest, the land was held immediately of the King by Seigniors, one of whose obligations was liability to be called on for military services. The commonalty who held of the Seignior were in their turn liable to military service when called upon by their lord. Nor was this a mere formality: the almost constant warfare carried on between the Canadians and their neighbours to the South, the hated "*Bastonnais*", made the Seigniors and their dependents accustomed to active service: and indeed as early as 1674, Frontenac ordered all the Seigniors to call out the tenants for frequent drill.²⁶

On the Conquest, everything military was in abeyance until after the Royal Proclamation of 1763. In 1765, it was declared that the keeping up of a Militia was not necessary, and an ordinance passed that on "the Establishment of British Civil Government in the Province the Militia before that time estab-

lished was thereby abolished . . . ”²⁷ Thereafter certain attempts made to form volunteer French Canadian Regiments were not very successful and warrants compelling forced service of boatmen had to be withdrawn, as their legality was more than doubtful under the English law. The Quebec Act of 1774 reintroducing the old law of Canada, was expected to reconcile the French Canadians to British rule and it had some effect in that direction. When the Americans invaded Canada in 1775 under Montgomery and Arnold, the touchstone of actual hostilities showed a grave want of loyalty to Britain on the part of the habitants—not active disloyalty, but rather passive non-loyalty. The Seigniorial class were loyal, not that they loved England but that they hated and feared the American Colonists, their old and inveterate enemies.²⁸ But the habitants cared nothing for England, they feared no foreign yoke and wanted nothing but to be let alone. When in June, 1775, Sir Guy Carleton the Governor called on the Seigniors to muster their dependents, to have them provide themselves with arms and to be prepared to march to mobilization centres, most of the Seigniors obeyed so far as to issue their commands. But few were the favourable responses; the habitants considered that the feudal obligation to serve as soldiers no longer existed.²⁹ Some went so far as to mob and beat their Seigniors who attempted to enforce their orders, and Carleton was obliged to disavow the action of such Seigniors.³⁰ It was necessary to pass legislation on the subject and that was not long delayed: nothing of advantage could be done until the Province was clear of the invader, but after the retreat of the Americans in 1776, the Governor and Legislative Council at Quebec passed the first Militia Act, that of March 29, 1777.³¹ This Ordinance made all persons (with specified exceptions) from sixteen to sixty liable to serve in the Militia, and ordered their enrolment under penalty of £5, directed the Captains to draw out, review and exercise their Companies on the last two Sundays in June and the first two in July: a penalty of 10s. was imposed upon any one who should absent himself from this review except with leave of absence on reasonable cause. In time of war such a number of officers and militia men might be called out and marched as the Governor should see fit; and a penalty of £10 was imposed upon anyone disobeying. All above the age of sixty who had one servant and all holding lands *en roture* were to furnish carts, sleighs and carriages for the King’s use on demand and at a price to be fixed by the Commander in Chief under penalty of £5. The same penalty was imposed on any

who should desert or quit that service without due discharge. All these penalties might be prosecuted for before Commissioners of the Peace, i. e. the ordinary Justices of the Peace. Carlton thought that measures were necessary to reduce the Canadians "to that state of Deference and obedience which they formerly paid their ancient Government"; the Militia Act was "an experiment by way of Trial and as an Essay towards training the Canadians to obedience by Degrees."³² He ordered 500 men out to follow Burgoyne's Army: these drafted men proved unsatisfactory from the beginning.

The furnishing of carts, &c., was generally called *corvée*³³ and the men "*Corvée men*"; and there was from the beginning bitter complaint against both the service itself and the partiality shown in enforcing it—the result was that the Ordinance was openly disobeyed in many instances and evaded in more. In 1780, the prospects of ultimate victory over the revolting Colonies were dim: and Lafayette's presence with the Colonials had awakened in the hearts of many Canadians hopes of reunion with their beloved France. In the summer and fall of 1780, a large number—running up into the hundreds—of Canadians in Montreal and vicinity refused to obey the orders of the military for the transport of provisions for the troops. The disobedience becoming general, it was determined to prosecute the offenders—and in the absence at Quebec of the Crown Officers, Powell was retained for the prosecution. Unpopular as he knew the task to be, he, with that devotion to public duty which characterized him through life, cheerfully undertook it from a persuasion of its necessity. He expected that the Commissioners of the Peace would be actuated by the same reason.

Had matters been as they were a few years before, he could have relied upon a sympathetic court: the Justices of the Peace were men of some standing in the community and all enthusiastically loyal. Now, however, Powell found that the Justices were averse from convicting their neighbours, and that they admitted the slightest excuse as a reason for dismissing charges made for disobeying orders for *corvée*. The French Canadian Magistrate did not hesitate to say "*qu'il étoit le fleau du Pays et qu'il venoit manger les pauvres Canadiens.*" Powell's complaint, January, 1781, to Colonel Carleton at Quebec is of record, and it is supported by Captain Maurer the Military officer in charge.³⁴ Both Powell and Captain Maurer considered it inadvisable to proceed with the prosecutions, as the fines in the cases which were successful scarcely paid for the expense.

Anyone who knew Haldimand's plan of governing Quebec, could prophesy what would follow and prophesy almost the particular methods and agents to be employed.

The complaint was effective: Judge Adam Mabane who was the "handy man" of Haldimand's Administration, was despatched to Montreal to bring the erring Magistrates to their senses. He at once called a general meeting of the Justices of the Peace, and in the name of the King commanded them to enforce the law in all its rigour.³⁵ This was effective—the Writ of Supersedeas³⁶ retained all its force; and we hear no more of indisposition to enforce the law or of insult or disrespect to the legal representative of the Crown.

Powell says that his popularity suffered from these prosecutions; but it may be doubtful if any unpopularity resulting was of serious financial disadvantage to him. Any loss thereby suffered must have been more than made up by his official retainers—he informs us that he "was employed by the Crown in the delicate service of conducting the Court duties until the Peace" in 1783.

In the following year, occurred an incident creditable to Powell's humanity; it is significant of the times and requires no explanation—this will be told in his own words:³⁷

"Montreal, 22 August,
1782.

"Sir

"I should make an Apology for the Liberty I take but that I considered it a public Duty.

"When you were here some time since, I am informed that mention was made to you of a young female slave bought of the Indians by a Mr. Campbell, a Publican of this Town, and that when you learned that she was the Daughter of a decent family in Pensilvania,³⁸ captured by the Indians at 10 years of age, your Humanity opposed itself to the barbarous Claim of her Master and you Promised that she should be returned to her Parents by the first Flag with Prisoners.³⁹

"In Consequence of such a Promise the Child had been taught to expect a speedy release from her Bondage, and, finding that her Name was in the List permitted by his Excellency to cross the Lines with a flag from St. Johns, she imagined that there could be no Obstacle to her Return; but, being informed that Mr. Campbell had threatened to give her back to the Indians, she eloped last Evening, and took refuge in my House from whence a female Prisoner, (sometime a nurse to

my children) was to sett off this Morning for the Neighborhood of the Child's Parents. Upon Application from Mr. Campbell to Brigadr, Genl. De Spêht,⁴⁰ setting forth that He had furnished her with money, an order was obtained for the delivery of the Child to her Master and there was no time for any other Accommodation⁴¹ than an undertaking on my part to reimburse Mr. Campbell the Price he paid for her to the Indians. This I am to do on his producing a Certificate from some Military Gentleman, whom he says was present at the sale.⁴² I have no objection to an Act of Charity of this Nature, but *all Political Considerations aside* I am of opinion that the national Honor is interested, that this Redemption should not be the Act of an Individual. As Commissary of Prisoners I have stated the Case to you, Sir, that you may determine upon the propriety of reimbursing me, or not, the sum I may be obliged to pay on this occasion.

"That all may be fairly stated I should observe that the Child was never returned a Prisoner, nor has drawn Provisions as such—although there can be no doubt of her political character, having been captured by our Savages.

"Richard Murray, Esquire, (Signed)

"Comissary of Prisoners,

"Wm. Dummer Powell."⁴³

"Quebec.

The answer reads thus:

"Sir,

"Quebec, 26 Augt. 1782.

"I am favored with your's by Saturday's post and have since layed it before His Excellency the Commander in Chief, and I have the Pleasure to inform you that he approves much of your Conduct and feels himself obliged for your very humane Interposition to rescue the poor unfortunate Sarah Cole⁴⁴ from the Clutches of the miscreant Campbell; and I am further to inform you that your letter has been transmitted by his Secretary to the Judges at Montreal, not only to make Campbell forfeit the money he says he paid for the Girl, but if possible to punish and make him an example to prevent such inhuman conduct for the Future; but in any Event you shall be indemnified for the very generous Engagement you entered into.

[Signed] Rich. Murray"⁴⁵

"Mr. Powell had redeemed his word the day it was given and paid Mr. Campbell Twelve Guineas⁴⁶ on production of a string of Wampum which a witness said he saw delivered by the Indians with the Girl and the Money paid by Campbell."

CHAPTER IV

THE STORY OF DU CALVET

IT was in the year 1782 that a decision was given of the utmost moment for the inhabitants of Canada—the object of the decision was the same Pierre Du Calvet who was Powell's first client. Let us first give Powell's version.

"Mr. P.'s unfortunate Client, Peter Ducalvet having escaped the vengeance of the Judges in one way, was suddenly taken from his dwelling House in the night by an armed force headed by a military officer and conveyed to Quebec (80 miles) where he was imprisoned on board a Ship in the River under a supposed charge of High Treason. This man was a high tempered Hugonot from Gascony, who had returned to Canada to enjoy his religion in freedom.¹ He was rich but virulent and had become so obnoxious to two of the Judges, (Roman Catholics) that their marked Partiality in all Cases to which he was Party was a matter of public animadversion and drew forth the Libel, which Mr. P. had defended. On the Charge of Treason which no one believed Mr. P. had applied to the Court of King's Bench for a writ of Habeas Corpus,² when it was refused upon the ground that the enjoyment of personal Liberty was a civil right concerning which all Controversies were to be decided by the Laws of France which did (not) know the remedy applied for.

"Mr. P. was, however, indulged to communicate by open Letter with his unfortunate Client, who for years suffered every misery of close Imprisonment, under a capital charge, and for a long time with the Aggravation of exposure to the torture of a Recollet society of monks, in whose custody he was placed, with a view to convert him to the Church of Rome.

"This Gentleman was finally discharged upon the express Command of the King, in the alternative of not bringing the charge to trial."

This is a very imperfect account and is misleading in many particulars. It is practically certain that Du Calvet adhered to the Americans during their occupancy of Canada.³ The evidence available at the time could not justify us in fixing treason upon him—that was based on his supply of goods to the American forces. That the American commander obtained

supplies for his troops during the occupation of Montreal is admitted: Du Calvet says that the goods were taken from his warehouse by force—and probably the form of force was gone through. But even if he did sell the goods, the sale of goods by a merchant to an alien enemy in control of his city is not necessarily treasonable. Du Calvet, however, went much further; he accepted a Commission as “Ensingne” in “the Canadian regiment commanded by Col. Moss Hazon” (Moses Hazen) to be composed of the Canadians who joined or were to join the American Troops.

Of course Powell could not know of this; he took his client’s story as true, and Du Calvet at all times most positively and emphatically denied all charges of disloyalty.

Nor was he “taken from his dwelling house in the night”: he was arrested near Three Rivers when on his way home from Quebec. On the 26th September, 1780, he left Quebec for Montreal,⁴ and went as far as Three Rivers without hindrance or molestation, “but on the 27th September, 1780, at about 4 o’clock in the afternoon, when he had gone about four miles and a half beyond Three Rivers, he was met by Captain George Laws (Lawe) of the 84th Regiment or Royal Emigrants . . . and another officer. They came up to him on the road with pistols in their hands, and told him that he was their prisoner and that they had order to arrest him wherever they found him to carry him before General Haldimand.” This is Du Calvet’s own account and it is supported by contemporary documents, Reports, &c.⁵

This was one of a number of arrests made about that time on the mere order of the Governor General without sworn information or cause shown sufficient under the law of England. But the Governor exercised the powers admittedly possessed by the French Viceroys who had in that regard much the same discretion as their masters, the Kings of France.

Du Calvet was imprisoned first on the *Canceaux* (Captain Shank) a 400 ton, 28 gun Sloop of the Royal Navy lying in the River opposite Quebec—the Captain receiving orders to prevent any person to speak to him. While legal proof was wanting there were even then very strong grounds for suspicion of treasonable communication with the Enemy.

Powell was consulted without delay, but he advised that however irregular the arrest might be, there was no legal remedy: he recommended application to the Governor for clemency. The prisoner had already written to Haldimand asserting his innocence and asking what was the charge against

him:⁶ this proving fruitless, he wrote again once more protesting his innocence and desiring to be allowed to go to London⁷ and again imploring consideration for his letters.⁸ Other letters saying that he had done no wrong to King or State and asking for the immediate consideration of his case or a discharge from confinement elicited a reply from the Lieutenant Governor Cramahé that in such times of danger the same mild treatment could not be extended to persons as in times of peace.⁹ Complaints of ill-treatment on the ship procured him, after six weeks' imprisonment, a transfer to the Provost's prison at Quebec where he remained for a month, from time to time protesting his innocence, offering unconditional submission, imploring trial or discharge and asking to be allowed to sail for London¹⁰—all without success. He was, however, removed from the Military Prison to the Convent of the Recollet Monks at Quebec where he remained until May, 1783.

Had such a thing happened in England, a speedy application would have been made for a writ of Habeas Corpus: but before his removal to the Recollet Convent, a decision had been rendered by the Court of King's Bench at Quebec which showed the hopelessness of such an application in the Colony.

Charles Hay, "a person in trade" at Quebec, had been arrested in the Spring of 1780, in the same way and for the same cause as Du Calvet: failing to move the Governor by entreaty he at last in November, 1780, applied to the Court of King's Bench for a Writ of Habeas Corpus. The Chief Justice Livius was absent in England and the office of Chief Justice was being administered by the same three Commissioners who had sat on the trial of Du Calvet for Criminal Libel at Montreal in 1779, Mabane, Dunn and Williams: the court, thus constituted, held that the Writ was not in force in Canada.¹¹ While in Civil Law countries a Court is not (in theory) bound by its own decisions as it is in Common Law countries,¹² there was no hope that the Court so constituted would depart from its decision given in Hay's case, and Powell did not advise an application on the part of Du Calvet.

Du Calvet continued his appeals to Haldimand with the same want of success as before;¹³ the fact was that the authorities had no satisfactory proof of guilt but had strong grounds for suspicion and were diligently looking for evidence. It was considered—and probably with reason—that it would be dangerous to allow him to be at large—he was "interned" for the sake of safety.

In October, 1781, it was decided to send Louis Jussome

(whose sister he had married) to England on his behalf. Jussome's ship was wrecked on the coast but he escaped with four others (out of about fifty): he went to London in December and represented Du Calvet's case to Germain who promised to instruct Haldimand to try the prisoner or discharge him at once—he also promised to have Livius proceed to Canada by the Spring Fleet of 1782. But Germain had other matters to think of much more important to him—he had been the evil genius of the North Administration for years¹⁴ and was perhaps more than any other subject responsible for the successful revolution of the American Colonies; he constantly urged the most vigorous measures against the Americans and was generally the storm centre of the House of Commons; he was now disagreeing with the remainder of the Cabinet on the future conduct of the war and resigned his office of Secretary of State (February, 1782). He was succeeded by Welbore Ellis (afterwards Lord Mendip): and to him Jussome made application and from him received the same assurances as from Germain. Ellis also informed him that Livius had received instructions to proceed to Canada—this was corroborated by Livius himself. With these assurances, Jussome sailed for Quebec, arriving in May, 1782.

But Ellis shared the fate of Lord North's Ministry which went down in disgrace in March giving way to the short lived Rockingham Administration—and no instructions to release Du Calvet arrived at Quebec.

Jussome tried in vain to see Haldimand, he sent in Memorials, as did Du Calvet, but in vain. Jussome sailed a second time for England in August, 1782, but was taken prisoner by the French and kept at Nantes until the following year. Du Calvet was now almost in despair, but some intimation reached him or his legal advisers that the Governor would now look with favour on an application for a Writ of Habeas Corpus—and that course was decided on. Livius had, for some reason, not come out to the Colony—he never did as a fact—and the same three Commissioners were exercising the office of Chief Justice of the King's Bench: but the former decision was not binding and the influence of the Governor over the temporary Judges was thought to be very great—accordingly the application did not seem hopeless but rather the reverse.

Powell was living and practising in Montreal, many miles and days away: he had an agent in Quebec to whom the brief would in an ordinary case be entrusted, but that agent was James Monk the Attorney General who could not accept a

retainer against the Crown. It was accordingly decided to retain Robert Russell,¹⁵ a prominent English-speaking Barrister of Quebec who had been acting for Du Calvet in an important civil suit in the Court of Appeal. A very unpleasant conception of the Court at that time is given by the fact that Russell feared for his licence to practise if he should venture to move for the Writ in the manner in which the motion was made in England every day. He had Du Calvet present a petition to the Court to allow him to bring before them his case and to employ Russell to speak before the Court on his behalf—this was granted and Russell moved the Court for a Writ of Habeas Corpus. The Court reserved judgment for six days and, November 27, were of opinion "that nothing be taken by the said motion."¹⁶

On the Preliminaries of Peace being signed between Great Britain and France and the prisoners on either side released in April, 1783, Jussome went over to England and interviewed Lord North who in that month had succeeded Lord Grantham as Secretary of State for the Home Department then in charge of Colonial Affairs. The whole situation had changed: the preliminary Articles of Peace between Britain and her revolted Colonies had been signed in January and the Definitive Treaty was on the way—there was no longer anything to be feared from treason in Canada and nothing to be gained by continuing Du Calvet's imprisonment. It does not appear that Jussome's mission was at all useful—all the prisoners were to be released.

It would seem that the speedy discharge of Du Calvet was at least in part due to the exertions of the wife of Charles Hay, a Quebec Cooper, already mentioned—a woman of much perseverance and force of character, apparently also of some social standing. Her husband as has been said was imprisoned on a charge of High Treason; and when in November, 1780, the writ of Habeas Corpus on his behalf was refused, Mrs. Hay made repeated representation to the Home Authorities. They did not expressly interfere; but suggested to the Governor that prisoners should not be kept without trial for any extended period; and finally whether through her persistence or not, in May 1783, both Hay and Du Calvet were set free.

It may not be amiss to tell here the remainder of Du Calvet's story.

On his release he at once applied for a passport to England but the news of the Preliminaries of Peace being signed arriving about the middle of May, he determined to ask for a pass-

port to the United States to obtain payment of a large claim (something over £1000 sterling) he had against the American Government for goods their army had obtained in Montreal. This passport was refused and he went to England arriving there in September, 1783. He applied to North and Fox, afterwards also to Lord Sydney to have Haldimand recalled that he might sue him for damages—of course the Governor-General as Head of the State could not be sued in the Colonial Court—this was not done but when Haldimand ceased in 1784 to be Governor and arrived in London, he had him arrested in an action for false imprisonment, etc. Haldimand was held to bail in the sum of £20,000: the action proceeded, a Commission was issued to examine witnesses in Canada, and Du Calvet came out to Quebec to execute this Commission. Sailing on his return voyage from New York for London, March 15, 1786, on an old Spanish prize then called the "Sherburne", neither passengers nor ship were afterwards heard of: but in a violent storm such as had never occurred in the memory of man, the ship foundered and ship, crew, freight and passengers were lost.¹⁷

CHAPTER V

AFTER THE PEACE

THE years 1780-1783, were probably the happiest of Powell's life. He was reunited with a dearly beloved wife, he was esteemed by all and his financial means were sufficient for every call. He tells us that "in that period no creditor ever called upon me a second time", and "in the course of those years, I have reason to suppose I acquired the confidence and esteem of my fellow citizens."

The birth of a daughter promised to complete the happiness of the young couple; but the little one named after the grandmother, the wife and the favorite sister, vivacious, saucy and loving Anne, lived but a few weeks, happier in her fate, perhaps, than the future Anne Powell whose tragic story will be told in a later chapter.¹

No one of intelligence could fail to see the danger of the methods of Government in the Province. In the Legislature, there was but the one House, the Legislative Council of nominated members only; the people, French and English, had no voice in nominating them, and they were responsible to the Governor or to his masters, the Home Administration. In the administration there were to be found many abuses, amongst them the arrest and imprisonment upon the order of the Governor and at his sole discretion of anyone whomsoever without charge or complaint from any source, and, as was seen in such cases as those of Hay and Du Calvet, without chances of deliverance by legal action. Moreover the justice of the Courts was not above suspicion in many instances.

Powell all his life had the lawyer's instinct, personal obedience to the existing law, advice to clients to obey the law implicitly so long as it was law, but endeavoring by constitutional and peaceful means to have a vicious law changed. While he was never a Radical, he was not blind to the injustice of some of the acts of the Government. He says: "However I might revolt against the avowed principles on which the justice of the Province was administered, I was silent . . . and inculcated silence and subordination in others." He was wise. So long as the Revolutionary War continued here was no hope

of diminishing the arbitrary power of imprisonment. Canada was too near the revolted colonies; and their emissaries were too numerous, cunning and active, to allow of taking chances. *Inter arma silent leges*; and it not seldom becomes a military necessity to imprison those against whom there is only suspicion and nothing that would be accepted as evidence in a Court of Law. Under existing circumstances in Canada had the Courts held that the Habeas Corpus Act was in force, it would have been suspended immediately.² But when peace was proclaimed, this necessity disappeared; arbitrary acts of authority became plain tyranny.

In addition to the other causes of disquiet was the objection by the English-speaking Colonists to the French laws. The Quebec Act was never acquiesced in by what were called the "Old Subjects"; and the "New Subjects", the French Canadians, objected to the English civil law. The Quebec Act gave effect to the wishes of the latter but it outraged the former.³ Even during the war, the English part of the population had made protest against the French law; and when it became obvious from the terms of peace that a great many loyal Americans must seek other homes, a determined effort was made to re-introduce the English law, substantially that to which the Colonists had been accustomed.

The absence of a Legislative Assembly had been a grievance for several years; at first only the Older Subjects expressed any desire for such a chamber, the New Subjects were rather indifferent. But in the course of time they—or at least many of them—also desired it; and in the summer of 1783, there was considerable agitation in that direction. The great fear of the French Canadians was that Roman Catholics might be prevented from being members of the proposed House or from being voters at the election of such members, according to the existing principles in England.⁴

All sections of the community which gave expression to their desire, wished to take away the arbitrary power of the Governor and to have the Writ of Habeas Corpus or its equivalent introduced into the Colony.

As regards the law in civil matters, there was considerable difference of opinion: (speaking generally), the Old Subjects wished the English law reintroduced or at least trial by jury of questions of fact, the New Subjects were content with their law and were divided as to jury trials.

The French Canadians were anxious about their priesthood—they wished that a Bishop should be provided for Montreal

and that the clergy should be subject to their own Bishops only. This desire was confined to the New Subjects and the Old Subjects were indifferent.

Powell was very desirous that American Loyalists should come in large numbers to his part of Canada but recognized the obstacles presented by the existence of the French law and the autocratic form of government. He does not seem to have been at all active in agitating for a change at first. But about this time a flagrant abuse in the administration of justice occurred in a case in which he was concerned; and he left the Court with a declaration that he would never return until protected by a Habeas Corpus law and trial by jury. That circumstance decided him to join in the agitation against the French law and to press on the Home Government the desirability of affording a retreat for the Loyalists. Having given up his practice; he determined to take his wife and family to his and her people in Boston. He says: "I applied to Sir F. Haldimand for a passport to convey my wife and family to New England, there to await my return from England. The General on this occasion marked a personal consideration which I had no right to expect. The Treaty of Paris was in the Province, but in an unofficial shape, so that it was deemed improper to grant a passport which might expose a gentleman to insult, but the General sent a full passport for Mrs. Powell and her suite, with directions to the military command at the frontier posts to furnish her with every accommodation of boats and crew, and a private order to consider me as in the suite. I left her with her friends and returned to Montreal in time to promote the representation desired to the King and Parliament."

This movement into which Powell threw himself, took place among the English and American Canadians; it resulted in a petition (of which he was the first signatory) to the King and Parliament for such legislation as would make Canada attractive to the Loyalist Americans. The petition sought a repeal of the Quebec Act of 1774, the establishment of a Legislative Assembly, trial by jury and the like.⁵ The new subjects joined in this in considerable numbers; and it was decided to send three representatives to England with the petition. Powell was chosen as one and instructed to act with "Maseres the resident agent at London for the Protestant inhabitants at Quebec", and with him were Adhémar de St Martin⁶ and Jean DeLisle de la Cailleterie.⁷

The French Canadian colleagues had also another mission,

more important in their view. Haldimand had in June, 1783, sent out of the Province to England two French priests who had been furnished to the Colony by the Seminary of St. Sulpice at Paris, and was determined that French ecclesiastics should not officiate in Canada. A public meeting at Montreal had sent St. Martin and another as deputies to Quebec to procure the return of the two priests to Montreal but had failed in the mission. It was then determined to appeal to England; and St. Martin and DeLisle were selected to carry this appeal to the foot of the throne. They had still another petition of very great importance and indicative of a restiveness under purely English Government. They asked that the Roman Catholic French Canadians might, in any system of Government to be formed in Canada, have the "precious participation in the grace, the rights, the privileges and prerogatives enjoyed by Your Majesty's faithful subjects in all other parts of the Globe."⁸ The petition being ready, Powell and his fellow deputies left for England, sailing from Quebec, October 25th of that year.⁹ He resided in London during the winter to urge the objects of his petition; and had some interviews with Maseres the former Attorney-General of Quebec now *Cursitor Baron* of the Exchequer who had kept up his interest in the Colony, his former residence.¹⁰

But this was "a memorable period of political turbulence"; the Ministry and Parliament were too much taken up with the "imperative concerns of India and Ireland"¹¹ and the deputies were wholly unsuccessful in their mission; they found it impossible to interest the Ministry in the unimportant colony.

Powell took advantage of being in England to be called to the Bar of the Inner Temple, February 2nd, 1784;¹² he "could not subsist long in England" and came to Boston in the spring. The Treaty of Paris signed September 3, 1783, between Britain and the United States which acknowledged the independence of the new American nation contained in Article V a provision that Congress should earnestly recommend it to the Legislatures of the States to provide for the restitution of all estates and properties which had been confiscated belonging to real British subjects, and that they should have free liberty to go to the United States and remain there twelve months unmolested in their endeavors to obtain the restitution of their confiscated estates and properties. There was also a provision that Congress should earnestly recommend to the several States a reconsideration and revision of all laws or acts regarding the Loyalists so as to render them perfectly consistent with

justice and equity and also with that spirit of conciliation which on the return of peace should universally prevail. It was therefore the confident hope and expectation of the United Empire Loyalists that they would receive back their confiscated property or its value; but the hope was doomed to disappointment, and most of the States added insult to injury.

Massachusetts had not been behind the other States in strong measures against the Loyalists; in 1778, an Act was passed forbidding John Powell and others named from returning to the State, and about the same time his property, or at least some of it, was taken possession of on behalf of the State. It would appear that the proceedings taken in respect of the property were not fully known to the exile. At all events William Dummer Powell determined to go to Boston and remain there for a time in the hope of clearing up the matter: and accordingly he went to Boston in the Spring of 1784. His fourth son, Jeremiah, had been born to him in his absence in England, January 1784. The probabilities seemed to be that the Powells did not suffer so much as many of their friends and fellow Loyalists; but the situation required time for complete solution.¹³

His uncle, Jeremiah Powell, sympathized with him in his efforts, and, knowing that he was not in good circumstances, made a proposal that Powell should take his (Jeremiah's) whole estate and remain in Boston in peace and retirement until the Acts of the Massachusetts Legislature by which "he was made an alien to his native country, should be repealed."¹⁴ This proposal, Powell accepted; but he positively rejected the advice to solicit the individual repeal of disability for himself or to petition the Legislature; and much less would he renounce his allegiance to the Crown, confirmed by his oath and subscription on being called to the Bar.

He resided on his uncle's estate, improving it, until the death of Jeremiah in 1785. Had the legislation been such as he hoped for he might have continued in Boston, but he was disappointed.

Turning his eye to his former residence, he formed a favorable view of the outlook. True there was no change in the legislative body; for eight years longer there were to be but the Governor and an appointed Council.

But the arbitrary power of imprisonment had gone. The recommendation of the Home Administration to provide security for the liberty of the subject such as was secured in England by the Habeas Corpus Act had at last been followed in Quebec.

As early as 1775, the Royal Instructions to the Governor had said that security to personal liberty should never be lost sight of and had recommended as an example to follow the "writ of Habeas Corpus which is the right of every British subject in this Kingdom." The necessities of war prevented the recommendation being followed at the time; but after the Peace an Ordinance was passed, April 29, 1784, with substantially the same provisions as the Habeas Corpus Act.¹⁵

Trial by jury was another matter,¹⁶ dear to the heart of Powell; this was not yet granted but it was in the air and its friends in Canada were confident of an early victory which, in fact, came to realization in the early part of 1785. What influenced Powell even more than the changes in the law, actual and prospective, was the practical certainty of a change in the Government of Canada. Sir Guy Carleton was to return as Governor; Haldimand, between whom and Powell there were mutual distrust and dislike, was to be permitted to return to England, and while a Lieutenant Governor would take his place for a time, this was expected to be but temporary. Haldimand left Canada in November, 1784, and Powell returned to Montreal in the early part of the following year; "cheerfully abandoned all prospects from my family connections to throw myself upon the public in the hope of serving the Province of Quebec under the influence of its present Government and the general asylum of the Loyalists." He left his wife to follow in September with her children under the protection of her brother, George W. Murray. He took up his practice again in Montreal and soon reacquired a leading place in the profession there. His short stay in Boston however gave occasion for and lent colour to charges of treason from which he suffered from time to time until a late period of his life.

Shortly after his return to Montreal Sir Guy Carleton—now Lord Dorchester—became again Governor. He arrived at Quebec in October, 1786, and Haldimand had gone to England never to return. Powell had feared the displeasure of the new Governor on account of the active part he took in promoting the petition of 1783 and presenting it, but to his pleasant surprise, Lord Dorchester received him with favour. This Powell attributed to his being told of Powell's generosity in the case of the prisoner Sarah Cole; but Dorchester was not a vindictive man; he was open minded, except on the one question of loyalty to British connection; and we may be permitted to conjecture that he recognized Powell's real ability and worth.

The Governor, by whatever motive actuated, found occasion

before long to employ Powell in matters of great importance and no little perplexity.

The notice with which he favoured him continued as long as Dorchester was connected with Canada. On Powell's return to Montreal, he found that "The Bench, whose conduct I had so resented, had discovered its error in that particular case, and the Judges very honorably received me, indeed, my conduct appeared to have impressed them so favorably that some time afterwards, on an enquiry into the administration of the laws, evidence was given by the Sheriff of the District of Montreal, that Mr. Powell appeared in highest favor."

That he was at this time and until his elevation to the Bench the foremost Advocate at the Montreal Bar there can be no question.

CHAPTER VI

GOVERNMENT COMMISSIONS

IT was not very long before Dorchester availed himself of the services of the able and prominent lawyer—although the commissions were not lucrative and were foreign to his profession.

Even before the Treaty of Peace of 1783, many loyal British subjects made their way to the Colony to the north; and after the Treaty had put an end to all hope of the Thirteen Colonies remaining under the old flag, many thousands followed the example of their friends. Most of these settled in what was then the upper part of the Province of Quebec in what is now the Province of Ontario: they brought with them their customs and intended to bring their laws. By the Quebec Act of 1774, the French civil law was *de jure* in all this vast territory; and by that law the man who tilled the soil was but a tenant and not the owner of the land:¹ this was a tenure to which the American Loyalists were not accustomed—rather by suggestion than by express statement, they were led to believe that they would receive grants in fee simple whereby they would own their farms.² Powell says of these:

“The several military corps of Royalists reduced in the Province received their military rewards in Grants of Land upon the waters of the St. Lawrence above all the old french Grants; but in conformity to the ancient Course under the Kings of France the several Locations were declared to be parcel of distinct Seigneuries, which for the present were distinguished numerically as Seigneurie No. 1, 2, etc. The Promise held out to the disbanded Troops was of Lands to be held in fee simple, and it was not difficult for designing Persons to instill into the new Settlers that it was intended to give them only a base tenure for their farms as cerfs holding en roture³ from their officers who were to receive the Superiority in Grants of Seigneuries, Fiefs, &c.

“This Sentiment was encouraged by the, to them, unaccountable Delay in perfecting their Title by Grant; and excited by the Imprudence of some of their officers settled amongst them, the People became angry, held meetings, and, it was said, determined in the Event of their Grants being feudal as

in the French Inhabitants, they would cross the line and become Subjects to the U. States rather than transmit a base⁴ tenure to Their Posterity."

The settlers on being placed upon the land received what was called a Location Ticket: and this they looked upon as a token of indefeasible right to the land: the rapid progress made in the improvement of wood lands was unprecedented.

In 1784, 1785 and 1786 under Haldimand and his successors the Lieutenant Governors Hamilton and Hope, the nature of the grant to be made to the settlers when they had performed the duties on the land which would entitle them to a grant, was not defined—it wore the appearance of a Military grant and the land was described as part of a Seigneurie.⁵ As Powell says, there was very great dissatisfaction amongst the settlers—this proceeded so far that early in 1785, Sir John Johnson and a number of other officers then in London petitioned on behalf of the settlers, setting out that the tenure of land was a subject of general discontent and asking for the creation of a new Province separate from Quebec and extending west from Point Boudet (the future dividing point between Upper and Lower Canada, and the present between Ontario and Quebec) its metropolis to be at Cataraqui (Kingston), and inhabitants to have control—it would "include all the settlements made or intended to be made by the disbanded corps and the other Loyalists⁶ while it leaves all French Canada and the French Seigneuries as they were before."⁷ Lieutenant Governor Hope advised against this course as unnecessary, at least at the time, and he foresaw that it would create reasonable complaint among the Canadians⁸—but it was approved by the Merchants of Montreal.⁹ The Home Government determined not to do anything in the matter until Carleton, who was to return to the Colony in 1786, had thoroughly investigated.¹⁰

When Carleton arrived at Quebec he lost no time in allaying the fears of the Settlers. Let Powell speak for himself: "To enquire and prevent such a measure Mr. P. received a confidential Commission with the Surveyor General Collins and in a Summer's Progress through the new Settlements was enabled to restore Confidence to the Inhabitants and prepare them for an Organization according to the English Laws and Manners. Mr. P's report on this Commission was so satisfactory that it was followed by very flattering Confidences of various kinds."

One of these Commissions to Powell was much the same as that concerning the Upper Country settlers.

The Government in an earnest desire for the good of the Loyalists had in 1790 bought for the Crown the Seigneurie of Sorel¹¹ which had much valuable land particularly well adapted for improvement and cultivation: it was set aside for "Inhabitants of approved Loyalty." In 1786, Dorchester received instructions¹² to divide the land into small allotments and to allot it to non-commissioned officers and men of the regiments which had been disbanded and the loyal subjects who should be inclined to settle and improve the land—these loyal subjects to be only such as had withdrawn themselves from the United States after the signing of the Treaty of Peace. The instructions contained the term that the lands were to be held on the same tenure and rent as other tenants of Seigneuries. These instructions repeated in substance what had been enjoined on Haldimand three years before.

Under these instructions many settlers had been placed: and much the same discontent arose. Powell was commissioned by Dorchester to see the Colonists, and he had similar success to that which he had had with the settlers further west..¹³

The next Commission to be mentioned is of a different character but is equally indicative of the high opinion entertained of Powell's skill, prudence and integrity by the Governor. Powell relates the circumstances in these words:

"During the War the navigation of the Lakes had been restricted and no commercial Shipping permitted so that from necessity the Traders were obliged to freight the King's Vessels and account to the Quarter Master General. Great Complaints existed on both sides, the sailing officers having no benefit from the extra Charge and Labour of freight, were negligent, and the shippers complained of Loss, but were nevertheless forced to pay or lose the right of Conveyance.

"On this subject Mr P had in his office at the request of the indian Traders drawn up a strong Memorial to the Quarter Master General (General Hope) which produced at the time no good effect; but after the Peace, the navigation of the Lake being opened to the subject, it was necessary to close the King's freight Account, and the Governor and Commander-in-Chief addressed his Commission to Mr P and two Gentlemen of his nomination to collect the freight dues with full Power to modify and relax and acquit the Debtors As Justice and equity might authorize."

The last investigation to be mentioned at this time was more important than the others: and it had far reaching effect on Powell's career. The story is rather a long and intricate

one, but the material facts are not numerous or complicated.

During the Revolutionary War money for the Army was not sent out by the Home Government: that Government entered into a contract with Messrs. Harley and Drummond (whose agent at Quebec was the Hon. John Cochrane) to supply specie on the requisition of the Commanders in America, they being paid by the Bank of England and receiving a percentage commission on the transaction. Cochrane made drafts on his principals from time to time as required, cashed them at the current rate of exchange and so supplied the specie required. The exchange fluctuated very much as there was only one convoy to England every year: this being in October it is obvious that the Canadian debtor received no benefit from any remittance to his English creditor sent after October of one year until October of the next year: accordingly the Quebec merchants preferred to receive interest from their debtors rather than keep cash or bills locked up: the natural result was that bills in England dropped sharply in value immediately after the departure of the October convoy and rose gradually till immediately before the next—the rate of exchange would be immediately before the sailing at or about par, and immediately after anywhere from one to ten per cent below, gradually rising to par.

This did not suit Mr. Cochrane, who of course was called upon at all times to furnish specie by discounting bills on England: he naturally wanted his bills to be at all times at par. He accordingly suggested to Haldimand and the merchants that he should sell London bills at par at any time for part cash giving the merchants if they wished it, credit for the balance till the sailing of the convoy when they were to pay without interest. There was obviously the risk of a merchant failing to pay at the end of his period of credit, and there was the obstacle that Harley and Drummond had given positive instructions to Cochrane to give no credit for bills drawn on them.

Cochrane succeeded in having Haldimand guarantee him against loss and went on to sell in large quantities: in the year 1781 and 1782, credit sales of the bills amounted to nearly three millions sterling; and if the scheme had been successful, there would have been a considerable saving to the public. But easy money proverbially goes easy—the artificial credit raised and encouraged a speculative spirit in the Quebec merchants, the market was overstocked and on the approach of Peace, great loss was to be expected. Cochrane, as is generally the

case, threw good money after bad, and extended still more the credit for bills. Then Haldimand became alarmed: the Home Government refused to assume his guaranty and he was faced with an immense loss.

He consulted his confidant, Mr. Justice Adam Mabane, who brought into counsel his colleague Mr. Justice Fraser: and these two advised strong measures against Cochrane, and the debtors for bills sold on credit. At once there was a panic; everyone who owed for the bills might expect to be called upon to pay without delay: universal bankruptcy ensued, the loss to Mr. Cochrane being over one hundred and fifty thousand pounds.

The Attorney General, Monk, strongly advised against such action being taken against Cochrane (the absurdity of suing one on bills against loss upon which the Governor had guaranteed him should have been manifest even to a layman not to speak of a sound lawyer like Monk) and refused to act in the proceedings: Jenkin Williams was made Solicitor General and he conducted the actions in a most arbitrary way.¹⁴ Powell had been retained by Harley and Drummond and their agent: and when the Colonial Courts found against the defendants he advised an appeal to the King in Council.

"On this appeal" says Powell "the whole came under the Eye of Mr. Pitt then First Lord of the Treasury, who thought fit to cover the irregularity of the law Proceedings and proposed a reference to Lord Dorchester to determine which part of the Loss should be sustained by Government, in behalf of Sir F. Haldimand and what Part by the remitters in behalf of their agent.

"The minute of reference gave ample Power to remit in part or whole the Moneys due on public Bills sold On Credit, upon the special Condition, however, that every Debtor should renounce all Appeal or Suits for Damages against Sir F. Haldimand, the Judges and all concerned."

Lord Dorchester made Powell one of the Board and Powell took an active part in the investigation. After full enquiry, the Board made a report which threw so much light on the maladministration of the Courts¹⁵ that Powell was blamed for the whole investigation, (and unless his colleagues were more than usually able and strong, he was in more than a merely technical sense responsible for it). He thus became exceedingly obnoxious to the judges, especially Mabane.

Dorchester had caused a hint to be conveyed to Powell that he would gladly reward him for his valuable services on

the Loyalist Commissions—he had given Powell no remuneration nor had Powell asked for any, for Powell twenty years later writing to the Lieutenant Governor of Upper Canada could truly say: “gratuitous services from the year 1787 to this day have never been declined.” He accordingly applied for a grant of land, and his application came up in Council. When it was read, Mabane objected to any grant being made: he said that Powell had at the Peace left the Province to settle in the United States and had become an American citizen. This, of course, arrested the consideration of the petition: the Governor insisted that Powell should be informed of the charge and Mabane was compelled to give permission to the Chief Justice, William Smith, to communicate the charge to Powell. The Chief Justice did so: Powell at once denied the charge in writing to the Chief Justice giving at the same time a sort of memorandum of who and what he was¹⁶—“the whole forming a prompt and satisfactory comment on the accusation.” He also wrote Mabane demanding the name of his informant: Mabane could not justify the slander and at the next Council meeting, Monday, December 29, 1788, a grant was directed to be made to Powell of 3000 acres of land in the location asked for.¹⁷

The charge of disloyalty was afterwards repeated on many occasions and in many forms; he could twenty years afterwards say that “the malignant whispers which twenty years ago were confuted are still remembered”; and several years later still, the echoes of the villainous charge were not wholly silent. This is the first occasion of its being openly made; but on all subsequent occasions as on this, it was triumphantly refuted—Powell was as loyal a British subject as ever lived in Canada, the home of the Loyalist.

He incurred the enmity of Mr. Justice Fraser in this way: Fraser had been Deputy Paymaster of the Forces and was a defaulter to the extent of about eight thousand pounds: his bondsman, the Chief of the Highland Clan of Lovat, being called on for the amount retained Powell to collect it from Fraser. Fraser acknowledged to Powell that he had spent the money and could not replace it. A judgment was signed by consent with a stay of execution to enable Fraser to negotiate with his kinsman. The negotiations failed and Powell was forced to sue out a writ of execution to realize upon the judgment: the judge of the Court of Common Pleas who had granted the writ afterwards delivered a *supersedeas* to the Sheriff: Powell applied to the full Court to set aside the *super-*

sedeas; Fraser was of course not on the Bench, and the judge who had signed the writ and the *supersedeas* astonished the Bar by a declaration he was allied to the defendant in such a manner as according to the French law "he could not act": the one judge remaining did not constitute a quorum, and according the *supersedeas* was sustained. Powell outraged at this denial of justice sent a memorial to the Governor who at once sent two of the Quebec judges to form a quorum with the third Montreal judge, and the *supersedeas* was promptly set aside: "The eclat of this extraordinary Case failed not to mortify the honourable Judges who were not Spared by the indignant Public. They attributed much of the odium to the mere agency of Mr. P. who, short of failure in his duty as a Lawyer and a Gentleman, could not have acted throughout the whole with more kindness and urbanity than He did. The resentment was, however, deep seated and operated in so many ways to effect the Practice at a Bar where such things as have been described could be, that he cheerfully seized the opportunity of a release, accepted the Appointment carved out for him, and removed his family to Detroit."

CHAPTER VII

APPOINTMENT TO THE BENCH

THE Province of Québec in 1789 when Powell was elevated to the Bench was very different in many respects from what it had been ten years before when he arrived from England.

The Paris Treaty had by Article II given to the United States the territory to the south and west of the middle line of the Great Lakes and connecting rivers, and by Article IX it had been agreed that creditors on either side should meet no lawful impediment to the recovery in full of debts previously contracted. Certain of the States had passed legislation intended to have the effect of preventing British creditors from recovering debts from debtors of these States.¹ After the Peace, certain British creditors suing for their claims were met by these enactments, and some of these enactments were held valid by the Courts.² When the President of the United States was appealed to, he was forced to say that neither he nor the United States had any power to annul or cause to be repealed the obnoxious legislation.

Britain on her part retained possession of much of the territory bordering on the Great Lakes and connecting rivers, including the important posts of Detroit and Michilimackinac³—the possession of these was actual, open and exclusive; and, in addition, there was a more or less imperfect and ambiguous possession and control of the vast territory west of Pennsylvania to the Mississippi on the west and the Ohio on the south and also of the hinterland of the various posts.

Thus Britain held *de facto* much that *de jure* belonged to the United States.⁴

The original division of the Province of Québec into the two Districts of Québec and Montreal still held:⁵ and in fact the District of Montreal contained not only the territory from the St. Godfroy and St. Maurice Rivers westward to the middle line of the Great Lakes but also Detroit, Michilimackinac and such territory as was controlled by Britain.

Some of the territory presented special problems of government and law⁶ but the great trading posts of Detroit and Michilimackinac were treated precisely as though they were

de jure, as they were *de facto* British. Through these places there was trade of £150,000 to £200,000 annually—all inward trade (except rum and a very small quantity of wampum) was imported through Montreal from Britain and practically all outward went through Montreal to Britain. The mercantile transactions between Montreal and the Upper Posts were many and naturally litigation was common. The question of Courts for the far west was not new—Sir Guy Carleton as early as 1775 when instructed to erect a Court of King's Bench for the whole Province and a Court of Common Pleas for each of the Districts of Montreal, was also directed that there should be an "Inferior Court of Criminal and Civil Jurisdiction in each of the Districts of the Illinois, St. Vincenne, Detroit and Missilimakinac and Gaspee by the name of the Court of King's Bench for such District . . . with authority to hear and determine in all matters of Criminal Nature according to the Laws of England . . . and in all civil matters according to the Rules prescribed by . . . the Quebec Act." Each of these Courts was to have "one judge being a natural born subject of Great Britain, Ireland or our other plantations", and there was to be one other person, a Canadian, to advise but not to decide.⁷ Haldimand's instructions in 1778 were in the same terms;⁸ but the Revolutionary War interfered with the carrying out of this project so far as it related to the western districts.

Accordingly, the Court of Common Pleas at Montreal was the only court having civil jurisdiction in the District of Montreal and that court must needs be resorted to by and against the western merchants—"the delay and expense occasioned by the distance" were enormous and "the suitor was generally more oppressed than benefitted: the great delay afforded an opportunity to the debtor to make away with his property and the plaintiff thereby . . . became further saddled with the costs of suit."⁹ In Detroit itself after an experiment by the merchants of an arbitration association which was without power to enforce its decrees (the *habitant* had no need of a Court) petitioned for a Court: so did the Montreal merchants. Further east but still in the Upper Country and mainly on the north side of the treaty line were settlers chiefly gathered round three centres, Niagara and the territory opposite and west of the river, Cataraqui or Kingston and Cornwall. These settlers suffered the same inconveniences as those of Detroit, but not to the same extent.

In 1785, some slight relief was granted to two of these groups by an Ordinance for the "upper parts of this province

from and above point au Baudet . . to the head of the Bay of Quintiz" (Quinté) giving jurisdiction to Magistrates in small cases.¹⁰ At length it was determined to establish new Districts each with its own Court,¹¹ and Dorchester issued his Patent, July 24, 1788, dividing the Upper Country into four Districts to which he gave German names—Luneberg from what is now the boundary line between Ontario and Quebec to a north and south line through the mouth of the River Gananoque; Mecklenburg from that line west to the mouth of the River Trent; Nassau, west to the extreme projection of Long Point; and Hesse west "to comprehend all the residue of the said Province in the Western or inland parts thereof."¹²

In each of these Districts was created a Court of Common Pleas with unlimited civil jurisdiction: it had no criminal jurisdiction; to each Court were assigned three judges, all laymen—there was not a single lawyer in the whole vast territory.¹³

To the Court of Common Pleas for the District of Hesse were appointed two Old Subjects, Alexander McKee and William Robertson, as Second and Third Justices respectively, and one New Subject, Duperon Baby, as First Justice.¹⁴ With that tenderness and regard for the conquered people which almost invariably characterized the British Conqueror, Carleton had in 1775 been directed to appoint one French Canadian Judge in each of the two Courts of Common Pleas for the Districts of Quebec and Montreal.¹⁵ While these instructions were not repeated, their spirit was observed where there was a French population.

As soon as the announcement reached Detroit, there was an outcry; and early in September, a petition signed by practically all the important citizens (including two of the Judges¹⁶) was sent to the Governor by the hands of Robertson and Baby who also brought down their own resignations. The petition pointed out that all the trade of Detroit was in the hands of the English merchants and Baby, that two of the Judges were extensively interested in trade and it was of dangerous tendency to combine the professions of Judge and Merchant, that all discussions respecting property connected with trade must nine times out of ten affect the merchant-judges immediately or circuitously and while the petitioners had every respect for the judges personally, they strongly objected to their being judges. They asked for a trained lawyer as a Judge, and that he should follow no other profession or avocation.¹⁷ The petition was referred along with a very

interesting and powerful letter on the subject from Robertson to Chief Justice William Smith,¹⁸ to a Committee of the Legislative Council. The Committee suggested the necessity of filling the positions vacated by Robertson and Baby and inducing "Gentlemen of Law abilities and possessing knowledge of the custom of Merchants" to undertake the employment with a salary "or such certain and permanent provision for their support as the dignity and importance of their station requires. Fees alone . . . will not for many years be adequate."¹⁹

After some consideration it was determined for the time being to appoint but one lawyer as judge with the title First Justice and to give him the same jurisdiction as three judges had in the Courts of the other Districts: and to pay him a salary of £500 sterling, whereas the other judges were paid wholly by fees.

Powell was approached on the subject by the Governor's representative: and, accepting the position, he was duly appointed.²⁰

An Ordinance of April 30, 1789, provided that until three judges should have been regularly named to preside in the Court of Common Pleas for the District of Hesse, all the power and authority of the whole number were delegated to the person who should receive a Commission to act as first judge of the Court.²¹

When a lawyer had been selected as judge of the far distant Court, it seemed safe to give him extended jurisdiction—a jurisdiction which was a great desideratum in a fur-trading country. Powell gives the following description which very fairly sets out the provisions of Section 9 of the Ordinance:

"This District ended the Province to the West, beyond was Territory possessed by the Indians and unorganized tho' claimed by the Spaniard and American as well as the Hudson's Bay Company.

"The extensive Fur Trade carried on in these remote Countries was chiefly fitted out from Montreal and was of growing importance. The nature of that Trade in which the last Fitter-out²² of an adventure was supposed to be preferred to the Extent of that Credit on the proceeds of that Outfit gave occasion to infinite discussion and it was considered of Importance to establish a Jurisdiction which should extend over that immense Country in which the Trade was carried on, as no legal Powers extended beyond the limits of the Province of Quebec. Such a Jurisdiction could not well exist; but to effect the same purpose the Act or Ordinance which established a

Court of Law in the district to be presided over by a sole Judge, declared that it should be no Exception to the process, Judgment and Execution in that Court, that the cause of action arose out of it, or that the Defendant had no Domicilium within it. This Provision protected this Authority wherever there was an indian Trader, and of course subjected his property and Conduct to control."

Another provision may be mentioned, viz: that in sec. 10, which directs that the plea that a debt is barred by the laws of prescription is not to be entertained except as to debts accruing due after January 1, 1790.

Powell says that he accepted the appointment "with the latent but confident expectation of a new system for the new Districts recently settled by the Loyalists in which I should hold the chief legal appointment."

For over quarter of a century, he was disappointed and experienced the hope deferred which maketh the heart sick.

His appointment naturally was displeasing to his old enemies among them Mr. Justice Mabane;²³ but it was received by the rest of the community at Montreal and Quebec with favour, while the merchants at Detroit had their wish.

CHAPTER VIII

THE JOURNEY TO DETROIT

THE family of the new Justice had been increased by the birth in 1784 of Jeremiah and in 1787, of Anne—both of these were to find a watery grave after being a heart-break to their parents—and in January, 1789, of Elizabeth.

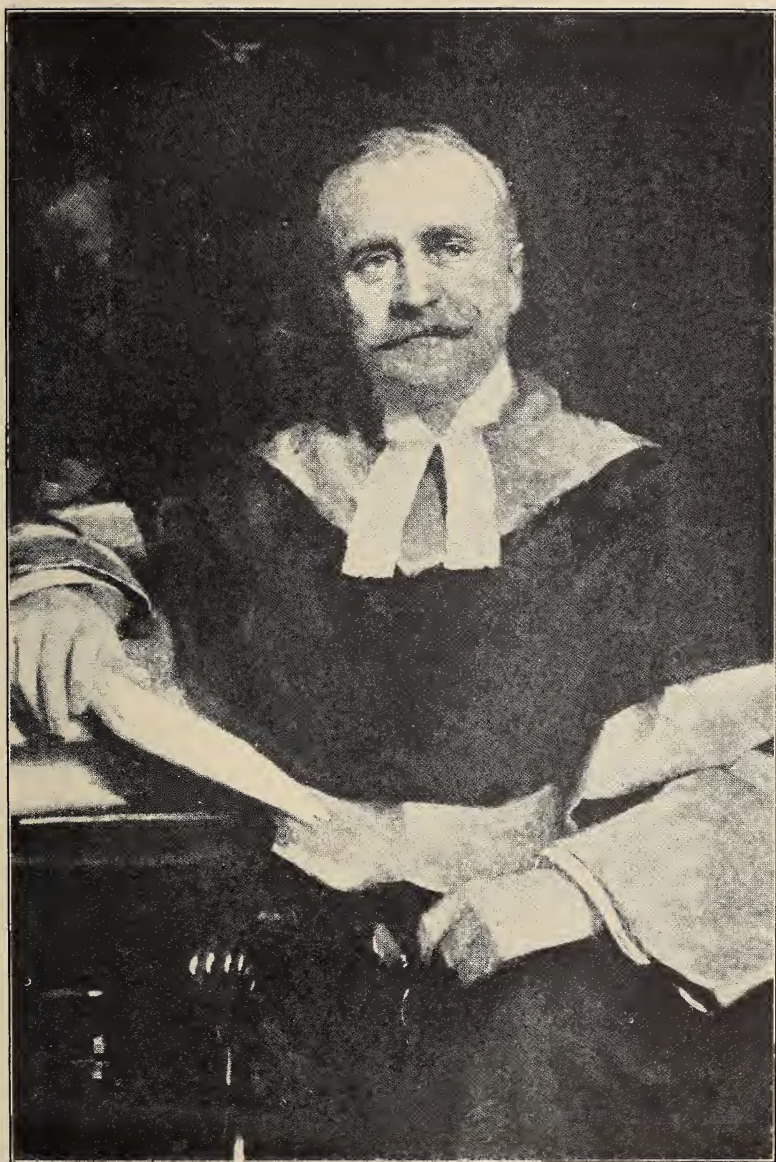
His sister Anne had joined the family group, coming from England for that purpose. All these, the husband and wife, the sister, four boys and two girls, Anne and the baby, were to make their way to the new home in the West.

To Lachine there was a good road; on the Island and west of the Ottawa River as far as the Pointe Boudet there were roads more or less passable; thence west practically as far as the River Trent, there were short stretches of ways through the forest which could scarcely be dignified anywhere as roads—from the Trent to near Niagara there was an uninhabited, untrodden wilderness—at Niagara, there was a portage road from one Lake to the other, thence west to near the Detroit River there was an almost unbroken forest—as a consequence almost all of the journey must needs be by water.

We are fortunate in having from the pen of Anne Powell a description of the trip. From her letters, many of which are extant, she seems to have been a favourite sister: she writes them in a lively and entertaining style; and her light chaff is very amusing. The manuscript of the journey is still in existence,¹ it is beautifully written, clear and legible and is certainly the production of a well-educated and intelligent woman. It has suffered some loss in the lapse of a century and a quarter but all that remains is quite clear and plain.

The party left Montreal May 11, 1789, and arrived at Detroit, June 9—a journey of 39 days. We shall let the fair traveller speak:

“When I talk’d of keeping a journal from Montreal to Detroit I was not aware of the difficulties attending the journey. I expected it would be tedious, and thought writing would be a very pleasant employment, and so it might have proved had it been practicable but the opportunities of writing were so few that I found it would be impossible to keep a journal with any degree of regularity, so left it wholly alone



WILLIAM RENWICK RIDDELL

and trusted to my memory (which never deserved such a compliment) for recollecting whatever was worth communication.

"We left Montreal on the 11th of May, with a large party of our friends who paid us the compliment of seeing us the first Stage where we took a farewell dinner and all the party except Mr. Clarke² left us. It was a melancholy parting here. I was the person least interested in it, and partook of it more from sympathy than any real sorrow I felt, all whom I was much attached to were going with me, but on those occasions crying is catching and I took the infection. Yet I felt melancholy, for tho' I had no particular friendships I have received many civilities from the people of Montreal and I felt a general regret at bidding them adieu. Mr. Clarke stole off in the morning before we were up, but an honest German Lad, whom my brother had discharged, followed us to Lachine and cost me a tear at parting though I cannot say exactly from what sentiment it flow'd; with his eyes full of tears he came into the room and kiss'd all the children round, then dashing away his tears, he attempted to thank his Master for past kindnesses, but the poor fellow's voice failed, he caught my Brother's hand and held it to his lips, he cast a look at my sister and me, I suppose he saw encouragement in our faces for he took our extended hands, dropped a tear on each, and, with blessings, that, I am convinced, flowed from his heart bade us adieu.

"We now went to our Boats; one was fitted up with an awning to protect us from the weather and held the family and bedding. It was well filled, eighteen persons in all, so you may suppose we had not much room; as it happened that was of no consequence, it was cold on the Water and were glad to sit close. This mode of travelling is very tedious for we were obliged to keep close along shore and go on very slowly. The first night we stopt at the house of a Habitan, who turn'd out with his family to give us the best room, where we spread our Beds and slept in peace. I entertained myself with looking at the Canadian Family who were eating their supper, saying their prayers and conversing all at the same time. The next day we reach'd a part of the River where the boats are obliged to be unloaded and taken through a Lock,³ the Rapids being too strong to pass; these were the first Rapids, of any consequence, I had ever seen. Perhaps you do not understand what I mean by a Rapid: it is where the water runs with swiftness over large rocks, every one of which forms a Cascade, and the river here is all a bed of Rocks. There is no describing the grandeur of the water when thrown into this kind of agita-

tion; the Sea after a Tempest is smooth to it. We breakfasted at the house of a man who keeps the Lock and dispatched Mr. Smith⁴ with a message to a Mr. Dennie who lived at the distance of a few miles, and with whom we had promis'd to dine. I believe I have never mentioned Mr. S. before; as he is to be our fellow-traveller I will now tell you who he is. Mr. S. was a Clerk of my Brother's, a sensible, well disposed young man who lost his Parents early and was cheated of his little fortune by his Guardian. When my Brother gave up Business he had no further occasion for a Clerk and Mr. S. saw himself without friends or protection, he preferred following the fortune of his only friend to being left at Montreal, and readily embraced an offer of making one of our party to Detroit. As soon as Mr. Dennie heard of our arrival a Calash⁵ was dispatched for the Ladies, a saddle horse for Mr. P. and a waggon for the children and servants. Mrs. P. was unwilling to trust the little girls out of her sight, so we each took one on our Laps, but went only a little way when the Calash broke down. Fortunately none of us were hurt; my Brother had rode on and we were a good deal perplexed what to do. I proposed getting into the Waggon, but my Sister would trust neither herself nor the infant in it; there was no other alternative than walking and letting the servants carry the Baby,⁶ till the man could go home for another Calash. The sun was hot and the road dusty; one carriage, to me, was just the same as another, so up I mounted and a very pleasant ride I had with a fine view of the Country. Mrs. P. was heartily fatigued before the Calash met her. The hospitable welcome and the good dinner we got at Mr. D.'s set all to rights. In the evening we went on ten miles further to a public house where we were tormented with Fleas and Dirt. We then resolved not to stop at another Inn if we could possibly meet with any other accommodation. My Brother had travelled the road before⁷ and knew the people and the distances from one house to another. This part of the Country has been settled since the Peace; it was granted to the Troops raised in America, during the War; we went from a Col. to a Captn., from a Captn. to a Major. They have most of them built good houses, and with the assistance of their half pay, live very comfortably and increase and multiply at a great rate. We pass'd one night at the house of a Captn Duncan⁸ whose Wife I had often heard mention'd by my sister and whose story I commiserated before I saw her person. She is one of the loveliest young women I ever saw, both in person and manners, is now only nineteen

and has been 5 years married to a Man who is old, disagreeable and vicious, but he was suppos'd to be rich and her friends absolutely forced her to marry him. I never heard of such a series of cruelty being practiced on any poor creature in my life both before and after her marriage. The disgust I felt towards him is now settled into fixed aversion which can never change for it is founded on principle. After the sacrifice was made her friends had the mortification of finding themselves deceived in his circumstances; so far from being rich he was deeply in debt, and had nothing to live upon but his half-pay and his new lands which were then in a state of Nature. There, however, he brought her, and there she lived in a hut without society, and almost without the necessaries of life, 'till he built a house, which he has done upon so large a scale that it will never be finish'd. My sister had been strongly attach'd to Mrs. D. when she was quite a child and is much beloved by her. I felt myself very much interested for this sweet young woman and should have great pleasure in hearing her Tyrant was dead, the only means by which she can be released. I, at that moment thought with pleasure of a circumstance that has often mortified me, the slighness of my own constitution which will never leave me long to struggle under any great misfortune; a good flow of spirits buoys me up above the common vexations of life: few people, I believe, bear them with more temper—but an evil too great for the strength of my mind would soon send me to the grave.

"The night following that which we pass'd at Capt'n. D's we reach'd the house of an old servant of Mrs. Powell's, the children were delighted to see her and I was well pleased with an opportunity of observing a new scene of domestic life. Nancy, it seems, had married a disbanded Soldier who had a small lot of land where they immediately went to live and cultivated it with so much success that in a few years they were offer'd, in exchange, a Farm twice its size to which they were just removed, and were obliged to live some time in a small temporary log house which consisted of only one room, in which was a very neat Bed where a lovely infant of 3 months old lay crowing and laughing by itself. A large Loom was on one side, on the other all the necessary utensils for a family, everything perfectly clean. Nancy went to the door and brought in two more fine children and presented them to her old mistress. We asked her if she was happy, she said, "Yes, perfectly so", she work'd hard, but it was for herself and her children. Her husband took care of the Farm and she of the

family, and at their leisure hours she wove Cloth, and he made and mended shoes for their neighbors for which they were well paid, and every year they expected to do better and better.

"Small as this place was we chose to stay all night, so, while Mrs. P. was giving orders for arranging the Beds my Brother and I walk'd out to enjoy a very fine evening. The bank of the River was very high and woody, and Moon shone bright through the trees; some Indians were on the river taking Fish with Harpoons, a mode of fishing I had never seen before. They make large fires in their Canoes which attract the Fish to the surface of the water, when they can see by the light of the fire to strike them. The number of fires moving on the water had a pretty and singular effect. When we return'd to the house we found the whole floor cover'd with Beds. The Man and Woman of the house, with their three children, had retired to their own and left us to manage as we pleased. A Blanket was hung before my mattress which I drew aside to see how the rest were accommodated. My Brother and Sister, myself, five children and two Maid-servants, made up the groupe; a blazing fire (not in the Chimney for there was none but in one side of the Room which was open at the top to let the smoke out and gave us a free current of air) shew'd every object distinctly. I was in a humour to be easily diverted and found a thousand things to laugh at; it struck me as very like a party of strolling Players. At night we always drest a dinner for the next day, so when we were disposed to eat it the cloth was laid in the Boat and the Table served with as much decency as could be expected. If we could be contented with cold provisions, not so our Sailors; they went on shore and boil'd their pot, smoked their Pipes, etc. One day we happen'd to anchor by a small Island where the Bank was so steep the men had some difficulty in climbing it. I finish'd my dinner before the rest of the family and felt an inclination to walk; I took one of the maids and made one of the men help us up. We strolled to the other side of the Island and when we turn'd round saw the whole of the ground cover'd with fire. The wind blew fresh and the dried leaves had spread it from where the people were cooking. We had no alternative, so were obliged to make the best of our way. I believe we took very few steps for neither of us had our shoes burnt through. The weather was now so fine that we ventured to sleep out, and I liked it so well that I regretted we had ever gone into a house—it is the pleasantest vagabond life you can imagine. We stopt before sunset when a large fire was instantly made and

tea &c prepared. While we were taking it the Men erected a tent; the sails of the Boats served for the Top, with Blankets fastened round the sides; in a few minutes they made a place large enough to spread all our Beds in, where we slept with as much comfort as I ever did in any chamber in my life. It was our own faults if we did not chuse a fine situation to encamp. You can scarcely conceive a more beautiful scene than was one night exhibited; the men had piled up Boughs of Trees for a Fire before our tent 'till they had made a noble Bon-fire. In the course of the evening it spread more than half a mile; the ground was cover'd with dry leaves that burnt like so many lamps, with the fire running up bushes and trees, the whole represented the most beautiful illumination you can possibly form an idea of. The children were all in Extacies, running about like so many Savages, and our Sailors were encamped near enough for us to hear them singing and laughing. We had heard, just before we left Montreal, of his Majesty's recovery, so, if you please, you may set down all this as rejoicing on that account, tho' I doubt whether it once occurred to our minds, yet we are very loyal people. On the tenth day we reach'd Kingston. It is a small new Town and stands in a beautiful Bay at the foot of Lake Ontario. The moment we reached a wharf a number of people came down to welcome us. A Gentleman in his hurry to hand out the Ladies brushed one of the Children into the lake; he was instantly taken out, but that did not save his Mother from a severe fright. We went to the house of a Mr. Forsyth, a bachelor, who very politely begg'd we would consider it our own. Here we staid 3 days and then sail'd with a fair wind for Niagara. At Kingston we were overtaken by two officers, one going to Niagara, the other to Detroit. Mr. Meredyth had been introduced to us at Montreal; Mr. Suckling was a stranger. They both express'd themselves pleased with joining our party and prefer'd the offer my Brother made them, to cross the Lake in a Vessel appointed for him, to waiting for another where they would be much less crowded. My Brother had also given a package to another young man⁹ and to Capt'n. Harrow,¹⁰ who commands a ship on Lake Erie. We were fifteen in a small Cabin where there were only 4 births.¹¹ When the Beds were put down at night everyone remained in the spot they had taken for there was no moving but by general consent. One night after we were all laid down and began to be composed, Mrs. P. saw one of the maids standing where she had made the children's Bed, and asked her why she staid there. The

poor girl, who speaks indifferent English, answered, 'I am *quazed*, Ma'am.' Sure enough she was wedged in beyond a possibility of getting out without assistance. I heard a laugh amongst the gentlemen, who were divided from us by a Blanket partition. I suppose they were quazed too. Lake Ontario is 200 miles over, we were four days crossing it. We were certainly a very good humor'd set of people for no one complained or seem'd rejoiced to arrive at Niagara.¹² The Fort is by no means pleasantly situated; it is built close upon the Lake which gains upon it so fast that in a few years more they must be overflowed. There, however, we pass'd some days very agreeably at the house of a Mr. Hamilton¹³ a sensible, worthy and agreeable man. Mrs. H. is an amiable sweet little woman; I regretted very much she did not live at Detroit instead of Niagara. We received the most polite attention from Coll. Hunter¹⁴ the commanding Officer, and all his Officers. Lord Edwd. Fitzgerald¹⁵ had been some time at Niagara before us, and was making excursions amongst the Indians, of whose society he seems particularly fond. Joseph Brant, a celebrated Indian Chief lives in that neighborhood. Ld. Edward had spent some days at his house and seemed charmed with his visit. Brant return'd to Niagara with his Lordp. He was the first, and indeed, the only Savage I ever dined at Table with.¹⁶ As the party was very large he was at too great a distance for me to hear him converse and I was by no means pleased with his looks. These people pay great reverence to rank; with them it is only obtained by merit. They attended Ld. Edward from the house of one Chief to that of another and entertain'd him with dancing which is the greatest compliment they can pay. Short as our stay was at Niagara we made so many agreeable acquaintances we were sorry to leave them. Several gentlemen offer'd to escort us to Fort Erie, which made the journey very cheerful. Mr. Hamilton, Mr. Humphreys, of the Engineers, Mr. Robertson of the 60th and Mr. Meredyth, with Capt. Harrow, Mr. Smith and my Brother went in the Boat with us to the Landing which is 8 miles from the Fort. There the River becomes impassable, and all the baggage is drawn up a steep Hill in a Cradle, a Machine I never saw before. We walked up the Hill and were conducted to a good garden with an Arbour in it, where we found a Cloth laid for dinner, which was provided for us by the Officers of the Post. After dinner we were to get into Fort Sloser¹⁷ 7 miles, by any means we could. Two Calaches were procured, in one of them my Brother drove my sister and Mr. Humphreys and me in the

other. Mr. M. got a horse and the rest of the gentlemen made use of their feet. The road was good and the weather delightful, our ride would have been charming only the horses were so bad, they could hardly crawl. I never breathe freely when a horse seems tired; I always feel as if I was committing a crime in riding it. Mr. H. who is a humane man, gave up the point of whipping the poor Devil on out of respect to Capt. Watson, to whom the horse had once belonged, a circumstance that increased my compunction, for all men living, W. is the most compassionate, and in the condition the Animal was would as soon have attempted to carry as to ride him. It was not to be borne, so we took one of the horses from the Cart the children and servants were in, and made the best of our way after the rest of the party. The afternoon was wearing away and this was the only opportunity we should have of seeing the Falls. All our party collected about half a mile above the Falls, and walked down to them. I was in raptures all the way: the Falls I had heard of for ever but no one had ever mentioned the Rapids. For half a mile the River comes pouring down over immense Rocks, some of them forming cascades 30 or 40 feet high: the Banks are cover'd with wood as are a number of Islands, some of them very high out of the Water. One in the centre of the River runs out into a point and seems to divide the Fall, which would otherwise be quite across the River, into the form of a Crescent. I believe no mind can form an idea of the immensity of the Body of Water or the rapidity with which it hurries down; of the height you may, which is 180 feet. The water loses all appearance of a liquid long before it reaches the bottom, and the spray rises like light summer clouds; when the rays of the sun are refracted they form innumerable Rainbows, but the Sun was not in a situation to show this effect when we were there. One thing I could get no one to explain to me, which is, the stillness of the river at the bottom of the Fall; it is smooth as a lake for half a mile, deep and narrow, the banks very high, with trees hanging over them. I was never before sensible of the full power of scenery, nor did I suppose the eye could carry to the mind such strong emotions of pleasure, wonder and solemnity. For a time every other impression was erased from my memory. Had I been left to myself I am convinced I should not have thought of moving whilst there was light to distinguish objects. With reluctance I at last attended to the proposal of going on, determining, however in my own mind, that when I returned I would be mistress of my time and stay here a day or two at

least. As Fort Sloser was only at the distance of a pleasant walk, we all chose to go on foot. We were received there by Mr. Foster of the 60th, one of the most elegant young men I ever saw. Here we were extremely well accommodated, and much pleased with the house and gardens. I never saw a situation where retirement wore so many charms. The next day we went in a Batteau to Fort Erie. When we arrived there we found the Commanding Officer, Mr. Boyd, was gone in a party with Ld. Edward and Mr. Brisbane to the other side of the River where the Indians were holding a Council. The Gentlemen all returned in the evening and seemed so much pleased with their entertainment, that when they proposed our going over with them the next day we very readily agreed to it. I thought it a peculiar piece of good fortune having an opportunity of seeing a number of the most respectable of these people collected together. We reached the spot before the Council was met, and as we went to it pass'd several of the Chiefs at their toilets. They sat upon the ground with the most profound gravity, dressing themselves by a small Looking-glass, for they are very exact in fixing on their ornaments, and not a little whimsical. I am told that one of these fellows will be an hour or two painting his face and when anyone else would think it sufficiently horrible some new conceit will strike him; he will rub it all off and begin again. The women dress with more simplicity, at least all I have seen, but at this meeting there were not many of the fair sex, only some old Squaws who sat in Council, and a few young ones to dress their provisions; for these great men, like those of our world, like to regale themselves with a good dinner after spending their lungs for the good of their country. Some women we saw employed in taking small Fry out of the River in a Basket. A gentn. of our party took the Basket from one of them, and attempted to take the Fish as she did, but failing, they laughed so heartily at his want of dexterity. One young Squaw sat in a tent weaving a kind of worsted garters intermixed with Beads. I suppose she was a Lady of distinction, for her ears were bored in four different places with earrings in them all. She would not speak English but seem'd to understand what we said to her. A gentn. introduced Mrs. P. and me to her as White Squaws, begging she would go on with her work as we wish'd to see how it was done. She comply'd immediately with great dignity, taking no more notice of us than if we were Posts, a proof of her good breeding. We then went up a steep Bank to a very beautiful spot; the tall Trees were in full leaf and

the ground was cover'd with wild flowers. We were seated on a Log in the centre where we could see all that pass'd.

"Upwards of 200 Chiefs soon assembled and seated in proper order. They were the delegates of Six Nations, Each Tribe formed a Circle under the shade of a Tree, their faces towards each other; they never changed their places but sat or lay on the grass as they liked. The Speaker of each Tribe stood with his back against the tree. The old women walk'd one by one with great solemnity and seated themselves behind the men. They were wholly cover'd with their blankets and sought not by the effect of ornaments either to attract or frighten the other sex, for I cannot determine whether the men mean to make themselves charming or horrible by the pains they take with their persons. On seeing this respectable band of Matrons I was struck with the different opinions of mankind, in England, when a man grows infirm and his talents are obscured by age, the Wits decide upon his character by calling him "an old woman", on the banks of Lake Erie a woman becomes respectable as she grows old, and I suppose the best compliment you can pay a young Hero is saying he is *as wise as an old woman*, a good trait of savage understanding. These ladies preserve a modest silence in the debates (I fear they are not like the women of other Countries) but nothing is determined without their advice and approbation. I was very much struck with the figures of these Indians as they approach'd us. They are remarkably tall and finely made and walk with a degree of grace and dignity that you can have no idea of. I declare our Beaus look'd quite insignificant by them. One man call'd to mind some of Homer's finest heroes. One of the gentlemen told me he was a chief of great distinction, but he spoke English, and if I pleased he should be introduced to me. I had some curiosity to see how a Chief of the Six Nations would pay his Compliments, but little expected the elegance with which he address'd me. The Prince of Wales does not bow with more grace than Captain David; he spoke English with propriety and return'd all the compliments that were paid him with ease and politeness. As he was not only the handsomest but best drest man I saw, I will endeavor to describe him. His person is tall and fine as it is possible to imagine, his features regular and handsome, with a countenance of much softness, his complexion not disagreeably dark, and I really believe he washes his face, as it appear'd perfectly clean without paint. His hair was all shaved off except a little on the top of his head to fasten his ornaments to; the

head and ears painted a bright glowing red; round his features was fastened a fillet of highly polished and ornamented silver; from the left Temple hung two long straps of black velvet, covered with silver, beads and broches; on the top of his head was fixed a long white Fox-tail feather, which bow'd to the wind as did a black one in each ear; a pair of immense ear-rings that hung below his shoulders completed his head-dress which I assure you was not unbecoming, tho' I must confess, somewhat fantastical. His dress was a shirt of color'd calico, the neck and shoulders cover'd with silver broches, placed so thick as to have the appearance of a very rich net; his sleeves much like those that Ladies wore when I left England, fastened about the Arm with a broad bracelet of silver, highly polish'd and engraved with the Arms of England; four smaller bracelets of the same kind about his wrists and arms; round his waist was fixed a large Scarf of a very dark colored stuff lined with scarlet, which fell almost to his knees. One part of it he generally drew over his left arm, which had a very graceful effect when he moved; his legs were covered with blue cloth made to fit neatly with an ornamental garter bound below the knee. I know not what kind of a Being your imagination will represent to you, but I sincerely declare that all together, Capt'n. David made the finest appearance I ever saw in my life. Do not suppose they were all dress'd in the same taste; their clothes are not all cut to the same pattern like the Beaus of England, every Indian dresses according to his own fancy, and you see no two alike; their faces are differently painted; some of them wear their hair cut in a strange manner; others shave it entirely off. One old man diverted me extremely;¹⁸ he was drest in a Scarlet Coat, richly embroider'd, that must have been made at least half a century, with a waist-coat of the same that reach'd half way down his thighs; no Shirt or Breeches, but blue cloth Stockings. As he strolled about more than the rest, I conclude he was particularly pleased with himself. They told me he was a Chief of distinction. We only staid to hear two speakers. They spoke with great gravity and no action, making frequently long pauses for a hum of applause. Lord Edward, Mr. Brisbane and Mr. Meredyth remained with them all night and were entertained with Dancing, an amusement not calculated for women to see. We were detained several days in Niagara by a contrary wind. On the 4th of June, when we were drinking the King's health, like good and loyal subjects, the wind changed, and we were hurried on board. We were better

accommodated than when we cross'd Lake Ontario, for the weather was so fine that the gentn. all slept upon deck. Lake Erie is 280 miles over. We were five days on our passage. The River Detroit divides Lake Erie from Lake Sinclair, which is again divided by a small river from Lake Huron. The Head of Lake Erie and the entrance into the River Detroit is uncommonly beautiful. Whilst we were sailing up the river a perverse Storm of rain and thunder drove us all into the Cabin and gave us a thorough wetting afterwards when we went on shore.

"The Fort¹⁹ lies about half way up the River, which is 18 Miles in length. In drawing the lines between the British and American possessions the Fort was left within their lines. A new Town is now to be built on the other side of the river where the Courts are held,²⁰ and where my Brother must of course reside. As soon as our vessel anchored several gentlemen came on board; they had agreed upon a House for us, till my Brother could meet with one that would suit him. So we found ourselves at home immediately. We were several weeks at the Fort which gave us an opportunity of making a little acquaintance with the inhabitants. The Ladies visited us in full dress tho' the weather was boiling hot. What do you think of walking about when the Thermometer is above 90? It was as high as 96 the morning we were returning our visits. Mrs. P. and I spent the chief part of our time in our chamber with no other covering than a Slip and under petticoat. We found all the people extremely civil and obliging. In point of society we could not expect much; it depends altogether on the Military, an agreeable Regiment makes the place gay. The 65th which we found there on our arrival was a Corps that would improve almost any Society. The loss of it has made the place extremely flat and sets the present Regt in a disadvantageous light, which it cannot bear. While we staid in the Fort several parties were made for us, one very agreeable one by the 65th, to an Island a little way up the River.²¹ Our party was divided into five boats, one held the music: in each of the others were two Ladies and as many gentlemen as it could hold. Lord Edward and his friend arrived just time enough to join us. They went round the Lake by land to see some Indian settlements, and were highly pleased with their jaunt. Lord Edwd. speaks in raptures of the Indian hospitality. He told me one instance of it which is so refined that it would reflect honor on the most polish'd people. By some means or other the gentlemen lost their provisions and were

entirely without Bread in a place where they could get none. Some Indians travelling with them had one loaf which they offer'd his Ldship, but he could not accept it. The Indians gave them to understand that they were used to do without it and so it was of less consequence to them; the gentlemen still refused. The Indians then disappear'd but left the loaf of bread in the road where the travellers must pass and were seen no more. Our party at the Island proved very pleasant, which those kind of parties seldom do; the day was fine, the company cheerful and the Band delightful. We walk'd some time in a shady part of the Island, then were led to a Bower where the Table was spread for dinner. Everything here is on a grand scale; do not suppose we dined in a little English arbour; this was made of Forest Trees; they grew in a Circle and it was closed by filling up the spaces with small Trees and Bushes, which, being fresh cut, you could not see where they were put together and the Bower was the whole height of the Trees, tho' closed quite to the top. The Band was placed without and play'd while we were at Dinner. We were hurried home in the evening by the appearance of a Thunder Storm. It was the most beautiful sight I ever remember to have seen. The Clouds were collected about the setting sun and the forked Lightning was darting in a thousand directions from it. You can form no Idea from anything you have seen of what the Lightning is in this Country; these Lakes, I believe, are the nurseries of Thunder-Storms, what you see are only stragglers that lose their strength before they reach you. I had the pleasure of being on the Water in one and getting very completely wet. My Clothes were so heavy when I got out of the boat, I could scarcely walk. We were a very large company going up on what is commonly called a party of pleasure. Most of the Ladies were wet as myself. We could get no dry clothes so were obliged to get our own dried as well as we could. A pretty set of fogires we were when we met to dance, which, on those occasions, is customary before dinner. I had resolved against it for the day was very warm, the party large and the room small. I was prevail'd upon to alter my mind by their assuring me that exercise would prevent my feeling any ill effects from my wetting, and I found it so.²²

CHAPTER IX.

DETROIT

DETROIT had been in existence about a century—the Fort Gratiot built in 1686 had been abandoned, but the Fort established in 1701 by Cadillac on what is now Jefferson Avenue had been kept up, and the adjoining country was partially settled. When Major Rogers took over the Western country for the British at the conquest in 1760, the population of Detroit and its neighbourhood was 1000, the settlement running along the river several miles.

Detroit was in 1775 definitely and formally annexed to the Province of Quebec with a Commandant wholly under the control of the Governor General: the Commandant however was for some time generally called the Lieutenant Governor.

The population of Detroit and its neighbourhood was about 4000 when Powell arrived in 1789,¹ the farms extending along the river above and below the fort of both sides of the River while there was a small settlement at the present Amherstburg.

The business was almost wholly fur trading which was largely in the hands of the English speaking (generally Scotch) merchants, there being but one French fur trader.² The population, however, was largely French, the farmers almost wholly so;³ and they were with very few exceptions wholly illiterate.⁴

Practically all the litigation was to come from the English population—the *habitants* settled their disputes amongst themselves.

For a time the Governor of Detroit had assumed to appoint Judges and Justices of the Peace, but when Governor Hamilton and his Judge Dejean were, in 1778, indicted by the Grand Jury at Montreal for causing a man to be hanged for larceny, the practice came to an end.⁵ The great distance from Montreal causing delay in the determination of disputes, a Board of Arbitrators was formed by the merchants with some success: but William Robertson could say in 1788 “there have been few instances since the conquest of any law being administered”: and “as to the administration of criminal justice, none has been administered within the District since my residence” of six years.⁶

The Post of Michilimackinac was less important, but the state of affairs generally was there much the same as at Detroit: it was accordingly provided by Ordinance that the Governor might fix sessions of Circuit Courts of Civil Jurisdiction in the "northern part of the District of Hesse."⁷

It was high time for a court to be established in Detroit. The whole District was very much under the control of the Military, Naval and Indian Departments at too great a distance from headquarters to be efficiently controlled; and gross abuses were all too common. Licences to trade with the Indians could only be had of the Commandant, the trade was becoming a monopoly in the hands of a few particular friends of his, and "it happened by degrees to be discovered that none but those who bought their goods of them were perfectly loyal or good subjects."⁸

A Land Board was also created under whose authority purchases were to be made by the Indian Agent from the Indians for the double purpose of removing all difficulties in the settlement of waste lands created by individual claims of purchase or gift from the Indians, and of preventing the gross impositions very commonly practised upon the Indians by white men who obtained large grants of land for a few trinkets and kegs of rum from the unfortunate aborigines whom they had first made drunk. In this way large fortunes had been made, the Indian grantees selling valuable property for a large price which they had bought for a small sum. Powell was made a Member of this Board: and from its beginning, August 7, 1789, until its end in October 1792, his was the guiding hand, his, the ruling mind.

The Court of Common Pleas of which he was the First and only Justice had unlimited Civil jurisdiction, including much equitable jurisdiction: but on the criminal side he could only commit for trial like any other Justice of the Peace. While the law provided that certain actions should be tried by a jury at the option of either party, there was no instance in his Court where a jury was demanded, all cases of whatever nature were tried by Powell himself without a jury and without colleagues. The practice was very simple and not unlike that in one of our Ontario Division Courts or the English County Courts.⁹ The Court sat at L'Assomption (now Sandwich) across the river from Detroit.¹⁰ While there is much of great interest to the lawyer—especially to the student of legal history—there is nothing of such general importance in the litigation as to call for remark here.¹¹

But it was not long before the Judge and Member of the Land Board came into collision with the autocratic officers. In Court¹² the Judge necessarily rejected all Indian titles when produced, in decision of points in controversy. The Royal Proclamation of 1763 had granted to Indians "for the present" as hunting grounds certain parts of the country (of course the King is in our law, owner of all conquered lands) and had provided that lands to be bought from them must be bought on behalf of the Crown by the Governor and not by private individuals—consequently unless an "Indian grant" was followed by a grant from the Crown, it was invalid.¹³ On the Land Board to carry into effect the instructions of the Governor it was necessary to antagonize the Indian Department which had assumed to deal with the lands of the Indians.

Powell became very unpopular with the official set who made their resentment felt. Not satisfied with showing their disfavour, some of them stirred up the Indians. This was very easy; the bands of Indians were accustomed to receive guns and ammunition, gay blankets, beads and other trinkets, and unlimited rum for deeds signed by their chiefs with their totem mark: all this source of revenue and of the dearly loved fire-water was suddenly dried up and that by the act of one man, a newcomer, previously unknown to them, and who cared nothing for the "customs of the country."

Threats of vengeance were made and repeated: Powell received apparently credible information that he was to be killed by a named Indian chief: Powell's wife and family were waylaid from time to time by painted savages who frightened them with dire threats: and, at length, the danger became so great that he determined to send Mrs. Powell and his family to England. That thereby the children would have the opportunity of obtaining an education was an additional inducement.

They left Detroit in October, 1791, travelling by way of New York and reached England the following year¹⁴—they were soon joined by Powell himself, who was forced to leave Detroit for the time being by a plot of the most dastardly character.

The old stories of disloyalty to the Crown were brought up time and again to discredit him: at length the malice of his enemies went to still greater lengths.

General St. Clair suffered a terrible defeat by the Miamis, November 4, 1791: he was the Governor for the United States of the Territory, and after General Harman's defeat in 1790

near the present town of Chillicothe, he became, in 1791, Commander of the troops in war against the Miami Indians. He was surprised and his force cut to pieces near the Miami villages, and his cannon and camp with much official and other correspondence were taken—although his command was composed of 1500 regulars and 800 militia and the Miamis had only 2000 all told, his force was cut to pieces and a horrible massacre followed. A young American Officer from Maryland had been saved from the slaughter and was under the protection of the Officer Commanding at Detroit; he, being apprehensive of some insult to him from the Indians who frequently visited the Fort and became intoxicated, requested Powell to harbour him until the opening of navigation; and this young prisoner's residence at Powell's country house gave some miscreant an opportunity of bringing Powell's loyalty in question—Powell gives the following account of the disgraceful plot:

"A letter addressed to Mr Knox, Secretary at War at Philadelphia in close imitation of Mr Powell's writing and with references which appeared incontrovertibly pointed to him, was clandestinely conveyed into the Quarters of a Military Officer, was communicated to all the Departments and to the indian Villages. It was of a nature to rouse the Indignation of All Parties against the writer. It acknowledged an habitual traitorous Correspondence with the Enemy, invited their approach, described Troops, deprecated the character and persons of their Commanders and officers, and marked the whole indian Department as bloodthirsty savages worse than indians themselves, and finally instructed how to destroy the Tribes without risque by infecting the Indian Prisoners amongst the Americans with the Smallpox, and sending them to carry the infection among the Tribes. As this contagious disease takes the character of Plague when it reigns among the Indians and is more fatal than any Plague recorded in history, it may be well conceived what Effect such a Complication of wickedness must have, not only on the Indians themselves but all classes who could give it credit and various Modes were adopted to enforce belief."¹⁵

The forgery was so well executed that when shown to Powell by the officer who found it in his room, Powell at once and without reading it, acknowledged it to be in his handwriting. When he discovered the contents, he indignantly repudiated the authorship: but such pains were taken to circulate the contents of the letter and to induce belief in his treachery that his life became unsafe. He got possession of

the letter and with it made his way to Quebec. Reports were industriously circulated through the Province and the United States that the indignant populace had executed summary vengeance and hanged him without trial: many such statements appeared in the newspapers of the United States.¹⁶

Before the time of his arriving at Quebec, Lieutenant Colonel John Graves Simcoe, the Lieutenant Governor of the New Province of Upper Canada, had arrived at that City where he remained for seven months before going to his Province. Powell continues his narrative:

"The result was that, by the advice of the Commander of the Troops and Ships, Mr. P. quitted his station and proceeded to Quebec where He met Colonel Simcoe, the lieut Governor of Upper Canada, now divided from that part of the Province of Quebec to be called in future, Lower Canada. Upon the first introduction of Mr. P. to the Lt. Governor, that Gentleman congratulated himself upon having discovered the Parties to the wicked forgery, who had betrayed themselves in a Communication upon that Subject to Col. Simcoe and sent one of their consorts to give him further Details. Mr. P. had the further Consolation of receiving the handsomest Testimony from the Commander of the Forces, Sir Alured Clark, and from Prince Edward¹⁷ (since Duke of Kent). Thus there was wanted no better Evidence of the meritorious Conduct observed by him at Detroit, than that the most inveterate Enemies (as those who got up the forgery appeared to be) could find sufficient to form a probable charge upon and had been driven to absurdities which condemned themselves."

Simcoe informed Powell that the persons responsible for this villainous libel were two officers who had gone with him from Montreal.¹⁸

This is the true story of occurrences which were misrepresented both at the time and afterwards.

CHAPTER X

THE PROVINCE OF UPPER CANADA

MATTERS in the Province of Quebec did not quiet down after the failure of Powell's Petition of 1783: there was continual quarreling between the Old and the New Subjects as to the law which should be in force. This was very greatly increased when after the Peace of 1783, the upper country began to be filled with Loyalists from the South—these demanded the laws to which they had been accustomed. At length it was decided to form two Provinces, and to allow each Province to decide for itself its own law—the well known Canada or Constitutional Act of 1791 was passed and by the beginning of 1792 there were two Provinces where one had been before—the Province of Upper Canada to the west, and the Province of Lower Canada to the east of the line which Dorchester had in 1788 selected as the Eastern boundary of the new District of Lunenburg.¹

By this Act there were to be two Houses in the Legislature of each Province—the Legislative Assembly elected by the people, and the Legislative Council appointed by the Crown.

Powell had been recommended by Dorchester as a member of both the Legislative and the Executive Council and by Sir John Johnson the Indian Superintendent (who expected himself to be Lieutenant Governor) for the Legislative Council—Powell expected and had a right to expect that he would be appointed and the omission of his name has never been fully explained.² It is possible that Haldimand, who detested him, had something to do with it. Simcoe could give no better reason than that his name was overlooked through "mere forgetfulness and oversight": but Simcoe himself detested Dorchester and Dorchester's patronage of Powell was enough to damn him in Simcoe's eyes. Powell says:

"Col. Simcoe was conscious that his animosity³ to Lord Dorchester had induced a mistrust of and disinclination towards me which had destroyed all benefits that nobleman had in view for me; yet he had the Candour to admit that the obvious forgery was the work of a base enemy (known to him), and that it only operated as evidence that no real Cause of Complaint existed against me when resort to such

preposterous and self-obvious falsehood was had by my Enemies."

"A Sort of Apology was offered by him for the entire omission of my name either in his Lists of Counsellors which, it was true, had been at the head of both in those transmitted by Lord Dorchester; but the nature of this apology was adding Insult to Injury so that I dropped all thoughts of further Distinction in the New Province or its Institutions."

Disappointed as he was in not being of either Council, he felt still more his being passed over for the Chief Justiceship of the Province, which went to William Osgoode:⁴ he concealed his disappointment and accompanied the Governor and his Civil Staff to Kingston. There the Governor's Commissions were read and he and his Executive Council were sworn into office on the arrival of a quorum.

Powell had received a Commission of Oyer and Terminer and General Gaol Delivery for the District of Mecklenburg enabling him to hold the Court of Criminal Assizes at Kingston,⁵ but this was under the old régime; he had no Commission from the new Governor and there was no Proclamation validating the former Commission. Nor could Simcoe then legally issue such a Commission; his Instructions required him to take the oaths before the Members of the Executive Council. Four had been named, Osgoode, Robertson, Grant and Russell, and only Grant was in the country. There could, therefore, be no quorum of the Executive Council on Simcoe's arrival at Kingston—the Common Law requiring at least half of the number to be present. Powell, it was said at the time, was quite ready to overlook the irregularity and go on and try the prisoners. Fortunately this was not necessary: the Chief Justice arrived at Kingston with the Attorney General, John White: after the Lieutenant Governor and his Council had been sworn in, a Commission of Oyer and Terminer and General Gaol Delivery was issued to Osgoode and he presided in the Criminal Assizes,⁶ Powell returned to his post at Detroit and took up again his judicial work: but he found that his wife, his father, and his whole family connection in England were alarmed by the reports concerning him in the American papers which had been copied into the English papers: and he asked for and obtained leave of absence to go to England.⁷

He sat in his Court at L'Assomption, September 5, 1792—he does not seem to have taken his seat on the Land Board after he had left Detroit in 1791—and went to Quebec where he caught the Fall fleet and rejoined his wife in England.

Fortunately, Dorchester was in England at the time and had reassured the anxious friends concerning the atrocious stories, but Powell was none the less eagerly awaited and warmly received.

Powell is singularly reticent as to his movements on this visit to England: it is, however, certain that he attended the office of the Secretary of State, asked for an enquiry into the charges made against him,⁸ and urged his claims to advancement. It is also certain that he received assurances that "his name was clear" with the Secretary, and that there was no obstacle to his being appointed to the Chief Justiceship in case of a vacancy if recommended by the Lieutenant Governor. It would be going too far to call this assurance a promise, but Powell had a right to expect, and did expect the appointment. From contemporary letters, it is clear that he sought the assistance of Mr. (afterwards Sir) William Grant, member of Parliament for Shrewsbury, and afterwards Master of the Rolls.⁹

Leaving three sons behind to be educated, Powell with his wife returned by way of New York where they remained for a time with her brother, George W. Murray.¹⁰ Coming to Detroit, he resumed his judicial duties and sat regularly from September 16, 1793, until the Court was abolished. During his residence in Detroit, he received a number of Commissions of Oyer and Terminer and General Gaol Delivery for his own and other Districts.

The time had come for a change in the Judicial system and its assimilation to that of England. Colonel John Graves Simcoe, the first Lieutenant Governor of Upper Canada, was English to the core—he loved and admired everything English in Church and State, law, custom, and habits—he would have gladly brought into operation the curious provision of the Canada Act for a hereditary Legislative Council, had he found any in the Province worthy of the honour of founding a noble family. He took an active part in the legislation whereby the English law was introduced in civil cases and all questions of fact were directed to be tried by a jury.¹²

The system of Courts for Civil Justice in Upper Canada was wholly un-English: each District had its own separate Court and these had no connection with one another. In England it is true there were local Courts but the Superior Courts were all centralized at Westminster—there they all sat *en Banc*, there they had their offices, and there the records of pleadings, judgments, etc., were all made up, and kept of record.

Simcoe had an able assistant in each of the Houses of Parliament—the Chief Justice, William Osgoode, in the Legislative Council, and the Attorney General, John White, in the Legislative Assembly. Osgoode drew up our first Judicature Act and it was decided to bring the Bill first in the Upper House. It was introduced, June 11, 1794, and at once excited strong opposition—the first “formal and regular opposition in the Upper House.” Of the five Legislative Councillors in attendance, three, the Chief Justice, Peter Russell (the Receiver General) and James Baby¹³ were Executive Councillors and of course supported the Bill: the other two, Richard Cartwright of Kingston, and Robert Hamilton of Queenston, were Judges of the Court of Common Pleas for their respective Districts¹⁴—they were strongly opposed to the change.

The first reading of the Bill was set for Monday, June 16: and a battle royal was expected. The House of Assembly adjourned to hear the debate—Cartwright moved the three months’ hoist, and Hamilton seconded the motion. The arguments against the Bill were founded on the inexpediency of such a measure in the existing state of the Province while the population was scattered and the communication uncertain—for the Bill it was urged that the public expected it and that it brought the Province abreast of the other British possessions. The motion was defeated. After being in Committee of the Whole, the Bill was brought in for its final reading, June 23, when Cartwright moved the six months’ hoist, seconded by Hamilton. Aeneas Shaw had in the meantime become a member of the Council, and John Munro, another Councillor, had come up, and taken his seat—the division was then 6 to 2. When the Bill was under consideration in the Legislative Council its opponents urged the sufficiency of the existing Courts; they provoked charges by some of those affected by the judgments of certain of the Courts presided over by laymen that they had decided against law. These charges were fully justified and produced a strong feeling against these Courts: and members of the Assembly were not slow in urging that the country should have Courts “composed of persons regularly bred to the profession of the law.” Cartwright and Hamilton entered a dignified dissent in the Journals of the Council;¹⁵ but they were in a hopeless minority in the Parliament and in the country. The House of Assembly was with difficulty restrained from “reading the Bill a first, second and third time on the day they received it”—they made one amendment only by restoring the traditional names of the Terms of Court.¹⁶

This Act long known as the "King's Bench Act"¹⁷ created a Court of King's Bench for the Province of Upper Canada: it repealed the Ordinances under which the Courts of Common Pleas in the Province were constituted and directed that all actions begun in these Courts should be continued in the new Court of King's Bench and that all records of these Courts should be transmitted to the new Court.

The Court of King's Bench presided over by the Chief Justice of the Province and two puisne justices was to be holden at the place where the Governor should usually reside: it was to have four Terms as in England. The actions were to begin by writ of *capias ad respondendum* stating the form of action and the writ must have a declaration annexed.¹⁸ These writs must be sued out of the Court at the Capital, which necessitated a trip or a letter to that place from perhaps the ends of the Province instead of going to a nearby place in the District. All the formalities of a lawsuit in England must be observed with their technicalities and pit-falls, delays and expense. "Assize Courts" as we call them would be held from time to time as required in the various Districts: these Courts dealt with records of pleadings made up in and returned to the Central office of the Court of King's Bench.

The opponents of the Bill were wholly justified in the complaint that the proposed system while "proper in England which . . . in point of size is hardly equal to the smallest of our Districts, where the communication is easy and expeditious and where the City of London . . . furnishes the greatest number of cases yet in this province with a thin population scattered over so immense an extent of country where the mass of the population, small as it is, is situated in the Districts most remote from the place where the Court is to be held, divided by inland seas and large tracts of waste lands of from two to three hundred miles in extent, shut off from all communication or intercourse for nearly four months of the year, without professional men or the prospect of sufficient business to support them, such an arrangement from the expense, delay, and embarrassment that must necessarily attend it appears to us to highly to operate in many instances as a denial of justice."¹⁹

The Act also created a Court of Appeal composed of the Governor, the Chief Justice and two or more members of the Executive Council.

The Chief Justice, William Osgoode, had months before the passing of this Act applied for the appointment as Chief Jus-

tice of Lower Canada and he had received from England an official mandamus for such appointment: he was, however, induced by Simcoe to remain in Upper Canada and guide the Bill through the Parliament: but as soon as the Parliament rose, he at once left for Quebec, and was sworn in as Chief Justice of Lower Canada.²⁰ This left a vacancy in the Chief Justiceship of Upper Canada: Simcoe did not recommend Powell for the position: on the contrary he asked for the appointment of an English lawyer.²¹

But Powell had to be provided for and he was appointed a Puisne Judge of the Court of King's Bench—the first of a long line of lawyers to fill that position.²²

CHAPTER XI

EARLY DAYS AT THE CAPITAL

THE Court of King's Bench was required by its Statute to sit "in a place certain,¹ that is in the city, town or place where the governor or lieutenant governor shall usually reside." Simcoe resided at Navy Hall, Newark, and it was incumbent upon all the Judges of the Court to be in Newark at least during Term—Powell must then necessarily remove his residence from Detroit.

His family now consisted of his wife, four sons and three daughters; but some of the children were in England: he where the governor or lieutenant governor shall usually

In Hilary Term beginning, January 19, 1795, there was removed to the Niagara frontier and took up his home in the Township of Stamford, where in the following October was born his youngest child Thomas.²

Before his arrival, Simcoe had had an opportunity of advancing Powell—William Smith the Chief Justice of Lower Canada had died and Osgoode had applied for the vacant place. A Royal Warrant had issued early in the year, 1794, for his formal appointment to that position: but Simcoe desired him to remain in the Province until he had piloted the Judicature Bill through Parliament. Simcoe knew that Powell must be provided for but he did not want him as Chief Justice which would mean that he would be a member of the Legislative Council and—what was even more important—of the Executive Council. He wrote to the Under Secretary in June, 1794, "I shall feel an irreparable loss in Mr. Chief Justice Osgoode. I hope to God he will be replaced by an English lawyer."³

When the Judicature Act was passed, Osgoode went at once to the Lower Province where he received his Commission from Lord Dorchester, the Governor in Chief.⁴

Whether Powell applied to Simcoe does not appear—the probabilities are against it: but he did apply to the Home Administration. To his repeated application, there was no reply until finally a successor was appointed to Osgoode, an "English lawyer" in the person of John Elmsley in 1796. Powell was not in the least a toadeater with Simcoe or even conciliatory. One instance which was the cause of much gossip and amused comment at the time will suffice—Powell knew (as

everybody knew, Simcoe's long standing and constantly increasing grudge against Dorchester, but nevertheless when he removed from Detroit to Newark and when the Township at Niagara Falls had its name changed from Mount Dorchester to Stamford, he adopted the name Mount Dorchester for the name of his residence and dated his letters from Mount Dorchester.

The Statutory Term was approaching—the Court should sit—the Act was assented to July 7, Powell was commissioned July 9, and Trinity Term of the Court of King's Bench began the third Monday in July, i. e. July 21. But Osgoode had gone to Quebec, Powell had not arrived and Trinity Term passed without a session of the new Court. Powell arrived at Newark before the next Term, the Michaelmas Term, and he presided alone in Court the first day of Term, Monday, October 6; but there was no business and the Court was adjourned until the following Saturday. On this day three motions were disposed of—there had been now time for the process of the new Court to be employed and it had been employed in the first case to be decided—it will be thought no evil omen that in this the first case in the Court of King's Bench, the Court disregarded an irregularity and allowed the case to proceed.⁵

The other two cases were different—the former was to set aside an award by Arbitrators, the other for an assessment of damages in a case in the Court of Common Pleas at Niagara—the Act allowed all actions begun in the Courts of Common Pleas to be proceeded with in the new Court.

In Hilary Term beginning January 19, 1795, there was more business: the writs had begun to circulate somewhat extensively.

In the absence of a Chief Justice a difficulty arose—the Act provided that the Chief Justice of the Province together with two puisne Justices should preside in the Court—at the Common Law it requires at least one half the number of any body to make a quorum, consequently Powell thought that it required two Justices at least to constitute the Court. He so advised the Lieutenant Governor,⁶ but Simcoe was expecting daily to hear of the appointment of Osgoode's successor. Powell, however, insisted on having a colleague at least in form; and Peter Russell, the Receiver General, was given a Commission for the Hilary Term only: this was renewed from time to time until the arrival of John Elmsley, January, 1797, as successor to Osgoode. Powell and Russell conducted the Court for two years, generally both sitting but occasionally one or the other.

The whole burden of organizing the Court, establishing the practice, &c., fell on Powell—he was a lawyer and was versed in the practice of the English Courts; Peter Russell,⁷ Powell describes thus: “An assistant Judge commissioned each Term *pro hac vice* who had been bred to Physick and had served as a Secretary to the Commander-in-Chief during the Revolutionary War. This Gentleman was so little versed in Constitutional Law that he expressed his astonishment to find that a Jury consisted of even numbers . . . (and) could be of little aid on the Bench but to make one.”

Powell is wholly justified in his statement: “it fell to me to form and put into order a Court of Original Jurisdiction having the authority of the King’s Bench, Common Pleas and in matters concerning the King’s Revenue, of the Exchequer in Westminster Hall. This was no trifling task without the aid of a single lawyer, for the Att’y Gen’l sent out with the Chief Justice although called to the English Bar had no pretensions to that character. During the two years and a half I presided alone in this Court and in a Annual Circuit, delivered all the Gaols in the Province and tried all the Civil causes.” White, the Attorney General, was not a good lawyer, even if it had been proper for the Judge to ask the assistance of the Law Officer of the Crown: and Powell presided over all the Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery, i. e. the Civil and Criminal Assizes in the Province until the arrival of Elmsley.

He laid down the Rules of Practice for cases from the Courts of Common Pleas (this was of course temporary) and for arrest under a *capias ad respondendum*: and conducted the Court with a moderately elastic practice. To anticipate a little—when the new Chief Justice took his seat, he changed the practice, making it more rigid: this was done in the absence of Powell and the Legislature at its next Session enacted Powell’s rules.⁸

The state of titles to land in the Province was very unsatisfactory. Settlers were given a Location Ticket or Certificate of Location and in many cases, they entered upon the land and cleared and cultivated it—but often they did not receive a deed. From the increased value of lands by labour so long bestowed upon them, questions of right on devises and intestate succession by death were hourly multiplying and called for deeds to the landholder. One obstacle succeeded another until the third year of Simcoe’s Administration when there was produced from the Officers of the Crown the draft of a deed.

It did not appear to conform to the forms of the Canada Act, and some persons interested in the general success of the country, doubting the quality of any advice to be obtained in the Province, made a case for Counsel and received the opinion of William Grant, afterwards Master of the Rolls, of a character deservedly high in the estimation of His Majesty's Ministers and of his profession, and who was with reason supposed to have been consulted in framing the Statute.

By this opinion the settlers were alarmed with the truth that they had no security for their labours, that the Certificate of Location vested no estate and that the Deed as framed was void, so that property of near half a million pounds was utterly afloat and without any assurance that it would be subject to the disposition of those who had created it. The alarm from such a communication it was obvious could not too soon be silenced by an effectual grant.

The ultimate cause of this unsatisfactory state of affairs was the shamefully inadequate remuneration given to the Officers of the Crown in the Province. At this time and for many years thereafter they were not only appointed but also paid by the Home Administration who seemed to have little conception of the needs of the servants of the Crown in the distant Colony. With the exception of the Lieutenant Governor with two thousand pounds and perhaps the Chief Justice with eleven hundred pounds, all the officers were paid a salary too small for the support in decency of themselves and their families. Simcoe complained that an Executive Councillor received less than an ordinary day labourer: and he and his successors frequently begged for increased salary for their subordinates. To supplement the small stipend, the utterly vicious system of fees was adopted—Attorney General, Secretary of the Province, Clerk of the Executive Council, all were to receive fees for every patent of land and for a time the Lieutenant Governor also had his fee.

Small as these fees were when calculated by acreage, they were sufficient to prevent many of the settlers from applying for a Patent as long as possible—and many relied upon their Location Ticket—there are instances of record of law suits over land held under Location Tickets.

While the United Empire Loyalists were entitled to land without payment of fees they found difficulty in obtaining their Patents—they soon saw that those who would pay for their Patents—many of them land speculators—were given the preference and the Loyalist had to wait long before he was

attended to. This trouble increased with time, and at length became an open and grave scandal: but already it had become of some importance. For one reason or other, most of the land in actual cultivation was held under Location Tickets: and it is no wonder that the country was alarmed by Grant's opinion.

Powell, it will be remembered, had been employed by Lord Dorchester in similar troubles before his elevation to the Bench, and he was now applied to for his opinion as to the proper remedy. He went into the matter very carefully with some of the Councillors and explained his views of the proper course to pursue—a course which seems to us a century and a quarter after the event to be an eminently reasonable and fair one.⁹ In a paper prepared for the authorities at the time he supports his proposal with admirable reasoning and cogency.¹⁰

The Executive Council rejected this proposal deeming it an encroachment on the Royal Prerogative and their own rights: Powell took the somewhat bold course of laying his views before the Duke of Portland,¹¹ but without result.

He had not ceased to apply for the Chief Justiceship—his last application was in March, 1796; and in July, with bitterness and mortification, he wrote that the appointment of Elmsley was an answer to his letter—the only answer he ever received.¹²

When Powell found that he was not to succeed Osgoode he determined to go to England again and represent his case to the Home Administration—he had no hope of favour from Simcoe. He left Newark in January, 1797, and was in England during the winter: he applied for compensation for being obliged to remove from Detroit to Niagara and also for increased remuneration for having done the work of a Chief Justice as well as his own for more than two years. He was allowed one-half of the Chief Justice's salary of eleven hundred pounds which added to his own of five hundred pounds made his income for some two and a half years one thousand and fifty pounds sterling per annum. At the same time, he received an assurance that his salary would be increased to seven hundred and fifty pounds per annum and—what was still better—an assurance that there was no existing exception to his succeeding Elmsley as Chief Justice if and when his name should be presented by the Lieutenant Governor. Simcoe had left the Province, and Powell's friend and colleague, Peter Russell, had succeeded as Administrator of the Government—Powell confidently counted on his assistance in case of a vacancy in the Chief Justiceship.

He returned to Upper Canada and to his work as a Justice of the King's Bench.¹³ He found that the Legislature had adopted an entirely different method of dealing with the land question, and had given power to the Governor to appoint three or more Commissioners for each District of which the Chief Justice or one of the Puisne Justices of the King's Bench should be one, to deal with all claims for grants of lands. The Commissioners were in dealing with all claims "to be guided by the real justice and good conscience of the case without regard to legal forms and solemnities", and should direct themselves by the best evidence they could procure, whether legal evidence or not: an appeal was allowed to the Executive Council.¹⁴

Before Powell's return, the Chief Justice had headed one of these Boards and had decided a number of claims: but he was of the Executive Council and must keep within call of the Governor, consequently it was upon Powell that most of the work must fall. He applied to the Chief Justice for the principles on which he had proceeded in the adjudication of claims; but he had not kept the evidence and could not give Powell any rule of guidance and consequently he had to proceed upon his own opinion.

The Act was for the relief of "Persons . . . possessed of lands . . . by authority of His Majesty's Government": Powell decided that the claimant should prove first of all that the lands were held by authority of the Crown. This was indeed in accordance with a literal reading of the Act, but while it agreed in the letter it violated the spirit of the Act: and Powell was compelled by the Executive Council to adopt a more elastic construction: thereafter he dealt with over two thousand claims, following his own view of "real justice and good conscience" and without a single appeal from his decisions.

Long before he had completed these services his friend, Peter Russell, had been relieved from the position of Administrator of the Government by the arrival in the capacity of Lieutenant Governor of Peter Hunter whom Powell had met at Niagara on his way to Detroit in 1789, Hunter then a Lieutenant Colonel had now become a General; he arrived and took up the reins of power in August, 1799.

While Russell had urged an increase of salary for Powell, he had had no opportunity to claim for him the Chief Justice-ship or the position of Executive Councillor.

During the regime of Russell, the change of the Capital of the Province from Newark to York (formerly, as now, Toronto)

projected by Simcoe as a temporary measure—for he had selected London at the Forks of the La Tranche or Thames as the provincial Capital—was effected. The usual residence of the Lieutenant Governor was consequently to be at York and unless that Act should be amended, the Court of King's Bench must also be at York. The Chief Justice and most of the permanent officials objected strongly to the removal, urging the expense of removal, the want of accommodation at York, the difficulty of obtaining jurymen, &c., &c., as reasons against the change, but in vain.

Powell moved with the rest, after a time gave up Mount Dorchester, and came to York where he was soon to establish a *Caer Howell* on Park Lot No. 12 which was granted to him as compensation for the expense of removal to York—the well known property in Toronto west of University Avenue and south of College Street.

Before leaving this part of his life a little known circumstance may be referred to. In 1794 a young Indian, Brant's son, had killed a white man in the Indian Village. Powell was asked to see Brant about the matter: Brant said that while personally he would recommend his young men to submit to the King's laws he doubted the prudence of an attempt to enforce them upon the Indians in their own territory—he added significantly that in case of need it would be seen who had the most interest with the Militia and that the Government would not be able to make them act against him. Powell expressed the opinion that the Indian tribes were entirely independent in their villages, and as the murdered man was a vagabond who preferred their society to that of his own people, the claim for the delivery of the Indian murderer should not be pressed—the matter was allowed to drop.¹⁵



CHAPTER XII

FIRST YEARS IN YORK

FOR many years the Court sat in a part of the Government Building used also for a Parliament Chamber—the Records of its proceedings are extant and are now in the Ontario Archives.¹

Even during Simcoe's time the work of the Court had increased so much that it was plain that a third judge must be appointed. Simcoe thought that there was no one at the Colonial Bar competent to fill the position and wished for a member of the English Bar. When he heard of Elmsley's appointment, he declined to make a recommendation, leaving it to the incoming Chief Justice to do so: Elmsley gave the names of five English barristers (none of them of his own Inn), and of these the Home Administration selected Henry Allcock.² He was sworn in and took his seat the third day of Hilary Term, 1798, January 9, since which time there continued to be at least three judges in the Court so long as it lasted and in the King's Bench Division until that too was abolished.³ The Court sat regularly and generally with three members.

When General Peter Hunter arrived, Powell, remembering him as a past acquaintance from whom he had received marks of esteem, counted upon friendly treatment from him; along with other things, also his influence to procure the succession to the Chief Justiceship: but he was disappointed. He acquired the active ill-will of the new Lieutenant Governor by what would seem the exercise of a plain duty.

Hunter had been appointed on his military record—at that time in the Province there was an apparently ill founded apprehension of an invasion by the Spanish from New Mexico—he had distinguished himself by successful operations against the Caribs in St. Vincent: and he was suddenly called from his command in Ireland to take possession of the Government with the command of the troops in both Canadas.⁴

Hunter soon saw the absurdity of the fear of invasion;⁵ and the affairs of the Province proceeded as usual until it became necessary for Hunter to go to Quebec in his military capacity. He intended to be absent from the Province for some six months, and during his absence he proposed to carry on the Government of Upper Canada from Quebec by written

orders to a Committee of the Executive Council, whose orders were to be obeyed as if dictated by himself at their head in Upper Canada. Powell, who up to this time had been treated by him with cordiality, was consulted by the Governor as to the legality of such a proceeding: he felt it his duty to represent that, by the Governor's Commission, and the Royal Instructions, Hunter would have no civil authority when out of the Province: and that, on the instant of his leaving it, the Senior Executive Councillor must administer the Government in his name, and must be sworn to that effect. This advice was displeasing, and the Governor was understood to say that he had in his pocket the Duke of Portland's permission to administer the Government in the way he proposed, which Powell "was pleased to think unlawful." Powell's reply was that having no part in the Government but having the position of a Judge, he was not in other matters obliged to know where the Governor gave his orders from, but that all criminal commissions under which he was expected to act must bear date within the Province, and that he "did not suppose His Excellency would oppose a Duke." This uncourtier-like liberty cost Powell the good will of the Governor, and it was not only unpalatable, but fruitless, for the Governor left the Province without delay.⁶

This was not the only obstacle in Powell's way. One of the scandals of the early times of the Province was the grasping after fees which was practically the only way to make money out of office—Simcoe though less a sinner in this respect was not wholly free from blame; Russell was a notorious offender and Hunter was not far, if any, behind. The friendship of Hunter with Mr. Justice Allcock which seems not to be explicable on any public or known ground, is explained by Powell—Allcock, he says, showed Hunter how he could increase his income. Through the long delay in issuing land patents, arising from causes already alluded to, the harvest which might have been reaped by his predecessor remained for Hunter, who directed all the grants which were to be gratuitous to the grantee and for which half fees were to be paid by the Government, to be made out as rapidly as possible: he pressed on the Heir and Devisee Commission in its task of ascertaining what lands were still unclaimed or to whom the Patents should issue.

In the progress of this system, it was discovered that the small fee on the Patent was so unfairly divided that the portion of the Secretary (who bore the greater part of the burden) was so trifling as to defray not one-fourth of the charge out of

pocket; nevertheless His Excellency, who gained in proportion as the Secretary lost, compelled him to proceed in that ruinous course, and, moreover, actually compelled the clerks in the public offices to engross a certain number of Patents for the Secretary every week exclusive of the regular duties of their offices: and he subjected this service, like a military duty, to a weekly report, every Monday morning. This forced issue of Patents could not but bring it about that grants were made in many instances to parties having no title to the land; in many hundred instances, indeed, the grants were made in the names of persons deceased. The objectionable practice produced two effects—it put in the purse of General Hunter, a good deal of money, variously stated at from ten to thirty thousand pounds; while the duty of supplying the place of more effectual Patents devolved on his successors to be performed gratuitously.⁷

During Hunter's regime, there was an active movement for the creation of a Court of Chancery: Allcock expected to be put at the head of it and drew up a scheme for the proposed new Court—Powell applied for the position but the scheme came to an end as it met with the disapproval of the Home authorities early in 1802.⁸ While he says that he was the only Judge in Upper Canada who had practised in the Civil Law, he never had a chance of the appointment, unless Allcock should refuse it.

The Chief Justiceship became vacant by the appointment of Chief Justice Elmsley to succeed Osgoode as Chief Justice at Quebec. Powell blames Hunter for Allcock's succession to Elmsley: but it is almost if not quite certain that Allcock had been promised the Chief Justiceship in case of a vacancy, before he came to Canada.⁹

It does not appear that Hunter interfered in the appointment at all¹⁰—however that may be, in the Summer of 1802, Allcock was appointed to succeed Elmsley as Chief Justice of Upper Canada; and he took his seat on the first day of Michaelmas Term, November, 1802.

Hunter died unexpectedly after a short illness at Quebec, August, 1804: he was succeeded by Commodore Alexander Grant as Administrator of the Government: Grant was a close friend of Powell's.

Grant had been present at the Conquest of Quebec as a subaltern officer in a Highland Regiment; but, having been bred to the sea, was transferred to the Provincial Marine, and actually commanded that force upon the Lakes with the title of Commodore. A mere *locum tenens*, he put himself into the

hands of some who had been the advisers of his predecessors: and was by them led into some little difficulty with the Assembly by an application of the funds under their control without an appropriation for the purpose.

As this was the thè first occasion in Upper Canada of a clash between the representative of the Crown and the House of Assembly, it may be worth while to state the circumstances somewhat fully. While the Home Administration paid the Civil List of Upper Canada, their payroll covered only those appointed by that Administration: and when the Colony had been equipped with Houses of Parliament, there was no provision for the payment of the necessary expenses, clerks, ushers, stationery, &c. The Legislature in 1793 laid a duty on imported wines and imposed a fee on licence for a public house or for the retail sale of liquor: in 1794, a duty was laid on stills—these were modified from time to time; and the Parliament had other revenues.

The Lieutenant Governor was authorized to lay out one thousand pounds on opening and improving roads, making bridges, etc., but there was no authority to pay the printer, the usher of the King's Bench, etc. Hunter had used some of the Parliament's money for paying such items, and the House had not objected.

Grant naturally followed Hunter's example; and as soon as Parliament met there was an uproar. It is hard for us to understand the very great excitement which ensued, unless we remember that at that time the Province had a number of men who were disloyal to British connection—some had been United Irishmen, some were republicans, and these and some others made of the unwise but innocent act of the Administrator, a shameful violation of the rights of the people.

The House of Assembly made a formal Address to the Administrator stating that the "first and most constitutional privilege of the Commons had been violated" which was "more than painful" to them, that studious as they were "to abstain from stricture", they hoped that he would "more than sympathize in so extraordinary a circumstance"—they asked him to refund the £613.13.7 and to direct that no more moneys should be issued without the assent of Parliament.

Grant consulted Powell as to his course and Powell advised him to state frankly to the Commons that he had followed precedent in good faith, and that the money would be replaced. The Administrator did not act at once upon this advice in full, and, indeed, the Permanent Under Secretary, Edward

Cooke, characterized the advice as something which would justly expose any lawyer in Westminster Hall to disgrace: Grant simply told the Commons that he had followed precedent: and laid the whole matter before the Home Authorities: the result was that the new Lieutenant Governor Francis Gore on the opening of the next Parliament (1807) in his Address informed the Assembly that he had given instructions for the replacement of the money taken out of the Treasury without Parliamentary authority. This operated as a sedative; and Mr. Justice Thorpe who had succeeded William Weekes as the leader of the discontented faction could muster but one supporter in his opposition to a motion to waive the return of the money correspondingly paid out by Hunter without authority.¹¹

In the meantime, Allcock had become seriously indisposed and had received (1804) leave of absence to go to England, so that for more than a year Powell had to do all the Term work in his Court without assistance.¹²

Allcock did not return to the Upper Canada Court, but was appointed Chief Justice at Quebec in the Summer of 1806, being followed in this Province as Chief Justice by Thomas Scott, the Attorney General.¹³

In July, Powell received news which for a long time caused him to forget his dreams of promotion: his son, Jeremiah, was a prisoner in South America and condemned to an ignominious death.

CHAPTER XIII

THE EPISODE OF JEREMIAH POWELL

JEREMIAH POWELL was the fourth son, born in Boston, in 1784, and educated in part under his father's eye. He was taken to England by his mother in 1791; there he completed his education under the roof of her brother at Norwich; his father when he went to England to clear himself of the charge of treason, left him at school to qualify him for commerce but he was so roused by the military spirit of the nation that he had abandoned his studies in order to enroll himself in a volunteer corps. Then Powell endeavored with the assistance of his old friend and patron Lord Dorchester to place him in the Royal Military Academy at Woolwich to take his chance of obtaining a Commission in the Artillery or Engineers.¹ But these efforts failed and in 1801 he came to this Continent. The following year, he was placed by his father in the counting house of Lenox & Maitland in New York where he remained three years.

He then (1804) went to Hayti on a venture of his own, and there he entered into a new arrangement. His friend, R. B. Forbes, a member of the firm Grant, Forbes & Company, was at that time in Port au Prince; the Negro Governor-General, afterwards Emperor Dessalines, gave him such assurances of protection that he made up his mind to establish a house of commerce in the Island. He suggested to young Powell to take an interest in the scheme, and the result was that Jeremiah, who had expected to clear about \$3,000 by his private venture and to return at once to New York, was induced to form a partnership with one Windsor who had come out with him in the "Sampson" from New York. The new firm, Windsor & Powell, was to be a commission house at Port au Prince to sell goods consigned by them by Grant, Forbes & Co. Although both his father and mother strongly disapproved of the scheme (the father wrote him a sharp letter still extant and his mother hastened to New York to meet him when he was expected to return, intending to urge him to give up the West Indies altogether) there is nothing to indicate that he might not have been very successful in making money,

had it not been for circumstances for which he was not responsible and which he could not foresee or control.

A considerable proportion of the goods consigned to the new firm consisted of military ornaments, epaulets, sword-knots, lace, etc., all invoiced as gold. These to the amount of \$3,000 were sold to Dessalines, both vendors and purchaser believing them to be gold. Two days after the purchase the Governor-General left St. Marc where the sale took place, and upon his return six or eight weeks after, he refused to pay for the articles alleging them to be "false gold." The Collector of Customs at St. Marc, one Langlade, had bought the remainder of the "gold" ornaments; and he also refused payment for the same reason. The commission firm had the goods complained of tested and they turned out to be brass gilt; they therefore received back the goods from Langlade, but made another effort to get payment from Dessalines. The answer was a threat strongly implied if not expressed.²

Jeremiah Powell came to the American Continent in the spring of 1805; arriving in May, he went into the matter of the "gold" ornaments, and it turned out that they had been sold to Grant, Forbes & Co., for "sur-doré." He returned to Hayti in August, 1805, ridiculing the idea of personal danger, but taking the precaution of executing in the presence of his uncle, George Murray of New York, at that place, a conveyance of his land in Burford Township, Upper Canada to his mother and sisters.

Dessalines had become Emperor and had lost all self-control; naturally cruel and now armed with absolute power, he committed the horrible deeds which have condemned him to perpetual infamy. The young Canadian did not escape his memory, the innocent misrepresentation of the articles sold him was made a crime, and he did not hesitate to threaten death as the punishment for deceiving an autocrat.

Just at this juncture, on February 18, 1806, there arrived at Jacmel, a port on the south coast of Hayti, the ship *Leander* having on board Miranda and his expedition for Venezuela which had left New York more than a fortnight before.

Francisco Antonio Gabriel Miranda, generally known as Francisco de Miranda, was born in Venezuela, served for a time in the Spanish Army, but was suspected of treason; he lived in England for a period and received a pension from the British King. He expected assistance from Britain in severing Venezuela from Spain; and there can be no doubt that his aspirations were rather encouraged. He at length in 1805 after

living in England for seven years, left, and came to the United States.

It would seem that the Government of the United States was not wholly ignorant of his project, but took no part in it. He, through friends, procured the ship *Leander*, loaded it with military stores, induced a large number of men in New York to embark with him, concealing however, his object from most of them, and set sail for Jacmel in Santo Domingo in February, 1806, with the intention of freeing Venezuela from the Spanish yoke

The handsome young Canadian attracted the attention of Miranda, who represented (not without some foundation for the assertion) that Britain approved of his project. He, moreover, held out before the eyes of the young merchant an alluring prospect of profitable trade, when the South American Colony should be free. Threatened on the one hand by the black Emperor, flattered on the other by the hope of serving his country and the expectation of pecuniary advantage, it is not to be wondered at that the persuasion of Miranda proved effective—Powell joined his expedition and received a Commission as Major in the Revolutionary Forces.³

The expedition sailed from Jacmel, March 27, 1806, Miranda having acquired two small schooners in addition to the *Leander*. After remaining for a few days in the Island of Aruba, they set sail for Venezuela. The Spaniards had received warning of the proposed invasion, and were ready; when the "patriots" attempted to land near Porto Cavallo, April 28, two Spanish coast guard vessels attacked the schooners in which were Powell and some others, very inefficiently armed, Miranda, who with all his knight-errantry had a yellow streak, left his followers in the lurch, and fled with the larger ship *Leander* and so escaped.

The lot of those in the schooner was unhappy; after a gallant resistance they were all taken prisoners, bound and taken to Porto Cavallo. They were speedily tried and found guilty of piracy, rebellion and murder; ten were sentenced to death by hanging, and thirteen to ten years' imprisonment at Porto Rico, sixteen (or nineteen) for eight years at Boca Chica near Carthagena, and fifteen for ten years at Omoa in Nicaragua; three who were mere boys were reserved for the King's pleasure. Powell had had the presence of mind, when he saw capture was inevitable, to destroy his Commission; his youth and apparent subordinate position saved his life, and he was one of those sentenced to imprisonment at Omoa. Those sentenced

to death were hanged and beheaded the following day and their heads were exposed on poles. Powell and some others were sent to Boca Chica on their way to Omoa.

The news came to Mr. Justice Powell in July: Mr. George Murray wrote from New York to John Powell, the Judge's eldest son, at Niagara, who transmitted the news at once to his father in York. His narrative will show what steps he took and the result.

"In the year 1805, my fourth son who had passed three years in the Counting House of Messrs. Lenox and Maitland at New York, was induced to engage in an adventure to St. Domingo, as an Agent of several associates at New York who had contracted to furnish supplies to the black Emperor of Hayti. This step was so adverse to my opinion and to my comfort, that his Mother understanding that he was to pay a visit to N. York in the Spring, made Pretext of a visit to her Brother Mr. Geo. Murray, who had taken with him two of her daughters, and went to N. York during the winter accompanied by her eldest Daughter & Grand Daughter⁴ with the hope of prevailing upon her Son to relinquish the odious Speculations he was engaged in. Her letters during the Spring Months announced the daily Expectation of the young Man's return to N. York, but on the — of July 1806, I received a letter from Mr. Geo. Murray, ascertaining that his Nephew had embarked with Miranda, had been captured by the Spaniards in a landing from the Schooners & with all the other officers was condemned to death. That the publication of this Intelligence being official could no longer be kept from his Sister and as he apprehended a very serious effect upon her Health, conjured me to lose no Time, to meet her at N. York or on her return. I instantly applied for leave of absence & the next day embarked in the Toronto Yacht⁵ for Niagara, where I arranged my Circuit with my son⁶ who was Clerk of Assize & sailed for Kingston the same day. A short passage of 24 hours brought me to Kingston from whence on the 22d I crossed the St. Lawrence at the Grand Isle & engaged the owner of a travelling Tin waggon to take me to Utica. We travelled with tollerable expedition through this new Country and reached the Village of Utica on Saturday Evening the 26. Here I was delayed all Sunday and embarked in the Stage for Ballston Springs on the Monday Morning in Company with the then Mayor of York, Colonel Willet and his Lady. The second day we arrived at the Springs and there finding from my third son, Grant, the Physician of the Spring, that his

Mother was to leave New York that day in a Sloop for Albany, I proceeded to that City, and waited with the most painful anxiety six days before she arrived. She was accompanied by her Sister & Family & Mrs. Loomis with her Daughter & Servant, making altogether 14 persons whom I conducted to Schenectady the same day. I had there leisure to discover that there were hopes of our Son's life, tho' none of his liberty, without strong Exertion. The party recruited themselves a few days at the Springs and on the 10th we moved towards Niagara. Having taken an extra Stage to ourselves by paying seven fares for 5 persons we travelled tollerably commodiously and with increasing chearfulness. Six days more brought us into Canada, and at Niagara we separated; Mrs. P. and our youngest Daughter⁷ remained there with their Son & Brother, J. P., who was much indisposed and I proceeded to York with my two Daughters.⁸ This first Step occasioned to me a Journey out & in of near 1000 miles and an expence not short of 300 Dollars. When settled at home, the various reports of the Fate threatening our Son, produced such a Gloom and constant distress, that I decided upon an Effort for his Relief. To effect it, I was without friends and without money. My Imagination could only direct me to a Mr. Stoughton whom I had known many years before Spanish Consul at Boston. I was in no Credit with my Banker but determined to undertake something, I obtained six months leave of Absence, after my Circuit and borrowed 400 Dollars of the Chief Justice.⁹ Half of this sum I left with the family and having concluded my Circuit at Cornwall, the lower extremity of the Province on Saturday the 4th Octr. and on the 5th crossed over to St. Regis on the Line 45 in the U. S. On Monday the 6th went by water to the Falls, and hiring Horses proceeded the same day on stage towards Plattsburgh on Lake Champlain. I arrived there 7 P. M. on the Evening of the second day being Wednesday the 8th, on the 9th crossed Lake Champlain at Cumberland Head, over Grand Isle & the Sand Bar to Burlington, where I overtook the Mail Coach for Boston and passing the Connecticut River over Mr. Frederic Geyer's Bridge at Walpole, I reached the Great Town, the place of my Birth on the 15th. I here found that Don Juan Stoughton was a Person of no Influence and that any Introduction from his would be fruitless, but that he had a Daughter who had been educated by his Brother Don Tomaso, Spanish Counsel at N. York, who was married to a general Officer of high rank and credit at the Court of Madrid. Finding no other channel of Communi-

cation, I proceeded from Boston the 18th through Providence & Rhode Island for New York where I arrived on the 24th. From the Gentlemen with whom my son had lived, I procured an Introduction to Don Tomaso Stoughton, but He informed me that his Niece's Husband was in his Government at Majorca, and that no Influence would have any Effect on my Son's fate, unless I could procure that of the Spanish Minister with the U. S. the Marquis de Yrujo. As Mr. Stoughton did not offer his Services to procure me the Countenance of this Gentleman, I sought it through other Channels—being assured that my Son's Tryal was over, and that he had escaped, by concealing his Commission, as an Officer, but was condemned to ten years Presidio (Slavery) at Omoa, which Intelligence was humanely inserted in the Log book of an American Vessel lying at Laguaira,¹⁰ by an Irish Interpreter, present at the Trials. It occurred to me and all my Son's friends that it would be desireable in the first Instance to procure a Change of the Scene of his Imprisonment from Omoa, the most unhealthy climate in the world, to Porto Rico, which was a salubrious air and accessible to his friends; this was particularly the anxious wish of his Partner, Mr. Archibald Kane, who visited me at York and assured me that he would, in person, convey the necessary Supplies to his friend, if I could procure his removal. With this view, Admiral Sr. A. Cochrane¹¹ was mentioned to me, as having Influence, & having been acquainted thirty years before with the mother of Sr. Alexander's lady, I visited by old friend, Mrs. McAdam and Mrs. Shaw at their Country Seat. They warmly interested their other Son in Law Mr. Wilkes, who wrote in my behalf a most pressing Letter to the Admiral, and also procured for me from Mr. Hoffman the Atty. Genl. of N. York, a letter to Mr. Dallas the Attorney-General of Pensilvania, who was the friend of Gov. McKean the father in Law of the Spanish Minister, the Marquis de Casa Yrujo. Whilst this was doing a young Gentleman who had been a counting house Companion of my Son, left his name at my Logings with a pressing wish to see me, that he might introduce me to a Person, of great Influence with M. D. Yrujo, who hearing of my Son's Disaster from Persons who spoke favorably of him & hearing also of my actual Pursuit, had expressed a wish to be serviceable to me. To this philanthropic Man, James Barry, Esq., I was introduced by my Son's young friend, Mr. Campbell. Mr. Barry with the politeness and Manners of the old School introduced me to his Lady who was God Mother to Marquis d'Yrujo's old-

est son, the family being Roman Catholics. This lady highly accomplished, charitable and humane, gave me such a letter to the Marquis as was irresistible. I went to Philadelphia to deliver it. I was delayed but a few hours when Mr. Fatio his Secretary waited upon me at my Hotel (the Mansion House) with a Letter from the Minister to Vasconcelos the Governor General of Venezuela, soliciting, as a personal boon to him, that my Son might be removed to Porto Rico, untill the King of Spains Pleasure could be known. With this letter Mr. Fatio delivered a polite Compliment from the Marquiss, intimating that no more could be done in America, but that anything might be expected from the humanity & liberality of his Sovereign,¹² if solicited in Person. That the Marquis had directed Letters to be written to Mr. Fatio's friends to Porto Rico & Omoa to secure every comfort which my Sons Situation might be susceptible of. With this Cordial I returned the same day to New York. My new and worthy friends, the Barrys, gratified by this Success, and perceiving that I was decided upon a voyage to Europe, put me in the way of aiding the good will of the Marquis d'Yrujo. Mr. Barry had been at Halifax, & finding there, Prisoners of War, a Nephew and friend of the d'Yrujo, had mentioned his discovery to Admiral Berkeley,¹³ who most liberally released the Gentleman in Compliment to the Minister. I had brought to Mr. Barry from Philadelphia a Letter of Acknowledgement from the Marquis to Adl. Berkeley, which Barry offered to put under the same Cover with one from me, in which I might solicit the Adls. Intercession for my Son, which Mr. B. observed, would authorize M. d'Yrujo to put the thing upon a different footing with his Court, from any other personal Application, which indeed, considering the Nature of the Case, must be handled with great Caution. Thus induced I wrote a letter to Adl. Berkely, which he politely acknowledged, to influence him still more I addressed a letter to Sr. John Wentworth¹⁴ the Gov. of Halifax, Adl. Berkleys Station, to my old friend Sampson Blowers,¹⁵ the Chief Justice, & to my worthy Acquaintance Father Bourke, Vicar General of the Catholic Bishop at Halifax, who had been very useful to Mr. Barry. Having dispatched these & the Marquis letter to Vasconcelos, under a Safe Guard of the British Consul General, Col. Barclay,¹⁶ I embarked for England on board the Science, Capt. Howard, with one fellow Passenger, Mr. Burnley of London last from Trinidad. After a rough passage of 30 days we landed at Deal and proceeded the same day to Canterbury. Mr. B. pursued his route to London. I reposed

two days in a State of Mind not to be envied. I had drawn £100 at N. York & had no more funds—saw no direct Prospect of making friends in my route to Madrid. I had however, on board Ship dressed up a ladder through the Princes of the Blood and the Secretary of State tho' with faint prospect of access to either. A few days after I reached London, I waited upon the Under Secretary of State¹⁷ who spoke me Fairly and did not oppose a proposal from Gordon, the second Clerk, who had the Colony Correspondence, to pay me the residuum of the Chief Justice's salary as a compensation for being sole puisne Judge for two years.¹⁸ This produced a supply of £618 Sterling which sensibly relieved me. The Secretary of States¹⁹ Private Secretary (Mr. Amyot) had been at School with my Son (at Norwich) and cordially gave his Aid—in an Official Introduction to the Transport Board, which had the Charge of Correspondence on the Subject of Prisoners of War & retained an Agent at Madrid, through whom & a similar Agent in London, Don Manuel de Torre, to whom Mr. Windham also introduced me, all Communication between the Nations passed.

Just at this Moment Buonaparte's Decree²⁰ declaring Prisoners of War all English in Territory of his Allies, rendered it impossible for me to procure a Passport for Madrid. I was therefore Fortunately constrained to await the Success of a Semi Official Application made to the Court of Spain through the Transport Office & Don Manuel. In the meantime I was not idle, I renewed an old acquaintance with Mr. Brook, a Spanish Merchant who was in habits of close Intimacy with Mr. De La Torre; I waited on the Spaniard and finding that he had given very slight attention to the Communication from the Transport board, I obtained thro' Amyot a private Compliment from the Secretary of State which had its Effect & the Don represented to his Court that the Government took a deep Interest in the Success of the application to remove my Son to Porto Rico In the Interval of an Answer being possible I visited my Sisters at Ludlow in Salop and at Tolpuddle in Dorsetshire²¹ near which last residence I visited the Convent of La Trappe removed from Auvergne to the Seat of Mr. Weld at ———. I had opened also a Correspondence through Mr. Charles Murry, with Dr. Jenner whose high reputation as Author of the Vaccine Practice²² had entitled him to address Buonaparte directly and obtain the release of a Prisoner in vain solicited by Government. This gentleman promised me a letter of Solicitation to the King of Spain & the Prince of the Peace.²³ Another Channel of favor through the Governor Gen-

eral of Venezuela was opened to me by my friend Major Robertson²⁴ in an Introduction to General Maitland²⁵ the Governor of Grenada, who had had an Occasion of rendering Services to the Spaniard. To him I transmitted a State of the Case, and three hundred pounds to defray the Charge of conveying the young Man to Porto Rico should that be the only obstacle. At this period I attended the Trial of Sr. Horne Popham²⁶ at Portsmouth, in hope of ascertaining some light on Miranda's Connection with Government which might be serviceable in distinguishing My Son's Case as a British Subject, from Piracy. Having received through Sir Rupert George, President of the Transport Board & in duplicate through Don M. de La Torre, the answer from the Court of Spain to Mr. Hunter, the resident agent for Prisoners, intimating that in compliance with the solicitude of His Britanic Majesty's Government, orders had been given to the Captain General of Venezuela to report upon the Circumstances of Mr. Jh. Powell's Case in order that His Catholic Majesty might make such order thereon as he might be induced by his desire to meet the wishes of the English Government. Although Don Manuel was pleased to add that he thought this a favorable Answer & implying eventual Success, I persuaded myself that no more would be said on the Subject unless pressed upon the spot by some Person interested. I decided upon a Journey into Spain notwithstanding the critical Circumstance of Bounapartes Decree. Providence seemed to favor my views a very proper letter to the King was drafted by Dr. Jenner & accident threw me in the way of Colonel D'Alezie whom I had known in Canada, an associate of Count De Puisays.²⁷ This Gentleman had known and admired my Son & spoke of his Misfortune in a Circle where was present the Countess Doyenhausen Da Ega actively ambassadrice de famille from the Prince regent of Portugal to his Father-in-Law the King of Spain. This lady banished from the Continent by the will of Buonaparte was in Correspondence with the disaffected to the French and kindly proffered the Interest of her family. My friend, Major Robertson, had also mentioned my Errand to his Royal Highness the Duke of Kent²⁸ who commanded my Attendance at Kensington Pallace & there observing that he had no personal Interest in Spain, introduced me to his brother the Duke of Sussex and his Guest the Duke of Orleans²⁹ the two last warmly engaged in my Service. The Duke of Sussex promised me letters to the Duke de Infantado, to the Count da Ega and to M. Dairrajo the Portugese Premier, adding that if those

failed, his Brother the Prince of Wales³⁰ would write to the Princess Regent to ask my Son's release from her father and that he wd prepare the Marchioness de Pombal to second it with her Influence which was very great with the Princess. His highness the Duke of Orleans regretted that his Alliance with the King of Spain did not admit of his addressing himself to any but the King or the Prince of Asturias, which in his actual Circumstances could not be done with Propriety—but was pleased to add that He would procure me a letter to Madrid which should be useful. On my Return from Kensington I called upon the Earl of Selkirk³¹ whom I had entertained at my House in Canada. He also had heard of my pursuit & finding that I only now wanted an Introduction to the Prince of the Peace who was then Sovereign in Spain, his Ldp was pleased to make me known to Lord Holland who was personally known to the Prince and had in time of Peace been in Correspondence with him. Lord Holland readily promised me a letter not only to the Prince of the Peace but to the papal Nuncios at Lisbon and Madrid, through whose influence a Spanish Gentleman, Vice Consul for the English, convicted of treasonable Correspondence with Adml. Nelson had been pardoned or at least saved from Death. Thinking it proper as I was upon leave of absence, to obtain permission from the Secretary of State to pass into Spain, tho' I could not have a regular Passport, I first visited Mr. Munro³² the American Minister with a request to be made the Bearer of a Dispatch to the American Minister at Madrid which might serve to procure me a Passport from the Spanish Ambassador in Lisbon, and this Mr. Munro politely promised he would do, without committing himself by any Certificate of my Nationality. As I mentioned this Circumstance to Mr. Gordon at the Plantation³³ office, He observed to me that I must in furtherance of my Object acknowledge myself at Madrid, and that they had thought of a means of procuring me admission into Spain as an English subject, the particulars of which I would learn by waiting in his name on Mr. Gordon of the House of Gordon & Murphy in the City. I hastened to the Counting House of this Gentleman, who was prepared to see me by Mr. Gordon & had received, as he said, the Commands of the Duke of Sussex to lend me every Aid in his Power. That his Partner, Mr. Murphy, resided at the Court and was in habits of perfect Confidence with the Prince of the Peace in extensive Contracts connected with the Importation of Treasure from S. America. That in the present State of War, the Spanish Governor of

Mexico had entrusted to a frigate receiving Specie at Carthagena, or La Vera Cruz an Accumulation of several years of public Correspondence with the Government at Madrid. That these Papers entirely lodged in the Secretary of States office, were to be delivered over to him as the acknowledged Agents, to be transmitted to the Court. That He had engaged a young Spaniard lately returned from Lima, to take Charge of them, but at the desire of his friend Mr. A. Gordon & in obedience to the wish of H. R. H. the Duke of Sussex, he would put them under the joint Care of M. Landecherry & myself, with authority to retain them unless permitted to deliver them in Person to his Partner Mr. Murphy at Madrid. That he wd. give me a letter to that Gentleman, which should insure as much exertion in my behalf as if I was his brother. I pause at this period of my Narration to review the singular Means by which an obscure Individual in the wilds of Western America, without a single link to connect him with any Interest in Europe, from Step to Step attained such an Introduction to the Court of Madrid as could certainly not be exceeded; when it is considered by what accidental Circumstances these successive advantages were procured, the Mind is lost in wonder.

“Armed then with all these potent Implements, and personal Introductions from the Countess Deyenhaussen to her Brother & friends in Portugal, I left London in Company with Don Pedro De Landecherry & nine Packages of Dispatches in the Mail Coach for Falmouth. My Agent had advanced me £200 for the journey, part of which I gave to Mr. Gordon for a Credit on Madrid & the rest with the Foxes at Falmouth for a Credit on Mayme & Brown of Lisbon. We embarked in the Packet and the tenth day landed in Lisbon. Among the Passengers was a Mr. Buller, Son of a rich Merchant in London, formerly resident at Bristol. This young Gentleman who had travelled and was well received in the best Houses in Lisbon advised me not to go into the City with Don Pedro, but to take my Quarter in Buenos Ayres, as more pleasant, healthy & respectable. Mrs. Wyndham, Lady of the Secretary of State, had with great kindness put me on a good footing with the English Envoy by a letter from his most intimate friend Mr. Byng, and Mr. Buller who was known to Lord Strangford³⁴ accompanied me in my first visit to his Ldp. The Spanish Ambassador the Count de Camp de Alangue was with the Court at Mafra, and as Don Pedro Landecherry was known to the Secretary of Legation, Don Pedro de Castro, we proceeded to that Convent in a hired Calesino.³⁵ It is impossible

to convey to an Englishman any Idea of the wretchedness of the accommodation on the Route to this royal Residence or of the Hamlet at the foot of the Convent. Our Impatience did not permit us to search out the Secretary, but we desired ourselves to be announced to the Ambassador so soon as He should rise from his Siesta. His Excellency received us with Complacency but declared his utter Inability to grant a Passport to an English Subject under any circumstances, and instanced a strong Case of Mr. O'Higgins, Nephew and Heir to the late Viceroy of Peru,³⁶ who had been waiting six months at Lisbon for Permission from the Court to proceed to Madrid, and that without such express Commission he dared not. His Excellency added that He was about to dispatch a Courier and if we would call at his Hotel the next day in Lisbon, he would state my Case to the Minister & solicit the necessary Permission, the fate of which we should learn in ten Days. This Check disturbed me much especially as Landecherry had the Dispatches in his Custody and being a Subject of Spain, I was apprehensive he might be induced to deliver them as proposed by the Ambassador to his Receipt. We returned to our wretched Stable where divided only by a plank from the Mules, we supped upon a cold chicken & a bottle of Champaign & claret which we had had the precaution to bring from Lisbon. The next morning I visited the Convent, a magnificent Pile of Building capable of receiving the whole Court consisting of several thousand Persons. The Chapels & Colonades are magnificent, adorned with a profusion of Sculpture in Marble but no paintings. The Library was also a magnificent apartment delightfully airy & light containing many thousand Volumes of well chosen books. We returned to Lisbon in the Evening, and the next morning I waited on the Nuncio with Lord Holland's³⁷ letter. This old Courtier, who was nearly allied to the royal family of Portugal, received with the Cordiality of a Parish Priest. He spoke in warm Terms of the English Nation and of Lord & Lady Holland, promised the most active assistance of his Influence and that of his Colleague Gravina, Nuncio at Madrid, by which he confirmed to me that He had saved the Life of the Vice Consul. When he heard my desponding acct. of my visit to Mafra, he consoled me by saying that the Count could act no otherwise, taken so by Surprise, that He was not in the habits of business, that he was a great rich & powerful Nobleman who gave his name to the Embassy, but that the Secretary was the Man of business. That he had the happiness of being well with Don Pedro Evarista, (de Castro)

who he should see that Evening & prepare accordingly, that he would wait upon the Ambassador in the Morn and if I would trust myself among so many Clergymen to eat my Soup with him the next day at 2 o'clock. He assured me that He should wish me joy of having conquered that Difficulty of the Passport, and that he would do his utmost to bring the principal affair to a happy close. Revived by the Nuncio's chearful assurances, I enjoyed a chearful dinner at M. Sitero's whom M. Buller had brought to our Quarters to see and invite me. The party was english, chiefly naval, with the Exception of a young Russian, M. Sus, an Eleve of the Russian Diplomacy. The Lady of the House was a Russian, Daughter of Adl. Greig distinguished by her Talent for the living Languages of which she spoke as correctly as the natives, Russian, English, German, French, Italian, Spanish and Portugese. We adjourned in the Evening to the opera, the principal Entertainment of which I could not well appreciate. The orchestra seemed to me numerous and excellent, the Singers indifferent, dancing disgusting from the excessive Nudity of the Females, the room was spacious, but not so well lighted as the English Theatres.

"The next day before I went to dinner I visited the royal Carriages and Barges at Jonqueira where I waited upon Donna Leonora, Sister of the Count Ribeira, with my Letter for the Marquis D'Alerno and herself. This Lady appeared to take a warm Interest in my Affairs, gave me a private address to a confidential friend of the Marquis D'Alerno, who was actively Commanding on the Frontiers & resided at Villa Viciosa in a sort of Honorable Banishment. At the Nuncio's I met besides his family consisting of five or six ecclesiastics, a Bishop whose title I forget and two lay men of learning and respectability, both Romans. The Nuncios reception was gracious to an extreme, he cordially congratulated me upon having succeeded with his friend Don Evarista and assured me that my Passports would be expedited without delay. At Table he politely apologized to the Bishop for placing me above him, by calling on his aid to honour his Stranger Guest in affliction. The Conversation was very general and conducted by the few speakers with Liberality and Spirit, principally in Italian & French. The Secretary of the Nunciature & the Orator of the House were lively and well informed Men inquisitive & polite in their Communications. It was an agreeable Dinner, at the Close of which whilst taking Coffee, the good Archbishop said to me after the siesta, 'I shall devote the evening to my Letters for you. I shall write at length to my Lord Gravina,

and in my best manner, persuaded that it will be shown and do your Affair no harm.' The next day I had an audience of the Count de Compo Alange in which I readily perceived the Effect of the Nuncio's friendship and of the Secretary's Influence. His Ldp. was gracious and almost affectionate, assuring me that he had communicated my Story to the Minister & his particular friends, with the hope of serving me & wished me the most ample Success. Don Pedro Evarista de Castro led us from this Audience to his Apartments where a note was taken to fill up our Passports & tho in French interest Don Pedro politely said in honoring my frankness and Courage in the explicit Account of myself I had given to the Ambassador, that the English were all Candour, but as that Virtue was not so general in the Peninsula, he should forbear to excite Curiosity by giving any Addition to my name in the Passport, in which I should be considered as sharing a joint Trust with Landecherry as Bearer of the royal Dispatches which would entitle to all sort of Protection on the Route. From him we proceeded to the Police Office to visé our Passport, and I accompanied Mr. Buller by Invitation to St. Martha, the English Hotel. There was a Select Party of Eight at Lord Strangford's Table, where the Conversation was gay and cheerful. His Lordship took occasion before we parted to pass a Bumper of Burgundy to the Success of my Journey to Madrid, by which I found the Guests were acquainted with my Errand as they all cordially joined in the wish with Expressions of a lively interest. We adjourned to the Opera. The next day was spent in preparations for our Journey, a Coche de Cordilleras³⁸ was engaged to put us down in seven days & a half for 300 Dollars. Mr. Buller dined with Landecherry, at 6 o'clock an Estafette from the Nuncio delivered his packet with a polite and most friendly note. At Eleven we embarked below the Exchange for Aldeia Gallaga.

"At the appointed hour we reached Madrid the seventh day and finding the Court to be at Aranjuez I repaired thither the next morning having first delivered my letters to Mr. Murphy, to Mr. Hunter, to Count Da Ega and to the Nuncio, Gravina, I prepared a Petition to the King of Spain, which the Count Da Ega presented to Cevallos the nominal Prime Minister. This was dated the 6 June and on the 9th Mr. Murphy accompanied me to the Levee of the Prince of the Peace, to whom I presented Letters from Lord Holland and Dr. Jenner together with a Copy of my petition to the King. It was graciously received, and in the Evening I received a Card from the

Countess da Ega to say that the Prince of the Peace had just given orders for the Release of my Son.

On the 10th an Under Secretary Don G^o. de Courtois waited upon me at my Hotel to present the Royal Decree for the unconditional release of my Son, and at the same time a particular Command to the Governor General of Venezuela, to receive me with Hospitality should I wish his Government in person to receive him.

"The Nuncio (Gravina) had come to Court from Toledo expressly to urge my affair and now called to congratulate me on a Success which he had not contributed to but found settled on his Arrival at the Situs from a visit to the Cardinal Archbishop of Toledo. I received the same day Congratulations from the Countess of Ega, and her sister the Countess Federica Doyenhhausen, from Mrs. Hunter, the resident's Lady, from the Count Colona, Commandant of the Spanish Guards influenced by the orders of the Duke of Orleans, and in the Evening at the Theatre, from the ladies of all the several Secretaries, who had learned the rapid Success of my application to the King. The kind attentions of Mr. Hunter and Mr. Gordon followed me to Madrid, with Letters of Introduction to Lisbon and on the Route. I arrived at this port the ninth day from Madrid, and found a Packet had dropped down the River that day. I engaged a Boat to follow her and got on board the Walsingham that night, and arrived in England, and Communicating to the Lords of the Admiralty the Event Admiral at Jamaica to send down a Vessel of War with the of my Journey, they were pleased to expedite an order to the dispatches & to receive my Son & give him a passage to England if desired.

"My object in Europe thus obtained I embarked for N. York and visiting the Marquis de Irujo at Philadelphia a License for a fast sailing sloop to proceed to Carthagena with the quadruplicate dispatch, in which my Son embarked and returned in health to the bosom of his family.

"This note is to elucidate the Correspondence covering the progress of this business which was permitted to be copied by Mrs. Mary Browne of Norwich, aunt to the young man & my wife's sister."³⁹ •

CHAPTER XIV

GORE'S ADMINISTRATION

WHEN Powell came back to York from Albany whence he had gone to bring home his wife, he found that the new Lieutenant-Governor had arrived, Francis Gore, who had been promoted from the Government of the Bermudas. He and Powell at once formed an attachment for each other which with occasional interruptions continued even after Gore's removal to England.¹

When Powell was in Spain, he received information that the Governor requested his services in the Executive Council, induced to do so by his high estimate of Powell's character and ability and by the representations of several persons of consideration in the Province who had been dismayed by the inefficiency of the Council.²

Powell on his return from Spain to England was informed that a mandamus was ready for him as an Executive Councillor, but was told at the same time that there could be no salary attached to his seat as there were already five Executive Councillors and the Home Government would not pay any more salaries.³ He was advised not to take out his Mandamus until a salaried vacancy should take place, and he acted on the advice.

At the same time he explained the proceedings with which his brother Judge, Thorpe, was mixed up and received assurances of future consideration for himself at Downing Street, including a seat in both the Councils.

He came home from England by way of New York and arrived at York in October, 1807: the Governor was hurt at his omission to take advantage of his appointment to the Executive Council. Some "candid friends" revived the old story of Powell's treason, and on a vacancy Gore was inclined to appoint Prideaux Selby: but Powell, hearing of the Governor's change of mind, wrote him and this led to an explanation—this resulted in the transmission of Powell's Mandamus as an Ordinary (and salaried) Member of the Executive Council.

From this time he was much in Gore's confidence: he was able to remedy very grievous abuses in the issue of land Pat-

ents, and, generally, showed himself a useful and diligent Councillor. He lost the confidence of the Governor by his judgment against the Crown in a proceeding brought on Gore's orders against a recalcitrant "Register" i. e. Registrar of Deeds.⁴

The Attorney General, William Firth, caused much trouble almost from his first arrival in Upper Canada in 1807: when he went to England he lodged a complaint against Gore: Firth also charged that the decision of the King's Bench in the Registrar's case was a blow at the Royal Prerogative. Powell was called upon to answer the complaint which he did to the complete satisfaction of the Home Authorities.⁵

During Gore's first Administration, it may fairly be said that Powell was the leading character in the Council,⁶ and that the Lieutenant-Governor was more influenced by his advice than by that of any other. But Gore was no mere *roi fainéant*: both before he went to England in 1811 and after his return in 1815, he sometimes acted in direct opposition to advice.

Gore obtained leave of absence and went to England—being succeeded by General Isaac Brock—the United States was threatening war and it was thought advisable to vest the Government in the Commander of the Forces in the Province.⁷

During the troublous times of the War of 1812, Powell rendered valuable assistance to the Administrators: amongst other services, he drew up the noble Proclamation of General Brock in answer to the extraordinary effusion of the American General Hull.⁸

General Roger Sheaffe the successor to Brock on the latter's heroic death at Queenston Heights, was from childhood the most intimate of Powell's acquaintances (he was born in Boston in 1763), and in everything relating to the civil administration relied entirely on his advice. In one instance, the advice following previous similar advice to Gore had far reaching effects on the standing of the legal profession in the Province. The Attorney General was appointed by the Home Administration: and at first he was always an English Barrister. White and Scott had been inferior lawyers and Firth had been insolent and turbulent. Powell persuaded Gore on Firth's hasty and undignified departure from the Province to appoint to the office a Canadian born and bred, the young John Macdonell.⁹ Macdonell received fatal wounds at the Battle of Queenston Heights, acting as Aid-de-Camp to Brock: Powell urged Sheaffe to appoint as his successor *pro tempore*

another young Canadian, John Beverly Robinson, though not yet of age and not yet called to the Bar.¹⁰ Since that time there have been but two not Canadian born, appointed Attorney-General or Solicitor General of the Province of Upper Canada.¹¹

Powell and the other Judges performed their judicial duties during the war regularly, including the trial at Ancaster in June, 1814, of those charged with High Treason.¹²

After the war, Gore returned to the Province.¹³ It was not long before Gore was able to help Powell: Powell had not received any remuneration for his long and arduous work as Commissioner concerning Heirs and Devisees of unpatented lands. At the instance of the Lieutenant-Governor, the Legislature granted £1000 to Powell for these services.¹⁴

He was also called to the Legislative Council,—the advanced years and the infirmities of Chief Justice Scott rendering his attendance as Speaker of the Legislative Council unpleasant to himself and the members, the Lieutenant Governor proposed to Powell to accept that situation; it was known that he had held for some years the King's Mandamus for a seat, which he had declined to present.

He accepted the offer only on the condition of the voluntary resignation of the Chief Justice and a compensation to himself of £400 per annum for the additional labour and expense to which he would be exposed. On these terms being agreed upon, Powell made a communication to the Chief Justice who instantly resigned; and Powell took his seat and the Speaker's Chair.¹⁵

The Lieutenant Governor without his consent applied to the House of Assembly for a salary to the Speaker of the Legislative Council which the House without hesitation voted at £500 per annum; and a Bill to that effect passed the Committee to a third Reading: its final passage was withheld to await Powell's conduct in the Upper House on a popular question as to the exclusive appropriation of moneys.¹⁶

This circumstance being told to Powell by Gore on the authority of the Speaker's communication to him as an inducement to him to give way, he decided to resist such advice and rejected the salary offered on such terms by the Assembly; he continued to insist upon the claim of the Upper House to a share in appropriating all public moneys.

The loss of £100 by this conduct did him little injury; for his contract for the £400 was fulfilled out of a fund provided for similar purposes which was at the exclusive disposition of the Crown.¹⁷

It was apparent that the Chief Justice must soon resign his judicial office also: Gore was authorized to make arrangements for his retirement on a pension and to appoint Powell in his stead. Powell attained the great object of his ambition, October 1, 1816 at the age of 61.¹⁸

The Colony was agitated almost from end to end over the "Alien Question" i. e. the permission to American citizens to hold land in the Province. Gore, acting as he believed—and with reason—on the wish of the Home Government, issued a Proclamation forbidding the administration of the Oath of Allegiance to anyone who was not in office or the son of a United Empire Loyalist without special authority so to do—October 24, 1815. Some of the prominent men of the Province, including even some of the Commissioners for Taking Oaths, had large quantities of land for sale and wished that as many persons as possible should be considered qualified to buy and receive grants for lands. At least one of these, William Dickson, refused to obey the orders of the Governor; and the Province was in an uneasy mood.

When the new Parliament¹⁹ met in 1817, it resolved itself into Committee of the Whole on the State of the Country—which was substantially equivalent to a vote of want of confidence in the Government. Not only was the Alien question raised but complaint was made of the Clergy Reserves, the grants to the Militia, the Post Office, &c. Two Resolutions were carried, a third lost and more were to be considered at a subsequent sitting of the Committee of the Whole: Gore, fearing the passing of still stronger Resolutions, suddenly dissolved the Parliament with an imprudent if not impudent Address—this was done in a fit of temper and against the strongest protests on the part of Powell.²⁰

The Province was aflame with indignation—the days of the Stewarts seemed to have come again. Gore left the Province in June, 1817, never to return: Powell thereby lost his best and strongest friend (next perhaps to Lord Dorchester), and he never had the same importance again. Just as Gore was leaving the Province, Robert Gourlay was entering it: while Gourlay had no influence on Powell's life and career, he has done more than any other to blacken his name by detraction and insinuation—he deserves a chapter to himself.

CHAPTER XV

ROBERT GOURLAY

WE now come to an episode, or series of episodes, which have given Chief Justice Powell more notoriety than all the other events of his life put together. For his part in the prosecution of Robert Gourlay he was vehemently attacked by that virile writer and held up to obloquy as a tyrant and oppressor. Whatever may have been his motives—and there is absolutely nothing to indicate that they were not pure—his actions cannot fairly be complained of. Gourlay is a type of a class at no time small and by no means extinct, who place their own interpretations upon law, statutory or otherwise, and when that view is not acceded to, proceed to attack the law itself as unjust, and at length assail those who are called upon to administer it.¹

Gourlay had land in Upper Canada, and came out in 1817 to see about it. On the voyage it occurred to him to make a statistical account of the Province, and with that end in view he prepared a series of questions to be submitted to the settlers in the various parts of the country. These questions attracted the attention of the authorities and he was accused of sedition: he was not slow to retaliate or to denounce what he thought wrong. He was indicted at Kingston for libel on the Government but triumphantly acquitted in August, 1818; again indicted for a similar offence at Brockville, he was, later on in the same month, again triumphantly acquitted.

But there was a weapon he had not thought of, a Statute passed in 1804 by the Provincial Parliament containing extraordinary but not wholly unprecedented provisions.² The Act was passed in consequence of the influx into the Province of United Irishmen and those who had been concerned in the uprising in Ireland in 1798, as well as some who were entering the Province from the United States, and who, it was suspected, were stirring up disaffection to British rule. It seems probable that the Bill was drawn up in England, and sent out for the Colonial Parliament to pass: but that it was modified and enlarged in its scope during its passage through Parliament.³ Powell certainly had no hand in drawing the Act, in having it pass the Legislature, or in advising its enforcement.

The Act authorized certain officials to cause the arrest of anyone who had not been in the Province for six months or who had not taken the oath of allegiance: and if they were not satisfied with the accused to command him to leave the country: if he should refuse he might be tried and again ordered to leave the country: if he refused or if leaving the country he returned the penalty was death.

One of the official set at York, and seemingly only one at first believed that Gourlay's conduct was seditious and dangerous—but that one was the Reverend John Strachan who had become exceedingly influential in the councils of the new Governor, Sir Peregrine Maitland.⁴ The prosecutions for criminal libel having failed, more drastic measures were determined upon—it is not, however, certain that Maitland approved or even knew that such proceedings were to be taken: unfortunately proceedings were taken although without express instructions from the Governor while at the same time almost certainly not against his desire.⁵

William Dickson and William Claus, both members of the Legislative Council, issued a warrant against Gourlay under the Act of 1804 upon an information sworn by Isaac Swayze, Member of the Legislative Assembly. No doubt the two Councillors acted in a most high-handed-way; it is said with every appearance of truth that Swayze acted in concert with them if not on their initiative, and if so, of course they should not have sat at all. But having granted a warrant, they had the power to deal with Gourlay as they did. Gourlay acted apparently without legal advice; he had no confidence in lawyers;⁶ had he in this instance consulted a lawyer he would have been informed that the Act by a not unusual clause provided that the proof of having been an inhabitant and of having taken the oath of allegiance should "lay" upon him. The evidence given against him was most trivial; but he did not prove that he had taken the oath of allegiance. It followed, then, under the Act, that for the purpose of that proceeding he had not taken the oath of allegiance, and consequently was a member of one of the two classes who came within the Act. It was a matter of no importance that he had been an inhabitant of the country for six months even if that was the case. He insisted that the Act did not apply to a British subject; but there is nothing in the Act so restricting its operation; and the persons chiefly aimed at by the Act—the United Irishmen—were British subjects by birth like himself.

He refused to obey the order of the Legislative Councillors

and was arrested and committed to the Gaol at Niagara under the provisions of the Act. The Act is specific that if the order be disobeyed and the person be found at large in the Province after the time set for his departure, a warrant must be issued for his committal to the Common Gaol or to the custody of the Sheriff "there to remain without bail or main-prize unless delivered therefrom by special order from the Governor or person administering the Government for the time being, until he or she can be prosecuted for such offence in His Majesty's Court of King's Bench or of Oyer or Terminer and General Gaol Delivery in this province or under any Special Commission of Oyer and Terminer"

Gourlay contended, as to the last he continued to contend, that the Act applied only to "aliens and outlaws." He applied for a writ of Habeas Corpus and retained an attorney to draw the papers: these were an affidavit by himself that he was a British subject, had taken the oath of allegiance and had been an inhabitant of the Province for more than a year before the date of the warrant; an affidavit by Peter Hamilton that he had known Gourlay in Britain and "that he was there respected, esteemed and taken to be a British subject"; and by Robert Hamilton, that Gourlay had been domiciliated at Queenston more than nine months before the date of the affidavit (January 12, 1819) and that he always understood that he was a natural born British subject.

The writ of Habeas Corpus was issued by the Chief Justice; Gourlay complains that the Judge did not express his opinion to the attorney when he applied for the writ; but that is not the function of a Judge, and moreover, it is quite certain that had he done so it would not have changed the course of events. The writ was obeyed. Gourlay was taken to York. He says: "on the 8th I went before the Chief Justice. One question only he put—for what end I do not know—"Have you brought any person with you?" The object of the question could not be doubtful to anyone; the Judge was asking the Prisoner if he had Counsel to argue for him. As no Counsel appeared, the Judge disposed of the case on the material before him, as was his duty and his whole duty.

Upon the material he could do nothing else than dismiss the application for the discharge of the prisoner:⁷ under the Act bail could not be taken.⁸ The accused was remanded into custody and was taken back to Niagara travelling "over a hundred and eighty miles of miry road in custody of the Jailer." The summer of 1819 was unusually hot and sultry

and the prisoner suffered severely from his close confinement, his health was seriously affected and his faculties were much impaired—he complains that his memory failed and that he found it impossible to think or write connectedly.

The sitting of the Court of Oyer and Terminer and General Gaol Delivery was fixed at Niagara for August. The Act provided that such offences as that charged against Gourlay could be tried in the King's Bench or at a Court of Oyer and Terminer and General Gaol Delivery or under a Special Commission of Oyer and Terminer. It was wisely decided to proceed in the ordinary course of the law; one can easily imagine the outcry which would have been made, had the prisoner been tried before the King's Bench in the extraordinary procedure by Information or if a Special Commission had been issued to try him. His trial came on before Chief Justice Powell and a jury, Friday, August 20, 1819, in the old Court House at Niagara, now "The Western Home." The charge laid against him was, under the provisions of the Act, of being found at large within the Province after the time specified in the order to leave.⁹ By reason of the onus of proof being laid on the accused by the Statute, all that was necessary for the Crown officer, Attorney-General John Beverly Robinson, to prove was the order and disobedience thereto of the prisoner; Gourlay had no Counsel and seems from his condition of health to have been unable to conduct his defence. No evidence was given on his behalf and the verdict of guilty was inevitable. He says, indeed, that when he heard that he was to be tried "only as to the fact of refusing to leave the Province . . . I was seized with a fit of convulsive laughter,¹⁰ resolved not to defend such a suit, and was perhaps rejoiced that I might be even thus set at liberty . . . " But he is not always consistent; in another place he says that he did not know that the word "offence" might be applied to the mere refusal to obey an order till he was, six weeks after the trial so informed by a gentleman from Montreal.

It was said by Dr. Dunlop in Parliament in 1841 that the Chief Justice told the jury that to constitute habitancy a man must possess a dwelling of his own; living in the house of another could not make a man an inhabitant, "a most lawyer-like and quibbling construction as to the meaning of habitancy." Gourlay himself says: "My fate, I believe, was determined by a misconstruction of the Judge of the word 'Inhabitant.' To the best of my recollection, this was defined to mean a person who had paid taxes or performed statute labour on

the roads." It is notoriously unsafe to rely upon the report of a legal argument or of a statement of law not based upon notes taken at the time, especially the report of a layman. Dr. Dunlop thanked God he was no lawyer—lawyers who read his speeches will agree with him both as to the fact and the gratitude; and Gourlay's state of mind was such, if he is at all to be believed, that he could not follow or understand what was said. It is scarcely credible that the Chief Justice made any such statements, they were not called for, the jury had only to pass upon whether the order had been disobeyed, and there could be no object in defining the words of the Act.¹¹ Upon the conviction of Gourlay he was given twenty-four hours to leave the Province which he did on Saturday, August 21.

Powell is called by Gourlay "a shallow lawyer" by whose opinion "a British subject may be imprisoned without relief from *Habeas corpus* and banished on the oath of Isaac Swayzie"; he assails him on other points also, but it is clear that in his conduct throughout this lamentable case, Powell acted but as he was compelled to act by the existing law.

Gourlay was brutally used, but the blame should be put where it is deserved. Powell's skirts are clear; he did not draw the Act, he had no hand in passing it, he disapproved of it, he did not put it in force but disapproved of its being put in force; all he did was, as a Judge, to interpret the Act, and that he did, *me judice*, correctly—and no one has ever said that in the performance of this duty he acted harshly or even discourteously.¹²

CHAPTER XVI

THE EARL OF SELKIRK

ONE of the most interesting of the many interesting personages with whom Powell in his long public career came in contact, was the well-known Lord Selkirk; perhaps no one with the exception of Robert Gourlay, has more vigorously assailed him in his capacity of Judge.

Thomas Douglas, the fifth Earl of Selkirk, was by common consent "an amiable, honourable and intelligent man"; born in 1771, he was educated at the University of Edinburgh. While still a young man he took a deep interest in social questions, and having his attention called to the unhappy conditions existing in the Highlands of Scotland, he determined to effect emigration on a large scale from those districts.

He formed settlements in Prince Edward Island and at Baldoon in the County of Kent, Upper Canada, but entertained wider views. Purchasing a large amount of shares from the Hudson's Bay Company, he obtained from that Company, against the protests of some of the minority shareholders, a grant in fee of about 100,000 square miles in the Red River County, now Manitoba. Lawyers differ as to the validity of this grant; the question is wholly immaterial now; but that Selkirk believed that the Company had the right to grant him this land and had done so legally, is certain.

When his immigrants made their appearance upon this territory, there was at once trouble due in great part to the North West Company, a fur trading company, what we should now call a "syndicate", who did not desire an agricultural community at this point. It was an active competitor of the Hudson's Bay Company; and conflicts between the servants of the Companies were by no means uncommon. Governor Semple and others were killed by Indians accompanied and led by servants of the North West Company.

The North West Company had a large and important station and fort at Fort William and to that fort in 1816 were brought some of the Selkirk Colonists; in the previous year many of the Colonists had left, worn out by the incessant aggression and terrorism on the part of the North West Company and by the difficulties of a new country.

Lord Selkirk was not fully aware of the state of affairs until his arrival in Canada in the fall of 1815, when he heard of the dispersal of his people during the previous summer. He was determined to resist the North West Company and applied to Sir Gordon Drummond then Governor-in-Chief at Quebec for military aid. This was refused; he had previously applied to Lord Bathurst, the Secretary of State at Westminster without success. He, therefore, determined to act alone: he hired a number of disbanded soldiers of the De Meuron Regiment, was commissioned a Justice of the Peace for Upper Canada and the Indian Territory;¹ and so equipped, he set out for the West by way of York (Toronto) and the Georgian Bay. On his way to Fort William he learned of the massacre of Semple and his men; he requested magistrates to accompany him (Messrs. Asken of Drummond Island and Erma-tinger of Sault Ste. Marie are named) but they declined and he proceeded on his own responsibility.

Arriving at Fort William, he issued warrants, as a Justice of Peace, against certain of the North West Company's partners and servants, and caused them to be arrested. Afterwards he took possession of the Fort and the property, furs, guns, etc. This act the Chief Justice at Quebec subsequently characterized as "speaking most mildly a forcible entry and a forcible seizure." A number of the prisoners were sent east for trial and some were unfortunately drowned—the North West Company always insisted that this was due to Selkirk's forcing twenty-one prisoners to be embarked in a canoe considerably under the usual size which could not safely carry more than fifteen.

The prisoners were directed to be taken to the Common Gaol at Sandwich, Upper Canada: but on reaching York, which they must pass on the way the Governor ordered them to be taken to Kingston where the Chief Justice and Attorney-General were attending the Assizes. An examination of the warrant showed that the offences were alleged to have been committed in the Indian Territory, and accordingly the prisoners were sent on to Montreal.²

But the North West Company was not satisfied to allow matters to remain thus; they made application to the Judges in York for a warrant against Selkirk and his men, but the Judges could, it is said, see no ground for a charge of felony. Application was then made to Francois Baby, J. P., of Sandwich. Vandersluys and McTavishe swore to an information charging the Earl and a number of others with having feloni-

ously stolen, taken and carried away eighty-three fusils the property of the Company. The Magistrate issued a warrant to William Handes, the Sheriff of the Western District of Upper Canada, for the apprehension of the Earl of Selkirk and nine others "if they shall be found within the District . . . to answer His Majesty for a Felony which they, it is alleged, have committed."

Another warrant for Riot, which had been issued by Dr. Mitchell, J. P., of Drummond's Island, the Earl had treated with contempt. He claimed that it had been "obtained from a drunken and superannuated magistrate in Upper Canada after the Judges of the Province to whom application had been made on the part of the North West Company had refused to grant it", and his "notorious habits of intemperance rendered it in the highest degree probable that his signature had been obtained surreptitiously."³

The warrant for felony was placed in the hands of William Smith, Deputy Sheriff of the Western District; he was also given a Writ of Restitution ordering the restoration of Fort William to the Company. Armed with these, he made his way from Sandwich to Fort William and arrived there, March 19, 1817: he produced his Writ of Restitution to Selkirk, but Selkirk refused to comply. Thereupon he arrested the Earl and some of the others on the warrant for Felony; his Lordship pushed him out of doors, and afterwards kept him in close custody at the Fort under a military guard.

Selkirk released Smith only in May, 1817, when he himself left Fort William with his forces for Red River. He had no thought of finally evading justice; indeed it is more than likely that, had it not been very inconvenient to deliver himself up in the Spring of 1817, he would have returned with the Deputy Sheriff.

After pacifying his people at Kildonan, Selkirk made his way down the Mississippi to St. Louis, across to Washington, thence northward to New York and by the Hudson River to Albany, then across the State of New York to Upper Canada.

So far facts have been stated as to which there is no dispute: hereafter there are in some points contradictions, but generally these arise from differing points of view—the main facts are clear, and in case of conflict the two stories will be given.

Arriving in York in January, 1818, Selkirk called upon the Chief Justice. They had known each other for a long time,

and on his first visit to York, the Earl had frequently visited and dined with the Judge; on Powell's visit to England to free his son Jeremiah, Selkirk has acquired claims to personal gratitude and attention. Selkirk offered to surrender himself and to give bail for his appearance to answer the charges against him: the Chief Justice refused to interfere, as there was no charge or complaint regularly before him, and as he explicitly stated to the Earl, he would not bail one charged with an escape from an arrest for felony. Selkirk says that the Chief Justice advised him to retire with his friends to the United States but this Powell denies.⁴

The Earl accepted the Chief Justice's invitation to dinner. The Chief Justice sent a message to the Attorney General, D'Arcy Boulton, that Lord Selkirk was with him and desired to wait upon him (Boulton). The following day Selkirk called upon Boulton and was informed that he had received instructions from the Secretary of State to institute criminal proceedings against him. It was arranged that Selkirk should surrender to the Magistrate who issued the warrant, M. Francois Baby, at Sandwich; and Selkirk proceeded to Sandwich accordingly, accompanied or followed by the son of the Attorney General, Mr. Henry John Boulton, who was Acting Solicitor General in the absence of John Beverley Robinson in England. Mr. Boulton conducted the prosecution before the Magistrates on the preliminary enquiry. The charge of Felony, i. e., of stealing the guns, failed; and Boulton then proceeded on the charge for Riot upon which a warrant had been issued by Dr. Mitchell, J. P. On this, Selkirk was committed for trial as well as on a further charge then laid of resisting arrest and another of assault upon William Smith for which a bill had been found at the Quarter Sessions. Dr. Allan, his physician and secretary, was joined with him in some of these charges and Captain Mathey in others.

Selkirk then went to Lower Canada and presented himself in the Court of King's Bench at Montreal to answer to other charges. The Court held that it had no jurisdiction⁵ but required renewed bail for Selkirk's appearance to answer the same charges before a Court of Oyer and Terminer in Upper Canada.

The Assizes came on in Sandwich in September, 1818, Chief Justice Powell presiding; and this is the first time that any real complaint is made against him in connection with the Selkirk matters. It is said that when Selkirk objected to two members of the Grand Jury one an agent of the North West

Company, another his brother also employed in the Company's business "Chief Justice Powell thought or at least decided—otherwise. He declared that the connection of these jurors with the Company was not sufficient to exclude them from continuing on the Grand Jury; adding that if these two gentlemen felt any bias or partiality they would, as men of honour, retire of their own accord." The Chief Justice resents the insinuation that his decision was contrary to his opinion and defends his conduct: that he was right in practice and in law is certain.⁶

John Beverley Robinson had become Attorney General upon the elevation of D'Arcy Boulton to the Bench⁷ and he first laid a Bill against Selkirk and certain of his men for resistance to legal process in the case of the warrant issued by Dr. Mitchell, J. P. This the Grand Jury, after a short deliberation, ignored. Then, against the recommendation of the Chief Justice, the Attorney General, instead of proceeding against the accused on the charges for which he had been bound over by the Magistrates in the preceding January, determined to lay a charge of conspiracy to injure and destroy the trade of the North West Company.⁸

A complaint is made that the Grand Jury had not been fully charged on conspiracy and were consequently perplexed with doubts, but the Judge had no idea that a Bill for that offence would be laid, so did not at the opening of the Court say anything about conspiracy to the Jury; when he found that such a Bill had been laid before the Grand Jury, he then "informed them to the best of his understanding of the nature of the offence of a Conspiracy."

When this Bill was before the Grand Jury for consideration, the Attorney General suggested that one of the agents of the North West Company should examine the witnesses in support of the Bill and when the Grand Jury refused to permit it, he claimed the right of attending the Grand Jury and examining the witnesses himself; this, he maintained, was a privilege to which he was entitled as a Law Officer of the Crown. Lord Selkirk at a later time, in a Petition to the Prince Regent, said that the Chief Justice ruled in favour of this right and said it was the practice in England and that thereupon he took the liberty of contradicting him in open Court.

The Chief Justice says that the Attorney General represented that the evidence was voluminous and diffuse, in various languages, and that it was for that reason that he desired

that the prosecutor should be before the Grand Jury. The Grand Jury being then in Court were told that it was not unusual for such aid to be given to the Grand Jury to relieve them of much labour, and that if they had objections to the prosecutor they could have none to the Attorney General. The Grand Jury expressed their willingness to have the Attorney General attend, and he did so. The next day, Selkirk objected and the Attorney General suggested that he should discontinue his attendance. The Chief Justice told him that so long as his presence was necessary he should attend. This conduct on the part of the Chief Justice was precisely what the law then required and still requires.⁹

The Grand Jury heard for three days the evidence of witnesses examined by the Attorney General, they then took two days longer to consider, during that time examining other witnesses against the Bill, which of course they had no right to do. On Saturday they were asked as to the progress made and their foreman said they could not agree either to find or reject the Bill. The Chief Justice then instructed them that if twelve of the Jury did not concur in finding a true Bill after a reasonable time, the Bill should be ignored. On Monday the Grand Jury were informed by the Court through the Sheriff, that if they or their foreman did not come into Court by noon and explain the delay, the Court would adjourn. The Sheriff returned and said that the Grand Jury would allow no answer to be made to the Court! The Court sat till 1 o'clock waiting for the Grand Jury and it was then closed. Powell says that before adjourning he called upon the Bar to be informed if there was any precedent in such a case, and the Bar unanimously answered in the negative, whereupon "the Chief Justice with the full concurrence of Counsel for the Prosecution and for Earl Selkirk, left the Bench without adjournment. In so doing he then thought and thinks still he did his duty." And no Judge, no lawyer, can be of a different opinion.

This conduct was made the occasion of a charge that he "stepped in to shield the Attorney General from the mortification of having another of his Bills thrown out, after the uncommon pains and unlawful means he had taken to have the indictment found by the Grand Jury." This ridiculous charge the Chief Justice treats with the contempt which it deserves; and while in view of the action of the Grand Jury in unlawfully hearing witnesses for the defence, it is not unlikely that the Bill would have been ignored,¹⁰ the Crown and the Attor-

ney General were no better off and Selkirk no worse off than if the Bill had been in fact ignored. So far as Powell is concerned the Bill for conspiracy had been laid against his advice and an ignoring of it would have been a justification of the wisdom of his opinion.

The troubles of Lord Selkirk were not over. It seems that he had such friends in the Western District that there would be difficulty in procuring a Bill from a Grand Jury of that District, and if a Bill were found there would be difficulty in procuring a conviction. Selkirk suggests that the conduct of the Attorney General was due to the fact that he had a retainer from the North West Company;¹¹ but it is certain that he had the express instructions of the Home Authorities to prosecute Selkirk for his actions at Fort William and it was his duty to prosecute him effectively.

Legislation was passed in Upper Canada whereby such offences as were charged against Selkirk and his servants could be tried in any District of Upper Canada.¹² Under this Act, at the Assizes at York, February, 1819, a Bill was found against Selkirk and some nineteen others for Conspiracy; but he had gone to England and the trial was not proceeded with.

The proceedings in the case of those sent down by Selkirk must now be noticed. One, De Reinhard, was convicted of murder in Quebec in May, 1818; but he was not executed, there being doubt as to the jurisdiction of the Court.

Another, McLellan, was acquitted of the same charge in Quebec in June, 1818. It was thought in the case of others that "justice could be more conveniently administered" in Upper Canada; and application was made to the Governor-in-Chief, Sir John Coape Sherbrooke, to direct the removal of these cases to Upper Canada;¹³ he consulted the Home Authorities and they agreed that he should do so; and this was done.

These cases were the occasion of another utterly groundless charge against Powell by Selkirk—that had he not been overruled by his two Puisnes he would have released these prisoners as and when they passed the boundary line of the Province. The fact is that all three Judges agreed that while the Warrant of Commitment to the Gaol at York by the Governor of Lower Canada was wholly invalid, the instrument under the Great Seal of Lower Canada was perfectly good and held the prisoners.

The prosecutions at the instance of Selkirk came on at the Assizes at York in October 1818, before Powell, C. J., Camp-

bell and Boulton, JJ., and their associates when indictments were found against four persons as principals, four as accessories before and ten as accessories after the fact of the murder of Governor Semple. A Bill for arson was found against three persons while an indictment against three for shooting at Miles Macdonell, one against another person an accessory before the fact and a third against still another person for robbery were ignored. On following days, indictments were found against three persons for maliciously shooting at Miles Macdonell and others, against four persons as principals, four as accessories before and ten as accessories after the fact of murder of Alexander McLennan, a third against still another person for robbery. During the same Assize another Bill was found against three persons as principals, and five as accessories before and after the fact for stealing nine pieces of cannon belonging to Lord Selkirk.

Two of those charged with the murder of Semple, namely Francois F. Boucher and Paul Brown, were then put on trial, all the three Judges and also William Allan, J. P., being on the Bench. The prosecution was conducted by Attorney General Robinson and Solicitor General Henry John Boulton, the defence by Samuel Sherwood, his brother Levius P. Sherwood and Dr. W. W. Baldwin—a report from shorthand notes is still extant.¹⁴ A perusal of the proceedings makes it plain that the prosecution was pressed with earnestness and vigor and that both prosecution and defence were brilliant examples of forensic skill and legal learning. The Bench also shows up well, and the whole trial was a model of propriety and fairness: an occasional outbreak between the eminent Counsel and an occasional complaint from the Chief Justice of lack of progress add a human interest to the whole and indicate the tension upon all concerned.

There was no doubt that the prisoners had been with and formed part of the band which killed Semple; and the defence was that Semple had met that band with an armed force, that he had begun the firing and that the shots which killed him were in self defence. The Chief Justice charged the Jury that on the indictment if they found that Semple began the affray and the shots which killed him were in self-defence, they should acquit; but if not, they should convict Boucher; that in any event there was no evidence against Brown. The Jury found a verdict of Not Guilty.

The next day Paul Brown was acquitted of a charge of stealing a blanket and gun. The following day, six persons

accused as accessories, demanded their trial as they had the legal right to do and they also were acquitted. In this case the Chief Justice charged the Jury much as in the first case, and Mr. Justice Boulton also charged the Jury: his charge was strongly in favour of the prisoners.

A few days later, before the Chief Justice and Mr. Justice Boulton two persons, Cooper and Bannerman, were placed on trial for stealing Selkirk's cannon. It was set up for the defence that the prisoners and others who were Selkirk's colonists, had removed the cannon to prevent them being used (as was intended) to stop the discontented settlers from removing to Upper Canada. Mr. Justice Boulton charged the Jury most impartially and the Jury promptly acquitted.

Considerable argument took place in regard to the course to be pursued in respect of others against whom indictments had been found. The Court, after full discussion, unanimously held that the only jurisdiction they had to try offences committed in the Indian Territory and therefore outside of Upper Canada, was derived from the special instruments from the Governor of Lower Canada under the Great Seal of the Province. Nothing further could be done as there were no others affected by such special instruments; but the Court refused to discharge Mr. McGillivray of the North West Company who had been for two years under recognizances to answer any bill to be brought against him.

At the same Assizes on the civil side, the Chief Justice himself presided: his brethren had sat with him on the criminal side by reason of the importance and novelty of the cases to be tried.

William Smith, the Deputy Sheriff from Sandwich, had brought an action for false imprisonment against Lord Selkirk, and that case came on for trial before the Chief Justice and a Jury; evidence was called on both sides, and the Jury found for the plaintiff with damages fixed at £500.

Daniel McKenzie, a retired partner of the North West Company, had also sued Lord Selkirk for false imprisonment. He was said by one of the witnesses to have been "the weakest man of the Company from habitual Indulgence in Intoxicants", but that did not prevent the Jury from finding a verdict in his favour for £1500.

Lord Selkirk had been expected in York at the Assizes, and the Attorney General had asked on Friday, October 23, for a delay till the following Monday as he understood that Selkirk would arrive on the Saturday or Sunday, and "as the Earl of

Selkirk was deeply interested in the result of these accusations and had given a great deal of attention to the investigation, he did not wish in the absence of his Lordship to put these men on their trial." The cases proceeded on Monday, October 26, in the absence of the private prosecutor: he left Montreal, indeed, at that time in the direction of Upper Canada and was confidently expected there; but he turned off to the left and proceeded to England by way of New York and never set foot in Canada again.

He petitioned the Prince Regent and Parliament but without redress; a volume of correspondence between his friend Halkett acting on his behalf, and Lord Bathurst is well known.¹⁵ Most serious charges were made by him and have been made since by his admirers against the administration of Justice in Upper Canada. A late writer says: "Justice was undoubtedly perverted in Upper Canada in the most shameless way";¹⁶ and this kind of charge has been widely believed. Any impartial person who will peruse with care the contemporary and other accounts of the transactions will say with perfect confidence that there is not a shadow of evidence to support the charge of perversion of justice in Upper Canada.

Dealing only with the Chief Justice; whatever the merits of the controversy in the Red River Country, he had nothing to do with it. Lord Selkirk with an armed force of soldiers took forcible possession of Fort William, he was the first wrong doer in territory over which the Upper Canada Courts had jurisdiction. His mistake in sending those whom he accused of crime in the Indian Territory to Sandwich, was corrected by the Chief Justice. Shortly thereafter, partners in the North West Company applied to the Chief Justice for a warrant against him for felony, and he refused. Then the partners asked for his interference in the matter of the forcible entry and detainer of Fort William: that he also refused, and told the applicants that this was exclusively in the jurisdiction of the Magistrates of the Western Districts and the redress a writ of restitution if the Magistrates saw fit to award one.

A writ of Habeas Corpus to produce the body of Daniel McKenzie was then asked for; that he could not refuse, but lest there should be bloodshed the Writ was not entrusted to the Company but to a special tipstaff who had specific instructions to deliver it peaceably and privately to Selkirk. This was done, and Selkirk returned that McKenzie was not in his custody.

When the Earl presented himself at Powell's house at York to surrender upon the warrant, he was referred to the Attorney

General, D'Arcy Boulton, and it was arranged that he should surrender to the Magistrate who issued the warrant. This warrant had been issued upon the sworn information by two persons who appeared to know the facts; and even Selkirk does not complain of what was done by the Magistrates upon the hearing nor has he anything to say against the Crown Officer, Acting Solicitor General Henry John Boulton—Boulton said "he was officially directed to bring forward against Lord Selkirk a charge of resistance to legal processes" and Selkirk was bound over in a trifling sum to appear at the next Assizes.

An indictment had been found at the previous Quarter Sessions against him for assault, etc., upon William Smith; he was bound over for this also but was unable from press of business to attend the next Sessions, and the bill was, at the instance of Attorney General Robinson, quashed for irregularity.

The proceedings at Sandwich at the Assizes have already been detailed. The only thing that Selkirk could possibly complain of was that a Bill was laid for Conspiracy. With that Powell had nothing to do. There was no perversion of justice, and the only irregularity was that of the friends of Selkirk on the Grand Jury in hearing witnesses on his behalf.

Whether the Act of the Legislature enabling proceedings to be had elsewhere than at Sandwich was wise may be a matter of opinion; that the Houses of Parliament approved is obvious, and after what had occurred at Sandwich few will doubt the wisdom.

Those who were accused by Selkirk and who came before the Upper Canada Courts were prosecuted with vigour, and no fault can be found with the rulings of the Judges. As the Chief Justice is the person most assailed it should be mentioned that the opinions of all the Judges on matters of law agreed and that in charges to the Jury Mr. Justice Boulton was much more favourable to the accused than was his Chief.

No complaint has ever been made against Powell in the civil trials.

As the Attorney General was rather an Imperial than a Provincial Officer and responsible to the authorities at Westminster, it may not be improper to say that "the temper and judgment with which he . . . conducted himself during the whole of these long and difficult proceedings . . ." received the entire approbation of the Home Government.¹⁷

CHAPTER XVII

DECLINE IN INFLUENCE

WHEN Gore left the Province in 1817, he was succeeded by Samuel Smith as Administrator of the Government and he remained Administrator for more than a year, being succeeded by Sir Peregrine Maitland, August 13, 1818. Maitland had undoubtedly received an unfavourable impression of Powell, "too marked to be mistaken", from some source before his arrival at York and for some time he treated him with great coolness and distrust.¹

But this distrust passed away by the end of the following year; and from 1819 to 1822, Powell was, with the exception of certain intervals of reserve and coolness on the part of the Governor, *persona grata* with him. He, however, was not the "power behind the throne" which he had been in Gore's time. Whether because Powell could not concur with him in all matters or for some other reason, Gore on his return to Upper Canada procured the appointment to the Executive Council of the Reverend John Strachan—the divine was Chaplain of the Legislative Council but he became a Member of that body in 1820. It is not proposed here to discuss the character of this remarkable man: we are perhaps too near his times for an impartial estimate and opinions are yet modified if not determined by sectarian relationships. But all are agreed that he was "a man of fiery energy and resolution", "a grim and determined warrior" "who was wont to take a masterful lead", that he never surrendered and his idea of retreat was *reculer pour mieux sauter*, that he was whole heartedly attached to his Church and earnestly advanced what he believed to be her interests, wholly disregarding of the opinion of those not of her communion.²

After Dr. Strachan's call to the Executive Council if not before, he and Powell were looked upon by the public as leaders of the official party afterwards to be known as the Family Compact.³ But there seldom was complete harmony,⁴ and as time went by the differences became acute. Some of the dissension arose from the view of Dr. Strachan that the Clergy Reserves belonged entirely to the Church of England, while Powell, a lawyer before all else, considered that the

words "Protestant Clergy" in the Canada Act had a much wider connotation.⁵ But that did not account for the whole—two strong men, of strong views, unbending and determined had met—the one must increase, the other decrease. Strachan's rugged physical health gave him an advantage over Powell who was now feeling the effects of advancing years—he was twenty-two years older than his clerical antagonist, and his health was broken by toil and the harassing care of a large family—he never knew what it was to be even comfortably situated financially, but suffered the *res angusta domi* to the end of his life. Strong man as he was in intellect and will, he was no match for Dr. Strachan; evidence slight perhaps but significant appears indicating that he was failing, becoming more self-centred, losing his sense of proportion—in a word, "losing his grip."

Strachan had a powerful ally in John Beverley Robinson, who having been when under age appointed at Powell's instance, Acting Attorney General in 1812 on the death of John Macdonell, became Solicitor General in 1815 and Attorney General in 1818. He had been a student in Dr. Strachan's school and loved and revered him to the last.

Open rupture was not long delayed: it was inevitable in any case; but the occasion is not one which reflects much credit upon Powell. The story is not long or complicated: the two Provinces of Upper and Lower Canada had early agreed that Upper Canada would not place an import duty on goods coming from the Lower Province, but that Lower Canada should collect the duty upon all goods coming through Lower Canada into Upper Canada and divide the money so raised with Upper Canada. Trouble arose between the two Provinces as to the amount each was to receive: and it seemed necessary to appeal to the Home Authorities. Powell who had been in Upper Canada from the beginning was asked by Maitland to draw up a Statement to be submitted to His Majesty; he did so, and it was adopted by both Houses of the Legislature.⁶ Maitland at the time Powell was asked to draw up the Statement, also asked him to carry it to England to enforce the necessity of relief from England: Powell agreed; but he and the Governor had reckoned without their host. The Legislative Assembly and Council "while they disclaim all desire of interfering with an appointment which . . . rests solely with Your Excellency and repose the fullest confidence in Your Excellency's wisdom to select a person duly qualified for this important mission, on considering the magnitude of the object, have agreed in opinion

from their experience of the extensive information of His Majesty's Attorney General on the affairs of the Province that the duties suggested . . . will be fulfilled by him in a manner most conducive to the attainment of the important end they have in view."⁷

Whether the Lower House was influenced to snub Powell in this way by his entering a Dissent on the Proceedings of the Legislative Council, December 21, 1821, against a money Bill sent up by the Assembly and passed by the Council: and whether the Council was under the influence of Dr. Strachan we need not enquire—it is enough that both Houses concurred in the request⁸—and no one knowing the two men would hesitate to prefer as an Ambassador on such an important mission the young, strong and active Attorney-General to the aging and physically weak Chief Justice.

Maitland was thus placed in a quandary: he took the proper course and stated the whole matter to Powell, showing that it was now impossible to appoint him to represent Upper Canada in England on this exceedingly important mission. Powell was indignant and took no pains to hide his anger: he entered his Dissent from the Address upon the Journals of the Legislative Assembly "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"—he later on entered his Dissent to the Act authorizing the appointment and to another granting money to provide for the expenses of the Commissioner "because it is unmasked 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." This comes with very ill grace from one who had himself hoped to be the Commissioner and was angry only on being passed over.⁹

Powell's conduct excited universal disapprobation: the Council itself protested against the presiding officer entering a Dissent and held it a breach of privilege for that officer to oppose the majority of the House whose servant he was. Maitland threatened removal from the office of Speaker and even from that of Chief Justice, and Powell gave way, having, as he says, discharged his duty by entering the Dissents. The Governor had two Members of the Council move and second the removal of the Dissents from the Journals and the motion was carried without opposition. The Dissents were removed before the Journals were sent to the Secretary of State; and

we should know nothing of them but for Powell's own records.

His health had quite given way and at the close of the Session he asked for and obtained leave of absence intending to go to Bermuda to recuperate.¹⁰

Instead of going to Bermuda he went to England with the intention of obtaining if possible some increase in his past salary,¹¹ when there occurred the second great tragedy in his life—the Tragedy of Anne Powell.



CHAPTER XVIII

THE TRAGEDY OF ANNE POWELL

ANNE POWELL was the sixth child and second daughter of William Dummer Powell.¹ She was born in Montreal, March 10, 1787, and accompanied her parents to Detroit: she was educated in part in Canada, but mainly in England, and was undoubtedly of a high order of intelligence. Her correspondence proves her possession of wit, considerable literary talent and a sound education.² She was, it is said, a handsome woman, though perhaps not so beautiful as her younger sister Mary; her manner was captivating and she was a good conversationist.

But she was self-willed, impatient of restraint, and had a hearty contempt for mere conventionality. The rigid formality of the official society of York irked her, and she resented with spirit "Mrs. Grundy's" stricture upon her conduct; moreover she was not too regardful of the feelings of her own people.

As early as 1812, gossip connected her name with John Beverley Robinson, one of the handsomest men of his time: and it was whispered that Powell's patronage of the young law student which resulted in his appointment as Acting Attorney General by Sheaffe was due to his expectation that they would become connected by marriage.³ Robinson, being in England pursuing his legal studies and having been appointed Solicitor General of Upper Canada, was married in London in 1817. Both Powell and his daughter Anne were then in England, and some comment was made on the fact that Robinson did not communicate to Powell the fact of his approaching marriage until everyone else knew it:⁴ but both Powell and Robinson repudiate the suggestion that there was any impropriety in this.

Whatever hopes Anne Powell may have formed of a union with the Solicitor General—and many of her family in private letters never intended for the public eye acquit him of anything but an occasional honeyed word—she concealed for a time her resentment, if any she felt.⁵

Returning to Canada in 1818, it was not long before she made herself conspicuous by what seemed like pursuit of Robinson; this was the cause of much annoyance not only to the Robinsons but also to her own family.

Powell before he went to England in 1822, had seen and deplored this conduct; after he left, it became even more marked. Robinson who had been appointed by the Governor to proceed to England as Commissioner on behalf of the Province in connection with the troubles about revenue between Upper and Lower Canada, was leaving with his wife; and Anne Powell expressed her determination to go with them. Robinson declined to allow her to do so and left for New York without her.⁶

Her mother expostulated with her and told her plainly that her proposed journey would be taken by Society generally as proof of her infatuation. This angered the young woman,⁷ and she said that she would go now no matter what happened since such things were said of her. Dr. Strachan, (not yet Bishop) was sent for—the confidant of most of the official set at that time, certainly of all those of the Anglican creed. He reasoned with the angry young lady and finally she was apparently persuaded to give up her plan; her baggage which was all packed for the voyage was locked up by her brother, Dr. Grant Powell; and all fear of scandal seemed over.

In the morning, however, it was found that she had fled and was on her way by sleigh to Kingston.⁸ She then went south and at Albany so far effected her purpose that she joined Robinson and his wife. She was tolerated by them, stopped at the same houses and, as her mother writes, “boasts she was always considered the *Lady* of the party.” The husband and wife sailed from New York but Miss Powell did not accompany them. Her mother’s brother, George W. Murray, living in New York, persuaded her to remain over; and Robinson refused to take her in company with himself and his wife.

After declining to sail in another ship because it carried no other women passengers, she took a later ship, the Packet *Albion* of 500 tons burden on which her townsman, Mr. Alexander Wood, had come out the year before. The *Albion* was not a new ship; but “she was one of the most thought-of ships that ever sailed, and the Captain (Williams) as much so, both as a well-behaved man and a good seaman.”⁹ The ship encountered heavy weather and was in great distress for several days during which Anne Powell showed great fortitude and courage, encouraging the men and taking her turn at the pumps with them—all was in vain, the ship was wrecked with great loss of life. A contemporary account in the *Cork Southern Reporter* reads:

“The *Albion*, whose loss at Garrettstown Bay we first men-

tioned in our paper of Tuesday, was one of the finest class of ships between Liverpool and New York, and was 500 tons burden. We have since learned some further particulars, by which it appears that her loss was attended with circumstances of a peculiarly affecting nature. She had lived out the tremendous gale of the entire day on Sunday, and Captain Williams consoled the passengers at eight o'clock in the evening, with the hope of being able to reach Liverpool on the day but one after, which cheering expectation induced almost all of the passengers, particularly the females, to retire to rest. In some short time, however, a violent squall came on, which in a moment carried away the masts, and, there being no possibility of disengaging them from the rigging, encumbered the hull so that she became unmanageable, and drifted at the mercy of the waves, till the light house of the Old Head was discovered, the wreck still nearing in; when the Captain told the sad news to the passengers, that there was no longer any hope; and, soon after she struck. From thenceforward all was distress and confusion. The vessel soon after went to pieces, and, of the crew and passengers, only six of the former and nine of the latter were saved." This tragedy took place at the Head of Kinsale on the south coast of Ireland.

Anne was one of those drowned; her body was cast on shore on the estate of Thomas Rochfort, and received Christian burial in consecrated ground at the Church of Garretstown nearby. A brooch found on her dead bosom was sent to her relatives in Canada, and it is still preserved, a melancholy memorial of her terrible fate.

The Chief Justice had been getting ready to return, but he learned from his wife's letter that his daughter intended to come to England (although the whole circumstances were not written, the wife feeling herself as she says "justified in concealing what would inflict on him unavailing distress").

He at first determined not to see her; outraged by her conduct, he instructed those at his lodgings not to allow her to enter: "No consideration will permit me to come in contact with her, she is of age and I am bound to provide for her no longer than she continued under my roof."¹⁰

But "dour" man as he was and sorely tried, the call of blood was strong, he relented, he made arrangements that she should be properly housed and kept in England (not in her relations' houses, for they would not receive her) and provided out of his all too slender resources a sufficient sum for that purpose. He took comfortable lodgings for her in London and meant to

do all in his power to make her happy and respectable. He was on his way to Liverpool to meet her and had got as far as Bath when the news came.

The father, stunned with the tidings, went back to London. Before returning to Canada, he made full enquiry of the owners of the *Packet* and of the survivors of the crew; he commissioned the erection of a tombstone over his unhappy daughter's grave, and a marble tablet to her memory within the church; he was somewhat consoled by learning that his daughter was fully aware of her coming doom and was prepared for it. The tombstone and marble are still to be seen at Templetrine Church.

The tablet is of white marble with a shelf on which is an urn of the same material, the whole bordered by or resting on black marble. It bears the inscription:

Anna Powell, Spinster,
was a passenger in the ship *Albion* (wrecked
on this coast on the 22nd April, 1822),
and perished with many others,
but her body being recovered from the sea, received
from the charity of strangers Christian burial in
the cemetery of this Church; in grateful memory
whereof this marble is inscribed by

W. D. P.

The tombstone is a flat limestone slab, resting on supports of limestone about 8 inches high. The supporting stone at one side has sunk so that the slab rests at an angle instead of being horizontal, and it lies only upon the edge of the opposite support.

Upon the tombstone appears the following inscription:

Anna Powell, Spinster,
Daughter of
William Dummer
and Anne Powell
of York in Upper Canada
Born 1787, Deceased 1822.¹¹

CHAPTER XIX

THE LAST STAGE

POWELL did not take any active part in the scheme favoured by the Home Administration in 1822 of uniting the two Provinces of Upper and Lower Canada;¹ he came to York in the Fall of 1822, and took up his judicial work. When Parliament sat in January, 1823, he presided during the Session in the Legislative Council (except when disabled by sickness); during this Session there was no open outbreak, but it is impossible not to see that there was constant friction between him and Maitland, and that Strachan had superseded him in the confidence of the Governor. In the following Session, the Governor complains of want of candour in Powell's explanation of his conduct, and does not stop at charging him with aiding the Opposition by suggestions and insinuations. There were serious and just complaints at the Chief Justice's conduct especially at his avoidance of open discussion with the Members of the Executive Council of the merits of the measure to which he objected.²

The time was now approaching at which Powell had long before determined to retire from the Bench. He thought that he should not act as a Judge after the age of threescore and ten; the Governor was not unwilling, but there occurred a circumstance which angered the Governor and the Executive Council and which we find some difficulty in explaining. While the Speaker had been acting in a capricious and irritating way with the remainder of the Executive Council and the Governor, he had also made enemies amongst the non-official community. In fact he was still regarded as the power behind the throne and was attacked by those dissatisfied with the Administration. A particularly scandalous article was published after the style of Junius in the "Colonial Advocate" on October 24, 1824, under the signature "Spanish Freeholder" attacking Powell under the name of Cardinal Alberoni "Lord Chief Justice of His Imperial Majesty of Spain" as "A traitor and a Judge who has immolated human victims to the Moloch of his own emolument." His conduct in the treason trials of 1814 was assailed and he was held up to public hatred and obloquy. It was not the Chief Justice as such but the Government which

was aimed at. To the amazement of everyone, the Chief Justice printed an answer, repeating the libel and justifying his conduct—still masquerading as the conduct of Cardinal Alberoni, be it said.³ This however was mild compared with what followed—a communication to the press (anonymous) attacked the Government; Powell published an alleged reply which but repeated the libel. Maitland asked the advice of the Executive Council, told them that the conduct of Powell since the appointment of the Attorney General had been extremely disingenuous, embarrassing and unbecoming and asked for the advice of the Council concerning the Chief Justice in printing such a statement in answer to an anonymous libel (which he himself republished) and which he was informed soon after its appearance it was the intention of the Government to make the subject of a prosecution. He added that he would have “no more intercourse with the Chief Justice except in writing or in the presence of a third person.” At the next meeting of the Council, only Powell, Strachan and Baby appeared, the letter of the Governor was read and Powell, leaving the chair, made a new statement. The following day, Smith joined Strachan and Baby; Powell being sent for, had nothing more to say. The next day, Powell did not attend or the next, whereupon the three, January 28, 1825, reported that the printed pamphlet had been written by Powell with the avowed object of creating complication, that it “reveals alleged passages of certain confidential and private conversations with His Excellency” “something like a breach of faith” exposing “measures of the Government to public contempt and reprehension” containing “various inaccuracies”, that the Council had “much personal experience and observation of this conduct of the Chief Justice since the appointment of the Attorney-General . . . extremely disingenuous and embarrassing . . . unbecoming his high station” and they advise that there should be no further intercourse with him.⁴ Maitland sent all the papers to Bathurst, the Secretary of State, with complaint against Powell’s conduct; and in a few months received a dispatch announcing His Majesty’s permission for him to resign, on a pension of £1000 Sterling per annum “on account of his long and faithful service.”⁵ It should be said that the members of the Executive Council, on Powell applying to Maitland to be allowed to resign on a pension, had reported that he was unworthy of such a favour; but the Home Authorities were more generous.⁶ He sat for the last time in the Court of King’s Bench, Saturday, July 2, 1825, the last day of Trinity Term,

6 Geo. IV; in Michaelmas Term, William Campbell appears as Chief Justice;⁷ Powell also retired from the Legislative Council and Campbell presented his Patent as Speaker, November 7, 1825.⁸ He thus escaped the storm which broke out in January, 1826, against Judges being allowed to have a seat in either Legislative or Executive Council.⁹

The remaining nine years of his life were passed in retirement.¹⁰ He took no part in public affairs; he went to England in 1826, chiefly he says to induce the Secretary of State to cause the Lieutenant Governor to remove from the records of the Province every vestige of the gross misrepresentations of Sir Peregrine Maitland of his conduct in the Executive and Legislative Councils.¹¹ He remained in England with his wife and daughter for three years; but passed the rest of his life in the Provincial capital, where he died, September 6, 1834, seventy-nine years of age. His devoted wife survived him for fifteen years, dying in March, 1849, aged ninety-three years. After being buried in the family burying ground (near the present Erskine Presbyterian Church) their bodies lie side by side in the St. James Cemetery, Toronto, and with them, that of their daughter, Elizabeth, who died, December 1, 1855.¹¹

NOTES.

NOTES

CHAPTER I

1. The first syllable is accented and was originally pronounced to rhyme with "cow"; the tendency recently has been to pronounce it to rhyme with "so"—precisely the same change is seen in the pronunciation of "Bowell": another form of the same name: "Howell", however still retains the original pronunciation.

2. This Thomas Powell had ten children; several sons died in infancy; William died in London; Susannah, born 1686, died 1780, aged 94, and lies buried at Ludlow, Shropshire; John was born at Bank House, circ. 1682 and died 1740 aged 58 or 59. (Powell MSS.)

3. The Dummers seem to have come originally from Devon: they spread over the South of England, including Hampshire.

The emigration of the elder Dummer, son of a country gentleman, to London to engage in trade was not without precedent. In the reign of Mary and still more in that of Elizabeth (as is well known) a great number of the younger sons of the landed gentry, the County Families, flocked to London to engage in trade. Some of the best known families at the present time, even among the nobility, trace their origin to London merchants of that period, and in no few instances, the founders were younger sons of gentle families.

The "Heralds' Visitation of the City of London" made in 1634 shows that more than half of the chief merchants of London were grandsons of country gentlemen and entitled "to wear coat armour."

4. In addition to the three sons named in the text John, William, and Jeremiah, there were two daughters, Anna who married the Reverend Dr. Pemberton of Boston, and who died, February, 1767, and Susan who married Mr. Symes of Springfield—neither is known to have left issue.

William Dummer Powell seems to have been a favourite of his aunt, Mrs. Pemberton—in a letter to him from his mother, Boston, June 13, 1767, Mrs. Powell says: "She frequently mentioned you in her illness with strong marks of affection": and the "buttons taken from her arms after she died" were sent to him "as a pledge of love from your surviving aunt."

None of the children of this first John Powell seems to have inherited his *gaieté de coeur*—they all seem to have been sedate and serious, even solemn; but the brother and sisters of William Dummer Powell and some of his children exhibited an atavistic reversion to type. This "skipping of a generation" is not uncommon in man or animals.

William Powell married (1) Miss Bromfield of Boston by whom he had two daughters, one of whom afterwards became Mrs. Mason, and

(2) Katherine, daughter of Thomas Goldthwaite and widow of Dr. Silvertown Gardner.

Jeremiah Powell married but died in 1785 without issue.

Both William and Jeremiah Powell were active on the Republican side, the former being implicated in the opposition to the imposition of taxation upon the Colonies by the Home Parliament.

The Stamp Act of 1765 was, indeed, repealed in 1766, but the "Townsend Revenue Act" of 1767, 7 Geo. III, c. 46, imposed duties upon paper, painters' colours, glass, and tea—the Colonists resisted, claiming that this was unconstitutional, and an infringement of their rights as being taxation without representation: and since the legal power of the Imperial Parliament to impose the duty was unquestionable, they opposed with the only weapon at their command, non-importation. The Act was repealed as to every article except tea (threepence per pound) in 1770 by the Act, 10 Geo. III, c. 17; and the tax on tea seems to have been retained not for revenue reasons, but rather as an assertion of the right to lay such imposts.

The Colonists still resisted: three hundred women of Boston, heads of families, signed an agreement not to drink tea until the duty was repealed: indigenous substitutes were found, raspberry leaves, thyme, &c; and though tea continued to arrive at Boston, there was no sale for it. The East India Company, hard hit, applied to the British Government for relief having then some seventeen million pounds in their warehouses: and an Act was passed in 1773, 13 Geo. III, c. 44, allowing to the Company a drawback of the full amount of the English duties on exporting their tea to America, the Company to pay the threepenny duty per pound on landing the tea in America. A number of merchants in the Colonies became consignees and agents of the Company in this business, amongst them Richard Clarke and Company, Elisha Hutchinson, Benjamin Faneuil and Joshua Winslow of Boston. The Colonists were still more determined to prevent the importation of the tea, and a large meeting held at the State House, Boston, October 18, 1773, appointed a committee to wait on the consignees in the city and request them to resign their appointment—this committee was not very successful, and another committee of seven was appointed, of whom William Powell was one, to wait on Thomas and Elisha Hutchinson—the Hutchinsons could not be found. When it said that the other members of the committee were John Hancock, John Pitts, Samuel Adams, Samuel Abbott, Dr. Joseph Warren and Nathaniel Appleton, William Powell's politics and standing in the community become manifest—Hancock, Adams and Warren were the most prominent of the popular leaders and Warren sealed his faith with his blood at Bunker Hill, June 17, 1775.

A committee of correspondence of twenty-one members including William Powell, Samuel Adams, Joseph Warren and other prominent leaders was also appointed to correspond with similar committees at other places. At length, on the night of December 16, 1773, a number of Bostonians, some thirty or thereabouts, disguised themselves as Indians, and threw the tea on board the Company's ships into the harbour—this is the well-known "Boston Tea Party": it is not certain that William Powell took any part in this escapade. Neither G. R. T. Herves in his *Retrospect of the Boston Tea Party*, New York, 1834, nor Francis S. Drake in his *Tea Leaves*, Boston, 1884, states that William Powell was present—the latter, however, mentions his name as member of the committees already mentioned.

Isaac Winslow Clarke, one of the firm, of Richard Clarke & Co., Con-

signees and Agents, afterwards married Anne Powell, sister of William Dummer Powell; and his sister, Susannah, married John Singleton Copley the artist, and became the mother of Lord Lyndhurst, Lord Chancellor of Great Britain.

Of Jeremiah (or Jeremy) Powell, his nephew William Dummer Powell says: "Jeremiah Powell, my own uncle, was twenty years of the Provincial Council and of such Reputation for Integrity, tho' of the Country Party, that he was included in the King's Mandamus in 1774 and during the war he exercised the office of President of the Council, the Chief Executive Magistrate of the Province, with that honor and humanity as rendered him peculiarly dear to every British prisoner whose Misfortune led him to experience them."

5. The curious incidents of a West India mortgage are of little interest to a Canadian—even to a Canadian lawyer. They are given at length in the text-books, e. g. Fisher on *Mortgages*, 6th Edit., Sects. 525, 1791. Speaking generally, the mortgagees are allowed to stipulate that the proceeds of the mortgaged estates shall be consigned to and sold by them and that they shall be allowed an omission and certain other casual advantages. The actual receipt of consignments, the sale, &c., were very often left to agents; and the bankruptcy of the agent and consequent ruin, or at least impoverishment, of the mortgagee was no uncommon occurrence.

6. Powell calls his maternal grandfather "Suetonius", but the form "Sweton" appears to be proper. Powell says that the "son and heir" of Sir Suetonius assumed the title; but this is but one instance in many of inaccuracies to be found in the manuscripts of his later years. While incapable of untruth and exceedingly careful of literal accuracy, so that his statements made until after (say) his retirement from the Bench in 1825, may be relied upon, he in later manuscripts was guilty of a number of mistaken statements, some trivial and apparently mere inadvertencies or *lapsus calami*, others of greater importance. I should perhaps say that I have carefully checked his statements at every stage of his life with contemporary documents wherever that was possible for me. Powell's grandfather, Sir Sweton Grant of Dalvey, was the third Baronet succeeding his cousin, Sir Ludovic, in 1710: he did not assume the title and died without male issue (Burke says "d. s. p." but the "proles" here is of course male issue.) He was succeeded by Sir Patrick Grant, his first cousin twice removed, and he, in 1755, by his son who is the Sir Alexander Grant spoken of by Powell in several places and by his mother in a letter to him from Boston, June 13, 1767. Sir Alexander's wife, also spoken of with gratitude by Mrs. Powell for her kindness to her son, was the second wife, Margaret, daughter of Alexander Grant of Auchterblair. This Sir Alexander Grant the fifth Baronet was the son of Sir Patrick Grant and Lydia Mackintosh; he died in 1772 and was succeeded by Sir Ludovic and he by Sir Alexander in 1780. Sir Alexander Grant, the celebrated Principal of the University of Edinburgh, was the tenth Baronet. See Burke's *Peerage and Baronetage*, 69th. Edit., p. 744.

7. The original spelling is "Tollemache"; this became "Tolmach", "Tallmadge", "Tallmage", and "Talmage"—the spelling in the text is that almost always used by Powell.

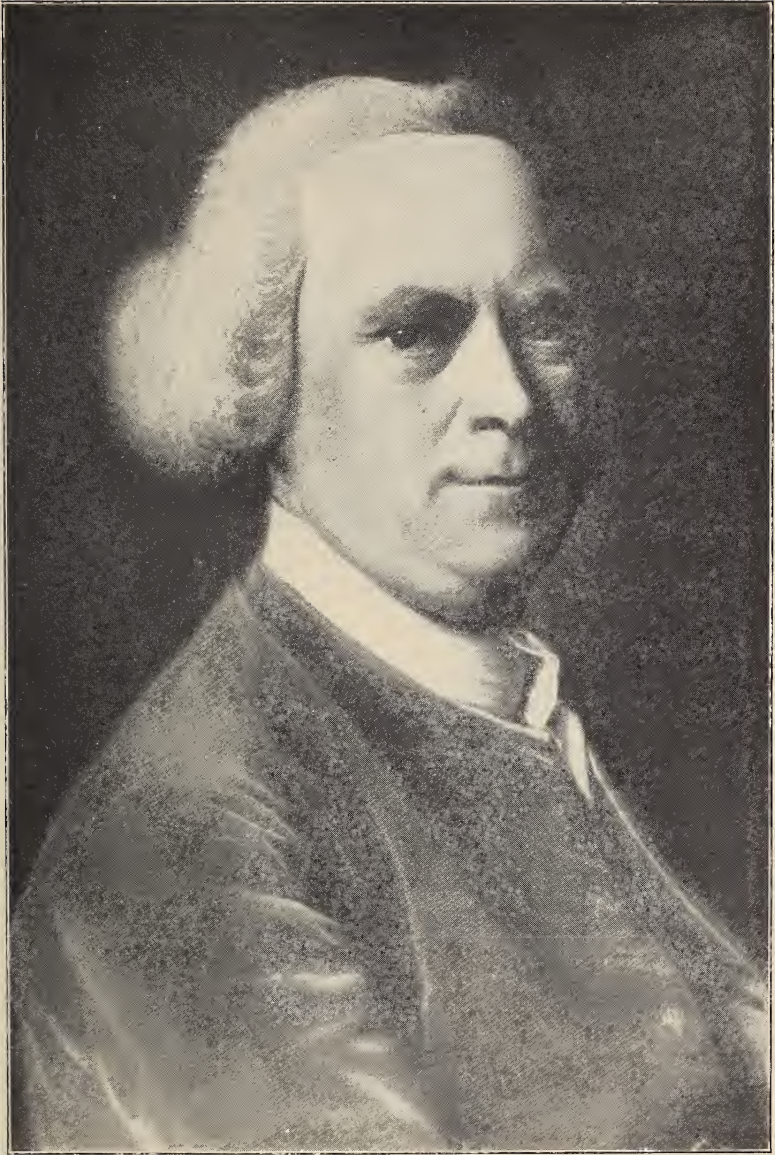
8. The Revd. Jonathan Travers was the chief manager of the school.

9. His being sent to Holland was due to the advice of John Grant, a business friend of his father's and apparently a relative of his mother's; and his father was then on his behalf "looking to an Interest in the Mercantile House of Sir Alexander Grant—Holland being then considered the School for merchants. There . . . I acquired a little more than the French Language with sufficient Dutch and Arithmetic to qualify me for the East; but in the Society of two Ladies, sisters from Vevey in whose House I lodged acquired a Taste for French Literature and concurrently for the Roman Classics." These two ladies were no doubt the wife and sister-in-law of Mr. Bevois.

10. This Earl of Erroll (or Errol) was James, the 15th Earl of Errol and son of the well-known Earl of Kilmarnock, who was executed in 1746 for his share in the rebellion of 1745. This Earl's wife was the heiress of the Earldom of Erroll; they had issue, James, the 15th Earl of Erroll; and Charles Boyd, who having become engaged in the affair of '45, escaped to France and returning died at Edinburgh in 1782 left this son, the "chum" of Powell and one daughter. Another son of the Countess of Kilmarnock was William Boyd, who was a Naval Officer in the service of King George II at the time of his father's execution.

11. A letter is preserved written by John Powell to Mr. William Reeve, a merchant in Bristol, England, concerning a scandalous story that he had not paid a large debt he owed to one Reeve a Merchant at Bristol and that he was to be arrested in Boston for it. This story had been told by one of the pupils at the school as coming from Mr. Reeve: and it caused the lad Powell to be shunned by all. The boy wrote to his mother, July 24, 1769; and the father wrote from Boston, October 12, 1769, to Reeve saying that it was a "false, cruel and Scandalous and wicked accusation", as Reeve knew—and added "I not only expect but Require from you as a Gentleman without Delay to write Sir A. Grant and the Rev. Mr. Travers fully the truth of this matter and oblige the boy whoever he is to make full and Publick acknowledgment in the School to my Son . . . and to Relieve my Boy from the Pain and anguish and Shame and disgrace he has suffered by a Forged Lye." (Powell MSS.).

12. John Powell, William Dummer Powell's father, had rather poor health: some of the correspondence hints at the cause being too much port, but this may be unjust; and, in any cause, those were the days of heavy drinking and the teetotaler was an object of pity as a weakling or of contempt as a hypocrite. His wife writing from Boston, June 13, 1767 to William Dummer Powell, her son, then at school at Tunbridge, says: "Your good & worthy papa has been ill this six month & for some part of the time dangerously so, indeed my dear I have been greatly distressd for you and my other Children. Yours Could not have been a Common loss for such tender fathers are rare even to the best Children. I thank the almighty there is at present hopes of his recovery if not to a perfect health to a tolerable state of ease. Oh my son much is expected much required of you to fulfill the injunction of a father who hopes and believes you may in time represent him to his family. Could I my Child but make you sensible of the gratitude of your good papa expresst to heaven when he lay as he imagin'd on the bed of death for blessing him with Children who promist to prove men and women of virtue it would not only raise the most tender



JOHN POWELL OF BOSTON (1716-1794), FATHER OF WILLIAM DUMMER
POWELL

Ideas in your mind but stimulate you to every praise worthy action & attainment."

At the time of his wife's death in 1774 his sister-in-law, Mrs. Champlin, of Newport, writing to William Dummer Powell, November, 1774, says: "Your Father, good man, is fast hastening down to the grave." John Grant, his close business friend writing from Spanish Town, Jamaica, December 23, 1774 says of him: "Your good Father is infirm; you should betimes consider yourself as the protection and guardian of your sisters, a delicate and tender charge."

Until the time of his death, John Powell was spoken of in the family correspondence as ailing and feeble, but he recovered to "a tolerable state of ease" and survived till 1794 when he died at Ludlow, Shropshire.

13. The Middle Provinces were the English Colonies which were neither New England nor the Southern Provinces i. e. Pennsylvania and New York—sometimes Delaware, New Jersey and Maryland were included in the term.

14. Jonathan Sewell, born 1728, died 1796, was the last Attorney-General of Massachusetts as a Province: he took the Royalist side, and at the outbreak of the Revolution, he went to England. He there visited the tomb of his ancestors and finding the name spelled "Sewell", he altered the spelling of his name to accord with the original—the family in America had been accustomed to spell the name "Sewall." He was the father of a much more celebrated son of the same name who, born at Cambridge, Massachusetts, 1766, was educated in England, came to New Brunswick in 1785 and became Attorney General of Quebec, and finally in 1808, Chief Justice of Lower Canada, dying in 1839.

15. See Note 4 *supra*.

16. The friends spoken of as at Newport were the Heatleys and the Champlins—Mary the daughter of Sir Sweton Grant and sister of Mrs. Janet Powell married as her first husband, one Heatley, the son of a Scotsman who had emigrated to Rhode Island and died there. She had two daughters Mary (Polly) and Janet (Jessie) by that husband, and after his death married a Mr. Bell. The Champlins were also relatives in the same degree, Mrs. Champlin being another sister of Mrs. Powell. Champlin was a merchant in Newport who with many other merchants of the same place was at this time "pushing to get their vessels out before the first of December", on which date effect was to be given to "the resolves of the Congress" which were "as fatal to Newport as the Boston Port Bill", (1774) 14 Geo. III. c. 17, which had by way of punishment for the Boston Tea Party removed the place of landing and discharging goods from Boston to Salem. The "resolves of the Congress" were those of October 20, 1774, committing the Colonies to non intercourse commercially with the Home Country.

Mrs. Champlin writes in most affectionate terms to William Dummer Powell whom she always addresses as "My dear Billy."

The apparently heartless desertion of Mrs. Powell on her death bed and of her body after her death by her friends should not be considered inhuman or even unkind. The distance from Boston to New York made it impossible for the husband and children of the deceased to be at her burial—and indeed Mr. John Grant in a letter from Spanish Town, Jamaica, December 23, 1774, says to the mourning son: "You

indeed had a double portion of affliction, but on retrospect you will probably extract comfort from the consideration that your worthy Father and tender hearted sisters escaped the unspeakable distress of paying the last mournful act of love and duty to her memory." (Grant says of her: "She was the kindest friend I ever yet knew", and speaks of "her extraordinary solicitude to have you reared up with knowledge and good qualities").

As to the conduct of the friends in New York, the condition of the times must be born in mind. The only prophylactic against Smallpox at that time known was inoculation which consisted in transferring the natural smallpox from a person actually suffering from the disease. While known from time immemorial in China and other eastern countries, and described to the Royal Society in London as early as 1714 by a physician from Constantinople, it owed its vogue in England to the celebrated Lady Mary Wortley Montagu who had had her son inoculated in Constantinople and who on her return to England in 1718 took great pains to spread the practice. In a few years, the Prince of Wales and the Royal Princesses were inoculated and soon the practice was adopted in America, France and Germany. There were, however, unfortunate results in many cases; the disease communicated by inoculation often proved as dangerous as when acquired in the natural way; and many persons, medical and lay, did not hesitate to declare that the remedy was worse than the disease. As is well known, too, there were many protestations by the clergy and other good and religious persons against interfering with God's decrees. It was not till 1796 that the great Jenner for the first time vaccinated, i. e. inoculated with the cow-pox; and in 1798, his first treatise on vaccination saw the light. Now, smallpox is a controllable and almost negligible disease; formerly it was an uncontrollable and a formidable plague.

17. All that is known of Mrs. Janet Powell bears out her son's ecomia—that she was well educated is proved by her letters written in beautiful caligraphy and good literary English; her letters show, too, that she was a devoted wife, a kind and thoughtful mother, a good Christian. Powell probably owed much of his character to his mother's teaching and example: and from the thousands of pages written by, to and of him, it is manifest that he was a clear minded, high-principled man—it may be somewhat set and even austere in his ways and without any sense of humour but honourable, truthful and sincerely desirous of doing his whole duty as son, brother, husband, father, friend, attorney, judge and councillor.

18. Her husband in one of his latest manuscripts pays her a beautiful tribute: "To an early attachment to a young person whom I found on my arrival from England in 1772, the chosen friend of my sister (Anne) and favorite of my mother, I am indebted for my preservation during that period from 17 to 20 in which I was otherwise without Guide or Control." Whether from this attachment or for other reasons, there can be no doubt that Powell was saved from any trace of the profligacy and drunkenness all too common at the period.

19. In common with most of the Loyalists, John Powell was much dissatisfied with the arbitrary measures of the Home Government and the Provincial Administration—for example, we find him associated with such "Patriots" as Jonathan Williams, John Rowe, John Scollay, &c., in a Petition to the General Court, December 19, 1760, complaining of the conduct of the officers of the Crown. See Drake's *History of*

Boston, Boston, 1856, p. 657. But like thousands of others he could not repudiate his allegiance and when the choice came to be made as to attempting the rectification of grievances by force of arms he kept his faith to the Crown. After trying in vain to reconcile the two parties, he declared himself a Loyalist. He remained in Boston, during the siege of that City by the rebellious Colonists, but found it too dangerous to continue his residence there and determined to make his way to loyal British territory. The children of John and Janet Powell were (1) William Dummer Powell, (2) John, (3) Anne, (4) Jane (Jenny) and (5) Margaret. Anne (or Anna) married Isaac Winslow Clarke, Montreal, and died there in childbirth in 1792. Jane married the Reverend Henry Warren, Vicar of the Parish of Tolpuddle, (Tolpiddle), Dorsetshire, England: Margaret does not seem to have married. John was left behind at Halifax when the rest of the family sailed for England in 1776. He was afterwards sent to Quebec and had some associations with Burgoyne. He seems to have had much of the *gaieté de coeur* of his grandfather, and while spoken of in loving terms by his sisters it is rather without respect. The father and daughters lived for a few months in London, then for a time at Caer Howell, Montgomeryshire, the ancestral seat, and finally at Ludlow, Shropshire, where the father died in 1794. Letters are extant from Anne to William Dummer Powell, dated from Halifax in April, 1776.

20. See Appendix A.

21. The records of the Middle Temple show the following entry: "Wm. Dummer Powell, son and heir of John Powell of Boston, New England, Esqre." was admitted 24 January, 1776. There are many Powells on the books of the Middle Temple, one at least of some note, John Joseph Powell admitted, April 25, 1775, called, May, 1780, the author of a number of legal treatises of high repute. (The lawyer of that name who is best-known is Sir John Powell, the Mr. Justice Powell who was one of the Judges at the trial of the Seven Bishops; he was, however of Gray's Inn).

22. There to become the Right Honourable Sir William Grant, Master of the Rolls, and one of the ablest and most celebrated occupants of that dignified office.

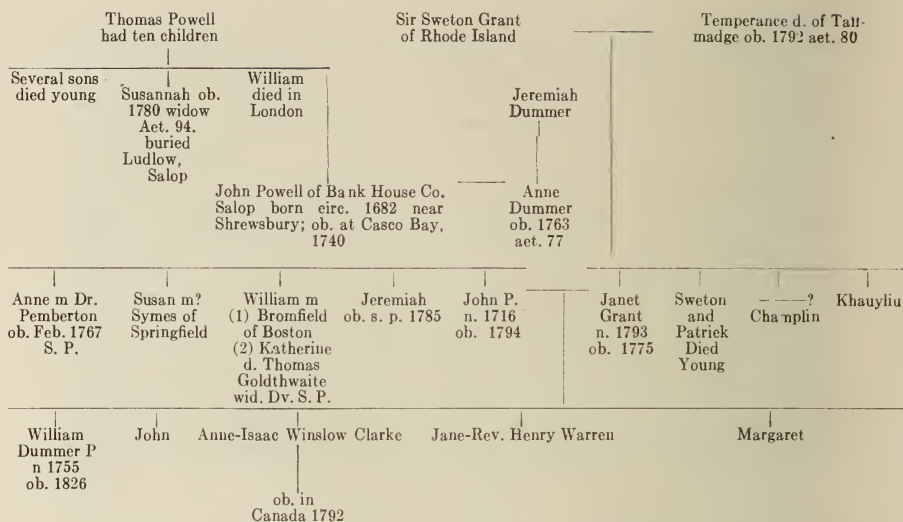
23. Some have said that Powell was called to the Bar in 1779 (e. g. Read's *Lives of the Judges*, p. 28) but that is a mistake; he informs us that he did not take his Call owing to the undue burden, the payment of the fees would cast upon his father's finances. The Records of the Middle Temple show that he was "Called to the Bar, 6 February, 1784."

24. John born August 26, 1776

William Dummer, February 15, 1778

Grant, May 24, 1779

It may be convenient to give here the table of genealogy.



There was a Colonel afterwards Brigadier-General Powell who is mentioned very frequently in letters, despatches, &c., of the Revolutionary times; he has sometimes been taken for the brother of William Dummer Powell, presumably his brother John. This is a mistake: he was Henry Watson Powell, an Englishman, and very distantly if at all related to our Powells—he became a Lieutenant in the 46th Foot in 1753, Captain in the 11th in 1756—this regiment became the 64th—then he served with his Regiment in the West Indies in 1759, and came with it to America in 1768. In 1770, he became Major in the 38th, and the next year Lieutenant Colonel in the 53rd: in 1776 he was placed in command of the Second Brigade as Brigadier General. In 1777 he was in command of Ticonderoga after the American evacuation. When Burgoyne surrendered, he abandoned the post and went to Canada. He became Colonel in 1779 and the next year bought an estate in the suburbs of Quebec. Major General in 1782, Lieutenant General in 1796, General, 1801, he died in England, July 14, 1814. William Dummer Powell never mentions him in any of his voluminous manuscripts; he does not seem ever to have met him, and certainly did not seek his assistance or patronage—something he never hesitated to do when he had any shadow of a claim for them—it is impossible that they could have been related at all closely. See Lieutenant Digby's *Journal*, *Munsell's Historical Series*, No. 13, Albany, 1887 at pp. 196-199 notes and authorities there named.



JANE (OR JANNET) POWELL, WIFE OF JOHN POWELL, MOTHER OF
WILLIAM DUMMER POWELL

NOTES: CHAPTER II

1. The Proclamation of 1763 contemplated a House of Assembly elected by the people as soon as the country should be thought fit for it; but that time did not arrive, and the Quebec Act put an end to the scheme for nearly a score of years and until the Canada Act or Constitutional Act of 1791, 31 Geo. c. 31 (Imp.). The Council was originally composed altogether of Protestants, almost altogether of English speaking Protestants, but after the Quebec Act, the French Canadian Roman Catholics had a fair representation. See my paper "Pre-Assembly Legislatures in British Canada", *Trans. Roy. Soc. Can.*, 1918, Sec. II, pp. 109, sqq.

2. At this time Peter Livius who had replaced William Hey in 1777.

3. The Criminal Courts were constituted by the Ordinance of March 4. 1777, 17 Geo. III, c. 5.

4. The Civil Courts were constituted by the Ordinance of February 25. 1777, 17 Geo. III, c. 1.

5. These little known Courts are discussed in a Paper written by me for the Ontario Archives Department and published in its *Report*, 1918: a further note will be found *post*.

6. I have before me a photostat of the Proceedings in the Court of Chancery now in the Dominion Archives. The Court certainly sat from January 25. 1765 to April 1770, and the Records of Pleadings are extant until March, 1774; neither Cramahé nor Haldimand seems to have acted as Chancellor, Murray and Carleton did in a few cases. See my Papers "The First Court of Chancery in Canada", *Boston University Law Review*, October 1922 and January 1923. The Ordinance of February 25, 1777, 17 Geo. III, c. 2, continued by the Ordinance of January 16, 1779, 19 Geo. III, c. 1.

8. In England, the Barrister (first called "Counter") received a warrant for commission under the Great Seal for sometime after the Norman Conquest: it is not precisely known how and when the power passed to the Inns of Courts. The Attorney originally was also appointed under the Great Seal, but the Statute of Westminster II. (1285), 13 Edward 1, by c. 10, enabled everyone to make an Attorney for himself. Seven years afterwards, Parliament ordered the Justices of the Court of Common Pleas to provide a certain number of attorneys in each County to attend the Courts. In 1402, the Act, 4 Henry IV, c. 18, ordained that all attorneys should be examined by the Justices and only those who were "good and virtuous and of good Fame shall be received", since which time all lawyers have been, at least in theory, "good and virtuous and of good fame." In the absence of a Statute forbidding it the Crown could still grant a licence to practise law.

The Quebec legislation of 1785 came about through the abuse of the power to grant licences. M. Roy in his valuable and interesting brochure, "*L'Ancien Barreau au Canada*", tells the story, pp. 60, sqq. He

is, however, in error in supposing that it was Haldimand who gave the licence which so outraged the Bar at Quebec—Haldimand left the Province in November, 1784. In the autumn of 1784, Alexander Dumas of Three Rivers, a man advanced in years, a bankrupt merchant, and a notary whose conduct had not always been honourable presented a Petition to Haldimand for a Commission as Advocate. Henry Hamilton, the Lieutenant Governor, was called in to deal with the petition as Haldimand had gone to England. The *Communauté des Avocats*, founded at Quebec in 1779, being informed of the application and disapproving of the man as well as of increasing their numbers, on December 6, determined to protest to the Lieutenant Governor against a licence being granted to anyone who had not served five years in the study of the law or could not prove his capacity and good character. Haldimand had in November expressed his determination to separate the professions of advocate and notary public, the combining of which he considered the cause of most of the never ending litigation; but Hamilton did not follow out this project, at least in the case of Dumas—it may be that he did not know what Haldimand had decided. At all events, within two days of this resolution of protest, the *Communauté* learned that Dumas had received his Commission, December 8, 1784. Then other means were adopted. Before Dumas could present his Commission to the Court of Common Pleas for enregistrement, the Attorney General, James Monk, moved the Court having regard to the abuses existing in the admission of Advocates to make or authorize to be made rules to avoid such abuses for the future. Monk speaking in English was supported by M. Panet, the most eminent of French Canadian lawyers, speaking in French and by the whole body of advocates in Court “sur l’information des vie et moeurs du sieur Alexandre Dumas, aspirant à la profession d’advocat et des causes qui peuvent l’exclure . . . qu’ils étaient prêts à filer.” The Court sent the protest to the Governor; he orally directed the registry of Dumas’ Commission and, January, 1785, the Judges of the Court were forced to inform the indignant Advocates that they were obliged to obey His Honour and to admit Dumas as Advocate. The vigorous opposition of the profession including his own Attorney General, had its effect upon the Lieutenant Governor. Accordingly, April 30, 1785, the Ordinance, 25 Geo. III, c. 3, was passed, which divided the profession into Advocates, Barristers, Attorneys, &c., on the one hand and Notaries Public on the other—which division still exists in the Province of Quebec—and directed that thereafter, no one should be commissioned or licensed to practise as barrister, advocate, solicitor attorney or proctor at law unless he had served five years under Articles and passed a satisfactory examination in the presence of the Chief Justice of the Province or two or more Judges of the Court of Common Pleas—exception was made in the case of those who had been admitted to the Bar in other British countries.

9. The detestation of Frederick the Great for lawyers is well known; but his Code intended to get rid of them was not the shining success he had hoped for.

10. This was not the celebrated Guy Carleton, afterwards Lord Dorchester, but his brother, Colonel Thomas Carleton, Quarter Master General, afterwards the first Governor of New Brunswick from 1784 to 1786 with the title of Governor in Chief and with that of Lieutenant Governor, 1780 until October, 1803. He had been Colonel of the 25th

Regiment in the Revolutionary War and had served with some credit. He had not the skill and *savoir faire* of his more distinguished brother, but he made a fairly good Governor. He was in 1786 offered the Lieutenant Governorship of Quebec but he preferred to remain in the Province of New Brunswick.

11. The name "Governor Wentworth" is ambiguous—there were two Governors of that name, both of considerable note. The first was Benning Wentworth, Governor of New Hampshire, 1741 to 1767, who died 1770; and the other was the more celebrated Sir John Wentworth, a prominent and zealous Loyalist who was Governor of New Hampshire, 1767-1774. It was he who gave Dartmouth College its Charter and first endowment. He was driven out by the rebels in 1774 and went to England but continued to be Surveyor-General of His Majesty's Woods in North America in which capacity he came to Nova Scotia in 1784: he was appointed Governor of Nova Scotia in 1792 and created a Baronet in 1795—he resigned in 1808 and died in Halifax in 1820 in his 84th year; it was this Governor Wentworth from whom Powell received a letter to Lieutenant Governor Cramahé. Haldimand's letter to Lord George Germain referred to in the text is among the Haldimand papers, Can. Arch., B. 54.

12. Hector Theophilus Cramahé of Swiss descent became Civil Secretary for the District of Quebec when General Murray was appointed Governor after the Conquest. He became a member of the Council in 1764 when civil government was established; in 1771, he was appointed Lieutenant-Governor under Sir Guy Carleton and acted as Governor in his absence for four years—on the appointment of Frederick Haldimand in 1778, he continued to be Lieutenant Governor of the Province. He was prudent and cautious; he had great influence at times with Haldimand and helped to keep him out of hot water—sometimes.

13. Son of Richard Clarke, a member of the firm of Richard Clarke & Co., consignees of the East India Company at Boston (see n. 4, p. *ante*); he afterwards married Anne (or Anna), Powell's favourite sister (see post Chapter VIII, notes).

14. James Monk was of the same family as General Monk, the restorer of the Monarchy after the Commonwealth. He was the son of James Monk who was in 1752, created a Judge of the Inferior Court of Common Pleas for the County of Halifax, Nova Scotia and who had trouble with the Governor, Lawrence, and set him at defiance. The elder Monk also became Solicitor General of Nova Scotia in 1760: and the son was appointed to the same office in 1774, being the member for the House of Assembly for Yarmouth.

He left Nova Scotia in 1776 for Quebec and was appointed Attorney General at Quebec the same year.

In Quebec, he was a party to many disputes with varying success. He was appointed Chief Justice of the King's Bench at Montreal in 1784 and presided over that Court till 1825.

Powell and Monk afterwards acted as agents for each other in Montreal and Quebec respectively—one of the results of their connection appears in Appendix F Monk v. Powell, an action which was the cause of much trouble to Powell.

15. The list of licences to practise as Advocate given by J. Edmond

Roy in his interesting brochure *L'Ancien Barreau au Canada*, Montreal, 1897, at pp. 73 sqq. does not contain the name of Powell—the names of Henry Kneller (the Attorney General whom James Monk succeeded in 1776) and William Grant appear on the list. The list was drawn up from the Registers of Commissions in the office of the Secretary of State at Ottawa but it is admittedly incomplete; that Powell received a licence is quite beyond all question.

On page 28 of the brochure will be found an advertisement shewing that such commissions or licences were granted by the Governor and then registered with the Clerk of the Court. Powell's petition for Licence to practise is to be found in the Canadian Archives, B. 217 at p. 45; it was filed August 20, 1779, and reads thus: "May it please Your Excellency.

"The Petition of William Dummer Powell humbly Sheweth that Your Petitioner has regularly studied the Law in the middle Temple of which Society he is a Member and that he hath at a considerable Expense transported himself into this province with a view to Practice, the Prayer therefore of this Petition is that Your Excellency would be graciously pleased to grant to Your Petitioner a Commission of Barrister in this Province and Your Petitioner as in Duty bound shall ever pray, &c., &c."

The Licence entitled him to practice as Advocate or Barrister, Attorney, Solicitor and Practor: but not as Notary Public, although there was as yet no division of the professions.

16. Montgomery's capture of Montreal in 1775 will be remembered: and he and Benedict Arnold only just failed to capture Quebec on the last day of the same year. The death of that gallant leader and small-pox together probably saved Quebec and Canada.

17. By the Ordinance of September 17, 1764, one Justice of the Peace could dispose of suits up to £5 Quebec Currency, any two Justices of the Peace to £10 Quebec Currency and the Quarter Sessions £10 to £30 with an Appeal to the King's Bench.

Some of the Magistrates (they were paid by fees) ran a sort of bureau (not unlike certain J. P.'s in the vicinity of Toronto were said to do a few years ago—does not the Preacher say: "The thing that hath been, it is that which shall be, and that which is done is that which shall be done and there is no new thing under the sun"). This produced such a scandal that an Ordinance was passed February 1, 1770, taking away civil jurisdiction from the Magistrates as "An intolerable Burthen to the subject and the means of great disquiet, vexation and oppression." Du Calvet indeed claims that he refused to accept any fees and even paid the expenses of his Court out of his own pocket; it does not therefore astonish us to read that he tried 3700 of these small actions in the three months, September to December, 1769.

18. The "*Ex officio* Criminal Information" was a very common weapon at that time against those who wrote against any branch of the Administration. Where the Attorney General (or, in a vacancy in that office, the Solicitor General) considered any writing likely to disturb the Government or prejudice the people or that it contained blasphemous, seditious or obscene language or a libel against the King or any of his Ministers, &c., he might of his own motion and on his sole responsibility, file an "*ex officio* information" against the offender in the Court of King's Bench—the Court that had no power to prevent

it—the defendant is brought before the Court; if he plead guilty he is sentenced, if not guilty, he is tried by a jury as on an indictment. The proceeding is now very rare.

19. It is the glory of the Bar that no one need go without Counsel to aid him, with whatever crime he may be charged. The Bar of England has laid down the rule which ours has faithfully followed. "A Barrister must not exercise any discretion in the selection of the suitor for whom he pleads in the Court in which he practises." The time-honoured oath which every Ontario Barrister must take reads: "You are called to the Degree of Barrister to protect and defend the rights and interests of such of your Fellow Citizens as may employ you. You shall neglect no man's interest nor seek to destroy any man's property. You shall not refuse causes of complaint reasonably founded . . . You shall not pervert the law to favour or prejudice any man . . ."

20. When we remember that the Information was filed against Du Calvet because he said that the Judges of the Court of Common Pleas were so set against him that he could not get justice, thereby charging the judges before whom Powell was to practice with corruption, the effect upon the professional fortunes of Powell supporting such a charge must be obvious especially when Powell was just beginning and had not an established position at the Bar.

21. Peter Livius is an elusive character; apparently he was born about 1727 in Lisbon of a German father in the employ of an English mercantile concern there; some however, give his birthplace as having been in England. At all events, he came to this Continent and became a Judge in New Hampshire. He lost that position in 1773 and then went to England where in 1776 he was made Chief Justice of Quebec to succeed William Hey, and came to Canada in the following year. He was an aggressive person and dissatisfied with his position and emolument; he got into trouble with Sir Guy Carleton, the Governor, on several matters and at length in 1778 Carleton suspended him. Livius went to England, appealed to the Privy Council successfully and was reinstated in his Chief Justiceship, 1779; he did not return to Canada but resided in London on an annual allowance of £1200 sterling until 1785. He was succeeded by William Smith.

22. When certain high offices of State are vacant it is not unusual to put them "in Commission"—that is, to appoint by an instrument under the Great Seal a number of Commissioners to perform the duties of the office. For example the office of Lord Chancellor was in the reign of William and Mary three times in Commission, in that of Anne once, George I twice, George II once, George III thrice, William IV once, Victoria once—on each occasion three Judges were appointed Commissioners. There is no instance of the Lord Chief Justiceship in England ever having been in Commission but during the absence of William Hey, Chief Justice of Quebec, three Commissioners had been appointed to execute his office—they were the same as those who were appointed in Livius' suspension. There have been only two Lord High Admirals of Great Britain since Prince George of Denmark, Queen Anne's husband, held that office 1707. The Earl of Pembroke was Lord High Admiral for nearly a year 1708-9, and, William, Duke of Clarence, afterwards William IV, for a little more than a year 1827-8—at all other times as now the office was in Commission.

The three Commissioners appointed exercised the functions of Chief Justice of Quebec, from the time of Livius' suspension until August 1784 (Can. Arch., B. 225, pt. 2, p. 376) and received for their services £3660, Livius enjoying his sinecure (Can. Arch., B. 350, p. 148; Can. Arch., B. 56, p. 296).

23. Adam Mabane was a Scotsman; educated at Edinburgh for the medical profession he came to Canada as an Army Medical officer and became the surgeon of the Garrison at Quebec (Du Calvet calls him "le chirurgical conseiller Mabane . . . le Juge Mabane . . . Magistrat à Quebec et sage-femme à Edminbourg, c'est là qu'il a pris ses grades de Docteur en jurisprudence Françoise dans les Ecoles de Chirurgie.") He was pushing and untiring in his efforts to advance himself, and obtained the confidence of successive Governors, especially Haldimand whom he almost entirely dominated. He was made a member of the Executive Council, but removed by Carleton, appointed a Judge of the Court of Common Pleas under the Quebec Act of 1774, a member of the first Legislative Council, and lastly a Judge of the Court of King's Bench. He acquired considerable property and was altogether a personage in early Quebec under the British Rule.

He was of a malignant unforgiving disposition and never missed an opportunity to do harm to one he disliked or thought to be unfriendly. In later years Powell found him a persistent and venomous enemy; he nowhere says or suggests that his appearance as Counsel for Du Calvet in an attack on the Montreal Judges was the original cause of Mabane's hatred of him but all the circumstances make that exceedingly probable, *me jūdice*—we shall meet Mabane again.

24. Thomas Dunn was born in 1731 in Durham, England. Engaging in commercial life, he came to Canada very shortly after the Conquest in 1759-60 and carried on business as a merchant. So far as appears he had no legal education but he was a man of great executive ability and impartial. A member of the Executive Council very early, he became a member of the first Legislative Council in 1775, and the same year Judge of the Court of King's Bench, Quebec. He became Administrator of the Government in 1805 and again in 1811 and acted with promptness and energy. A Seigneur, he was very popular with the French Canadian people and with no small number of the English population, but in those days it was impossible wholly to please both factions.

25. Jenkin Williams was the only one of the three Commissioners who had been educated for the Bar—he had the reputation, apparently well deserved, of being a sound lawyer. Powell speaks of him in high terms.

He was active in the proceedings of the English speaking citizens of Quebec looking to the establishment of an elective House of Assembly; and was a member of the Committee appointed in 1773 to draw up a Petition for an Assembly—a fairly full account will be found in Shortt & Doughty, *Constitutional Documents, 1759-1791*, published by the Dominion Archives, pp. 341, sqq. After the Quebec Act, he became in 1776 Clerk of the Legislative Council. In 1780 he is described by Haldimand as "the only lawyer" of any note except the "Attorney General." (Letter Haldimand to Germain, Quebec, October 25, 1780, Can. Arch., B. 54, p. 354; do. do., Q. 17, pt. 1, p. 270).

He became Solicitor General of Quebec and Inspector of the Royal

Domain in 1782; in 1792, Clerk of the Executive Council of Lower Canada; in 1793, a Judge of the Court of Common Pleas at Quebec and in 1784, a Judge of the Court of King's Bench for the District of Quebec. He also became a Member of both the Executive and the Legislative Council of Lower Canada. He was a careful Judge and kept his colleagues, the "sage-femme" and the merchant, from serious error in matters of law.

"Register" is what we now call "Registrar"—this is a comparatively modern word. I do not find it in our Upper Canada Statutes till 1829. 10 Geo. IV, c. 8, (U. C.); the Act of 1829, 9 Geo. IV (U. C.) used the term "Register." See Murray's *New English Dictionary*, sub. voc. "Registrar."

26. A "Special Jury" might be called for where the cases were thought to be of too great importance or intricacy to be tried by common jurors. The Prothonotary in the presence of both Attorneys took at random forty eight names of the principal freeholders from the freeholders' list; each Attorney then struck off twelve names and the remaining twenty-four were returned upon the panel. Special Juries are practically effete in Ontario—I have seen only one in more than forty years' experience.

27. To secure an acquittal the truth in every particular of the so-called libel must be proved by the accused, but that is not sufficient—he must prove also that it was published for the public benefit at the time when it was published so that the Jury must when they find a verdict of Not Guilty find that what was said was true and that it was for the public benefit.

This trial and verdict are startling and give us an idea of the low estimate which the Judges of the Court of Common Pleas at Montreal were held at the time by the better part of the citizens. Londres, Juin & Juillet, 1784." The statements contained in these books are not to be wholly accepted, the Haldimand Papers show that he misrepresents much and conceals more. So far as concerns the first connection between Powell and Du Calvet, however, the facts as they have been stated are quite clear. Du Calvet we shall find later in even more serious trouble with the Government and there will be further particulars given of his life and his tragic death.

28. The story of Du Calvet may be gathered in part from two publications of his, the one in English "The Case of Peter Du Calvet, Esq.", London, 1784, and the other in French "Appel à la Justice de L'Etat . . . par Pierre du Calvet, Ecuyer."

29. When Joseph François Perreault who afterwards was of some note and importance in Lower Canada, began the study of law at Montreal, about 1781, there were at that place only four practitioners according to his biographer, Dr. P. Bender, *Old and New Canada*, Montreal, 1882, p. 80. I cannot verify this statement but in any event the practitioners cannot have been very numerous.

In Quebec which was a much more important place there were only some ten or twelve Advocates when in May 11, 1779 they formed "La Communauté des Avocats." Roy names nine but there were Monk and Williams (at least) not in the list—Roy *L'Ancien Barreau au Canada*, p. 43—so that his statement "une dizaine" is not far astray. It may be of interest to say a word or two of the costume of the Advocate now so rigidly prescribed and strictly observed.

Of course so long as the Bar was not organized, there was no official garb prescribed but the first Article of the second section of the first chapter of the Statute of the Communauté des Avocats prescribed black clothes, a black gown and linen bands; thereafter we read of advocates being fined by their Society for appearing in Court (even where they were themselves party to an action) without proper garb, in a gray coat, white waistcoat, coloured clothes, "en culotte depareillée"—it was a bit early for canculottes; M. Cugnet "un des plus beaux hommes de son temps bravait sans cesse le règlement qui le forçait de parader en habit de croquemort" and so he appeared one day in July, 1785, in Court with flesh coloured nankeen breeches, which cost him an exemplary fine by his Society.

In September of the same year Mr. Russell was still more daring—he appeared in the Court of Appeal with a coloured coat and, *horrendo referens*—his hair without a ribbon. The President in open Court ordered him to apologize to the Court and to pay the usual fine of five shillings.

March 5, 1787, the Court of King's Bench passed the following order: Upon the motive of utility and decorum inducing polished nations to "protect and encourage the learned profession, and to that end giving them Badges of distinction . . . it is accordingly considered and ordered that at every future term of this Court, the Officers thereof wear the dress of Officers of the like employment in the King's Bench of Westminster Hall or nearly similar thereto; and that the Practitioners of this Court appear in Gown and Band, worn by those Gentlemen who are now called to the Bar."

The black garb and black gown have always continued as the prescribed dress—the bands continued in the Lower Province but in Upper Canada they disappeared from the costume of the ordinary Barrister or stuff gownsmen being retained by the King's Counsel; within the last few years, they have again made their appearance on the stuff gownsmen and are now well-nigh universal.

The Judges of the King's Bench wore the ermine robe—those of the Common Pleas the same as the Barristers. In this Province the Judges of the King's (Queen's) Bench and Common Pleas wore and continued to wear the plain King's Counsel coat with silk gown and bands at trials—in Term until a comparatively few years ago they wore a parti-coloured gown—the late Chief Justice Armour has the credit of causing this practice to be abolished; now the same garb is worn in terms as at trials. In Chancery, the same garb was worn at trials as in the Common Law Courts with no change when the full Court sat—the late Chancellor Sir John Alexander Boyd (*venerabile nomen*) never wore bands but always wore a white linen tie.

An amusing instance of a "strike" on the part of Advocates took place in 1780 at Quebec; but to tell the story would lead us too far afield.

30. It will be remembered that in 1776, two American armed vessels sent for this purpose, landed at Charlottetown, Prince Edward Island, and took away the Administrator of the Government, some of his civil officers, the Great Seal of the Island and such booty as could be seized—all were taken on board ship to Washington at Cambridge. Washington promptly cashiered the principal officers: unfortunately, however, he did not take means to return the unhappy prisoners—or the booty.

An incident of the year 1779 may be given here. James Bruce, Lieu-

tenant Colonel of the 70th Regiment in command at Halifax, reports, June 20, 1779, to Haldimand "A few days ago a Brig from Glasgow was taken almost in sight of our Battery; on seeing this I ordered out the armed Schooner—made the Privateer run away but she run the Prize first on shore but most of the cargo and even the ship it is thought will be saved; she is worth about £12000 . . ." The Privateer which captured Mrs. Powell's ship was more fortunate.

NOTES: CHAPTER III

1. The French Canadian habitants were very litigious (so long as their law was made cheap for them), and they contributed a little to the practice of Powell and men of his status—but only a little; it was the merchant whose business was profitable and consequently most sought after.

The habitants in their conception of the Courts and Advocates are not unfairly described by Haldimand in his letter to Gage, April 2nd, 1765 (Roy, *L'Ancien Barreau au Canada*, p. 29). "Comme ils étaient accoutumés à considérer leur gouverneur-général comme un Pacha, ils se figurent que tous ceux qui ont l'audace de lui régister seront au moins mis aux galères."

When they saw an Advocate setting himself in opposition to the powers that were without being sent "aux galères", they were wont to look upon him as exceedingly powerful and one to be cultivated. It is probable that Powell's defence of Du Calvet advanced him in the estimation of the common people as much as in that of the more wealthy merchants; but he leaves us no account of that.

2. Haldimand received twenty-one applications for Commissions as Notary Public including three for reinstatement but excluding four for change or enlargement of territory: of these, one was from an Advocate (Charles Thomas, Quebec), two were combined with applications for licence as Advocate (Charles Stewart, Quebec and Joseph Sanguinet, Montreal), and another was presented by a gentleman (Robert Russell, Quebec), who had applied for licence as Advocate ten weeks before. Powell's name does not appear on the list: There are only three English names in all. Powell comes second in the list of ten who applied for a Commission in the other branch of the Profession: he applied for a Commission as "Barrister" as did Hector Macaulay in 1784; three applications were for a commission as "Attorney" or "Attorney-at-Law", one as "Advocate", one as "Attorney & Advocate", one as "Advocate and Notary Public" while three were content to ask generally "to practise law" (one of them, Thomas Walker, afterwards applied for a Commission as Attorney) so that there were eleven applications by the ten persons, six English and four French. The applications appear in Can. Arch. B. 217, B. 218, B. 219.

3. In the Civil Law countries such as Quebec, the office of Notary Public is very much more important than in Common Law countries like Ontario; he draws up, passes and files contracts, conveyances of land, wills, etc., etc., while with us the Notary Public as such has practically only the noting and protesting of Bills of Exchange and Promissory Notes. By way of compensation with us in Ontario many solicitors receive a commission as Notary Public, while in Quebec that is forbidden: one cannot be a Notary Public and also practise in Courts in Quebec, but there is no such prohibition with us. We are as they were in Quebec before 1785 in that regard—the same person may be (and often is) Barrister, Solicitor and Notary Public.

4. John Finley, once well known but now forgotten, and a few companions from North Carolina, went to Kentucky in 1767; in 1769,

Finley with Daniel Boone and others made a further exploration. In 1776, Colonel Knox led a party from Virginia; in 1776, James Herrod built a log cabin at the present Harrodsburg and in 1775 Daniel Boone built his fort at Boonesborough; in 1776, Kentucky became a County of Virginia, and in 1779 a law was passed which enormously increased the immigration.

5. Major Arent Schuyler De Peyster, Commandant at Detroit, writing to Lt. Colonel Mason from Detroit, May 16, 1780, says: "The prisoners daily brought in here are part of the Thousand families who are flying from the oppression of Congress, in order to add to the number who are already settled in Kentucky, the finest country for the new settlers in America, but it happens unfortunately for them to be the Indians' best hunting ground which they will never give up." *Can. Arch.*, B. 100, p. 370.

6. The language of an official letter by General Thomas Gage to Colonel Henry Bouquet from New York, Feb. 26, 1765, (*Can. Arch.* A. 8, p. 505): this is Gage's language when speaking of "The Disposition of the People of the Frontiers."

7. The requests of the Indians for help to drive out the intruders are repeated time and again in the letters from the Commandants at Detroit and Michilimackinac to the Governor General at Quebec—many of these are to be found in the Haldimand Papers in the Canadian Archives.

8. Henry Hamilton was Lieutenant Governor of Detroit in 1778; he made one expedition to the South and captured Vincennes; but the following winter he was himself taken with all his forces and the Post by Col. George Rogers Clark. He was treated with brutality by Jefferson, the Governor of the State and afterwards President of the United States, but afterwards was paroled and exchanged. He then went to England in 1781, but returned to Canada in 1782 as Lieutenant Governor; he acted as Governor in the absence of Haldimand, 1784-1785; in the latter year, he was cashiered, being succeeded by Henry Hope. His conduct as Lieutenant Governor of Quebec was not wise and his recall was wholly justified.

9. Henry Bird was at this time a Captain in the 8th Foot; he took part in expeditions with the Indians in 1779 and 1780; on his return to Detroit he was in September, 1780, appointed Acting Engineer at that Post which office he filled with success. He acquired from the Indians in 1784, some land at Amherstburg which afterwards (1796) was taken by the Government for building Fort Amherstburg to command the mouth of the River Detroit. He established his family on this land, cleared about 200 acres of it and built two or three dwelling houses, made a good garden and planted an extensive orchard at an expense of £1200—*Can. Arch.* Q. 311, 2, p. 411; *ibid.*, Q. 311, 2, p. 398. He left Canada before 1796, he was obliged to go to England by reason of a suit in Chancery involving his whole English property and did not know of the Government expropriation at Amherstburg till some time thereafter—he joined his regiment, the 54th Foot and took part in quelling the Irish Rebellion of 1798; when this rebellion was put down, he embarked for foreign service and died on the expedition of Sir Ralph Abercrombie to Egypt, 1801, having been a soldier for thirty-six years. At the time of his death, he was Lieutenant Colonel of the 54th Foot;

he had previously served in the 8th and the 31st Regiments. A Petition was presented to Castlereagh by his widow, Elizabeth Bird, (*Can. Arch.*, Q. 311, pp. 408, sqq.) ; and later in 1818, another to Bathurst by his son, Lieutenant Colonel Henry Bird of the 87th Foot, asking for compensation from the Government. *Can. Arch.*, Q. 324, 2, pp. 271, 448 sqq. These applications were wholly unsuccessful as Haldimand's consent to the acquisition of the land from the Indians was expressly conditioned on a certain defined portion being reserved for a Military Post and this reserve included Bird's Lot. *Can. Arch.*, Q. 326, p. 48.

10. Simon Girty is called a renegade and other hard names by most of the writers of history or tales of this western country; he had faults but has received very hard measure—he took the losing side in the Revolutionary struggle. He was the second child (born 1741, James the third, born 1743, and George the Fourth, born 1745) of Simon Girty, an Irishman, and his wife Mary Newton, an English girl—they had another son, the eldest, Thomas; but he does not figure with his three brothers. The birthplace of the Girtys was near Harrisburgh, Pennsylvania. The mother, after the father's death at the hands of an Indian in a drunken frolic, married John Turner who had killed the Indian—the family moved westward and took refuge in Fort Granville. The Fort was taken by the Indians, 1756, and Turner, his wife and her children were hurried into the wilderness. Turner being recognized, was tortured and burnt to death at the stake in the presence of his wife and her five children, the youngest being the son of Turner. She and the youngest son, John Turner, were given to the Delawares; the four Girtys for a time at least to the others. The eldest, Thomas, was recaptured within a few weeks; but Simon, James and George were taken further away and adopted by the Indians—Simon going to the Senecas, James to the Shawnees and George to the Delawares. In 1759, Mrs. Turner and her four boys were delivered up at Pittsburgh. The three Girtys had thoroughly learned the Indian languages and had acquired more than a trace of Indian lore, skill and disposition. Simon at first took the side of the Colonials and was looked upon as a zealous Whig; but in 1778, he definitely chose the British cause and left Pittsburgh for Detroit with Alexander McKee, Mathew Elliott and others, a party of seven in all. Thereafter until the end of his life, he was an indefatigable and invaluable servant of the Crown in negotiating with, leading and taking the field with the Indians. He is said to have been the last to leave Detroit when it was given up to the Americans in 1796, under Jay's Treaty. Thereafter he lived on his farm in the Township of Gosfield until his death in 1817.

He has been charged with cruelty; and he was cruel as were most of the backwoodsmen of his time; but he was not wantonly cruel. Many instances are recorded of his saving prisoners from torture and death, more he would have saved if he could. Of his devotion to the Loyalist side I have no reason to doubt. Henry Bird who knew him well and at whose side he had stood in times of stress and extreme danger, said of him to Lieutenant-Colonel Bolton: "Girty I assure you, Sir, is one of the most useful, disinterested, friends in his Department, Government has." Letter from Upper Sandusky, (1779), *Can. Arch.* B. 100, p. 158.

James Girty was persuaded by Simon to espouse the cause of the Crown and he arrived at Detroit in August, 1778, about a month after his more distinguished brother. He is said to have excelled Simon in savagery but his ferocity is much overrated. He became a merchant at St. Marys in Ohio, married a Shawnee woman and at length removed

to Detroit and then to Essex County in Upper Canada. He died in the Township of Gosfield in 1817; unlike Simon and George, he was very temperate in his habits; and if he indulged in the orgies of cruelty with which he is charged, he had not the excuse of drunkenness.

George Girty became a Senior Lieutenant in the Continental Army but only to save himself from being sent a prisoner to the mines. He enlisted hoping to be able to make his escape to Detroit which he effected in August, 1779; he like his brothers was a fearless fighter and thoroughly skilled in woodcraft. He was also employed by the Crown, but afterwards went back to the Delawares, married among them and had several children. He died at a trading post on the Maumee about two miles below Fort Wayne, Indiana.

Those interested in the members of this extraordinary family will find an accurate and (generally speaking) impartial account in Butterfield's *History of the Girtys*, Cincinnati, 1890—the book is rare and out of print but a copy turns up now and then in the second hand shops.

11. Alexander McKee, whose descendants are still living at Windsor and its vicinity, was one of the most useful and devoted of the officers of the King at Detroit. He, a native of Pennsylvania, had been from 1772, on, Deputy Agent of Indian Affairs at Fort Pitt (Pittsburg) and was undoubtedly enthusiastically loyal to the Crown. He was a J. P. and carried on a large and lucrative business before the outbreak of hostilities between the Colonies and the Motherland—imprisoned by General Hand in 1777, he was released on parole—being threatened with imprisonment in the following year, he made his escape to Detroit with Simon Girty and others. Thereafter he took a most active part on the Loyalist side and was made a Colonel. He went into business in Detroit and was appointed Deputy-Superintendent of Indian Affairs, afterwards in 1794 Superintendent General. He was appointed in 1789 a member of the Land Board of Hesse and was granted land—he died in 1799. We shall see that he was appointed a Judge of the Court of Common Pleas for the District of Hesse in 1788, but made way for Powell.

12. Haldimand writing to Major Arent Schuyler De Peyster from Quebec, August 10, 1780, after receiving Bird's report of the conduct of the Indians on this expedition says: "Their conduct with Captain Bird is highly reprehensible. They have incessantly reproached the Commanding officer for not sending Troops to assist them in preventing the Incursion of the Rebels and when with great Expenses and at a very inconvenient Time you fitted out one Expedition for that purpose, they grew refractory and instead of complying with and supporting the measures of their conductor by which success must have been ensured, they abandoned him followed their wild schemes and wantonly contrary to their engagement killing the Cattle rendered it impossible for him to prosecute the Intention of his taking the field." Can. Arch., B. 121, p. 56.

Captain Bird's report to Major De Peyster from Ohio, opposite Licking Creek, July 1st, 1780 reads: "When they saw the Six Pounder moving across the Field, they immediately surrendered, they thought the three Pounder a Swivel the Indians and their Department had got with them. The conditions granted That their Lives should be saved, and themselves taken to Detroit, I forewarn'd them that the Savages would adopt some of their children. The Indians gave in Council the Cattle for Food for our People & the Prisoners and were not to enter till the

next day. But whilst Capt. McKee and myself were in the Fort settling these matters with the poor People, they rush'd in, tore the poor children from their mothers Breasts killed a wounded man and every one of the cattle, leaving the whole to stink. We had brought no Pork with us & were now reduced to great distress & the poor Prisoners in danger of being starved.

"I talked hardly to them of their breach of Promise—but however we marched to the next Fort, which surrendered without firing a gun. The same Promises were made & broke in the same manner, not one pound of meat and near 300 Prisoners—Indians breaking into the Forts after the Treaties were concluded. The Rebels ran from the next Fort and the Indians burn't it. They then heard the news of Col. Clark's coming against them & proposed returning—which indeed had they not proposed I must have insisted on, as I had then fasted some time & the Prisoners in danger of starving: incessant rains rotted our People's feet the Indians almost all left us within a days march of the Enemy. It was with difficulty I procured a guide thro' the woods—I marched the poor women & children 20 miles in one day over very high mountains, frightening them with frequent alarms to push them forward, in short, Sir, by water & land we came with all our cannon, &c., 90 miles in 4 days, one day out of which we lay by entirely, rowing 50 miles the last day—we have no meat & must subsist on Flour if there is nothing for us at Lorimiers. I am out of hope of getting any Indians to hunt, or accompany us, however George Girty I detain to assist me. I could Sir, by all accounts have gone through the whole country without any opposition had the Indians preserved the cattle." Can. Arch., B. 100, p. 410.

13. In the reports from Detroit and Michilimackinac about this time there are many references to blacks, slaves being brought in as prisoners, e. g., in Lieutenant Governor Patrick Sinclair's report to Lt. Colonel Bolton, Michilimackinac, June 8, 1780, he says that "the Indians & Volunteers on the attack against the Illinois . . . brought off forty three scalps, thirty four prisoners Black and White and killed about 70 persons. Can. Arch., B. 100, p. 430.

Lieutenant John Campbell writing to Captain Robert Matthews from Montreal, August 10, 1780, enclosed a "Return of the Negroes brought in by the Indians and sold to the Inhabitants of Montreal and others" to lay before the Governor General. Can. Arch., B. 111, p. 176.

There were many negro slaves at this time throughout Canada—the Indians themselves had many—and their value as an article of trade was well known. On several occasions the Indians killed the whites whom they could not sell but kept the blacks whom they could—it was rare although not entirely unknown that they tortured or slew a negro. In addition to negro slaves there were also Indian slaves generally known as Panis, i. e., Pawnees, from their being generally of the Pawnee tribe. See my Article on "Slavery in Upper Canada" read before the Royal Society of Canada, May, 1919; in the *Journal of Negro History*, Washington, October, 1919—also "The Slave in Canada", *Journal of Negro History*, July, 1920. There are a few instances of Indians selling whites for slaves: one of these we shall meet in the life of Powell—and very many of their enslaving white prisoners for their own service.

14. Bird's return to Detroit is notified by De Peyster to Lt.-Colonel Bolton. Writing from Detroit, August 4, 1780, he says "Captain Bird arrived here this morning with about One hundred and fifty Prisoners

... the remainder coming in for in spite of all his endeavors to prevent it the Indians broke into their Forts and seized many—the whole will amount to about three hundred and fifty . . . the Prisoners are greatly fatigued with travelling so far, some sick and some wounded. I shall defer sending them down least it should be attended with bad consequences . . . ”

Apparently the party in which Mrs. La Force was, arrived at Niagara in November, as Brig.-Genl. Powell states in his letter to Haldimand, November 10, 1780, “I shall send by this opportunity fourteen Prisoners to Montreal—they are most of them women and children.” *Can. Arch.*, B. 96, 2, p. 629. And they probably arrived at Montreal, December 2. *Can. Arch.*, B. 129, p. 190; although that is not certain, it is reasonably certain that it was late in the year: Mrs. La Force's petition reached the Governor-General, January 8, 1781; and Powell was not the man to let the grass grow under his feet in a case of this kind

15. I have copied the MSS exactly in spelling and punctuation: the use of a capital letter with nouns (still the practice in German) continued in English till well within the last century; some who had received their education in the eighteenth or the early part of the nineteenth century kept up the custom till death; it was not unusual to capitalize also the important words other than nouns—verbs were seldom so written. The universal capitalization of gentile adjectives such as French, Indian, is equally modern—hence Powell writes “british”; “Mr. P” is, of course, Mr. Powell.

16. In the Petition referred to *post*, Mrs. La Forcé states that her husband was “late of Virginia.”

17. This was not one of the two large Forts which Bird took in his 1780 expedition, Fort Liberty and Martin's Station, but a smaller Fortification; that there were several small forts is certain; that some of the prisoners brought to Detroit were from the small forts and that they (or some of them) were not rebels appears from the letter from De Peyster of August 4, 1780, already referred to (*Can. Arch.*, B. 100, p. 441). “In a former letter to the Commander in Chief I observed that it would be dangerous having so many Prisoners here but I then thought those small Forts were occupied by a different set of people.”

Bird in his report to De Peyster from Ohio River, June 10, 1780, speaking of the irritating conduct of the Indians says: “I hope, Sir, my next will inform you of success in our undertakings, tho' their attack on the little Forts their number being so great is mean of them.” *Can. Arch.*, B. 100, p. 407. Captain Alexander McKee reporting to De Peyster on the same expedition writing from Shawanese Village, July 8, 1780, tells of the capture of the two large Forts and says “the great propensity for Plunder again occasioned discontent amongst them and several parties set out towards the adjacent Forts to plunder Horses.” *Can. Arch.*, B. 100, p. 413.

Haldimand writing to Sir Henry Clinton from Quebec in 1780, (*Can. Arch.*, B. 147, p. 283) says: “A Detachment from Detroit . . . has destroyed three Forts . . . the Fickle and Perverse conduct of the Indians prevented something great being effected”—but that the La Force fortification was not one of the three is obvious from Bird's Report (Note 12 *ante*) *Can. Arch.*, B. 100, p. 410.

18. This conduct of the Indians was duplicated on very many occasions. The shocking massacre by Montcalm's Indian allies of the Brit-

ish soldiers, their women and children after the surrender of Ticonderoga in 1757 is too well known to be narrated here—Kingsford's *History of Canada*, Vol. IV, pp. 65-69, contains a sufficiently extended and accurate account of the horrible tragedy—a disgrace to French Arms—it may be noted that this was one of the occasions upon which the Indians killed negroes.

Bird had himself been disgusted with the brutality of some of his allies in the preceding year, 1779—the Wyandottes were determined to torture a prisoner to death; Bird did his best, offering the savages \$400 and at length \$1000 for him but all in vain; he then advised the captive to defend himself with a gun as long as he could, but the unfortunate man was "taken away and murdered at a great rate." Captain Bird took the body and buried it. The Wyandottes dug it up and put the head on a pole; Bird buried it again and lashed out at them all, "You damned rascals, if it was in my power as it is in the power of the Americans, not one of you should live. Nothing would please me more than to see such devils as you are all killed. You cowards, is that all you can do—kill a poor innocent prisoner? You dare not show your faces where an Army is: but here you are busy when you have nothing to fear. Get away from me—never will I have anything to do with you." Butterfield's *History of the Girllys*, pp. 93, 94; 7 Pennsylvania Archives, O. S., pp. 524, 525.

Notwithstanding all that has been said and written on either side, it is plain that (speaking generally) those in authority on both sides in the Revolutionary Wars deprecated the use of Indian Allies. It is true that at all times, some and in times of great stress most gave way to temptation—*necessitas non habet legem*—but all knew the danger and most avoided it as much as possible. Each side accused and continues to accuse the other, both with some justice but both with exaggeration.

19. Le Duc probably Philip Le Duc, a French Canadian, who cheerfully accepted British citizenship on the Conquest in 1760; at the American Revolution like most of his compatriots, he preferred Royal rule to Republicanism, and he proved a useful subject. He joined Bird's party as an artificer and was well thought of by his Commander. Bird writes to De Peyster, Ohio River, June 11, 1750. "Mons. Le Duc has behaved extremely well in every respect and has been very serviceable in making shafts and repairing carriages in which matters he offered his services. You seemed, Sir, to have an inclination to serve him on our leaving Detroit; I don't doubt but you will on his return find him worthy your notice." Can. Arch., B. 100, p. 407. He was one of the many inhabitants of Detroit who in 1769 protested against the giving of Hog Island—now Belle Isle, the beautiful Park of Detroit—to Lieutenant George McDougall of the 60th Foot; many of the inhabitants of Detroit had been accustomed to pasture their cattle upon the island as a common given to the public by de la Motte the first Commandant of the Post.

The claim of Lieutenant McDougall gave rise to the first case tried by Powell when he became Judge at Detroit in 1789. The story has been told in outline in my address before the Michigan Bar Association at Lansing, June, 1915, "The First Judge of Detroit and His Court."

20. Captain Duncan Graham, an officer in the Indian Department, who was afterwards stationed at Michilimackinac. Can. Arch., B 123, p. 427; *Ibid.*, C. 678, p. 160; *Ibid.*, M. G. 11, p. 525, sqq. He had taken

part with Bird in his campaign with the Indians in 1779—Bird writes from St. Duski (Sandusky) to Lieutenant Lernoult, Acting Commandant at Detroit, a letter received April 17, 1779, and says "Capt Graham has been so anxious to return ever since the day of his arrival that its with the utmost difficulty I have prevailed with him to remain."

21. Matthew Elliott was an Irishman who emigrated to Pennsylvania before the Revolution and engaged in the Indian trade, with headquarters at Fort Pitt (Pittsburg). Trading with the Indians, he was in October, 1776, captured by a party of Wyandottes and his goods taken from him. With his servant, Michael Herbert, he made his way to Detroit where in March, 1777, he was arrested as a spy by Hamilton and sent by him to Quebec. Next year, he was released on parole and went back to Pittsburg via New York; in March, 1778, he escaped from Pittsburg with McKee, Simon Girty and others and with them went to Detroit. An American writer (Butterfield, *History of the Girtys*, p. 57) says, "There were not to be found . . . three persons so well fitted collectively to work upon the minds of the Western Indians for evil to the patriot cause as Simon Girty, Matthew Elliott and Alexander McKee." The subsequent efforts and success of these three fully justify this statement; they generally acted together and all showed determination and consummate skill. Elliott became a Captain in the Indian service and took part in most of the campaigns carried on against the Americans. He acquired considerable property near Fort Malden where he lived for the later years of his life; his property there was laid waste by the American invader in the War of 1812. He was one of the Members of the House of Assembly of Upper Canada for Essex in the Third Parliament, 1800-1804—the Fourth, 1804-1808, and the Fifth, 1808-1812. An account of his activities would take a volume—suffice it to say, that he was one of the most active and successful of all the many active and successful servants of the Crown at Detroit.

22. Probably Duperon Baby, who was of an old French-Canadian family; born in 1738, he became a prominent citizen of Detroit and a trader of great enterprise. He also was appointed a member of the Hesse Land Board and rendered valuable services in interpreting. He died at Sandwich in 1796. He was one of the three Judges of the Court of Common Pleas at Detroit who (as will be explained *post*) made way for Powell.

23. Probably Frederick Fisher, an Indian Interpreter, certified by Alexander McKee as "a Man of Truth and confidence"—(Can. Arch., Q. 299, p. 273)—and afterwards much trusted by Colonel William Claus, Deputy Superintendent of Indian Affairs at Amherstburg (Can. Arch., M., p. 119), he was stationed for a time at Swan Creek (Can. Arch., Q. 57, 2, p. 432) and at Chenail Ecarté (Can. Arch., C. 250, p. 296; *Ibid.*, Q. 299, p. 292). He died, November 12, 1810, "owing to the effects of a violent cold"—Letter from Matthew Elliott, Superintendent Indian Affairs to Colonel William Claus, Dep. Supt. General and Dept. Inspector General Indian Affairs at Fort George (near Niagara on the Lake). The letter is from Amherstburg, November 18, 1810. Can. Arch., Q. 114, p. 74). The Indians gave "a Condolence of 111 Strings White Wampum for the death of Frederick Fisher." Can. Arch., Q. 114, p. 77.

24. It is to be noted that the slave mentioned by Captain Bird in this certificate i. e. Esther, is not one of the slaves claimed by Mrs. La Force.

25. Can. Arch., B 217, p. 116—this Petition is printed *in extenso* in *Mich. Hist. Colls.*, XIX, p. 494 (1891).

26. *Documents de Colonial History*, N. Y., 116. A very complete and accurate account of this feudal system will be found in the interesting and valuable work of Professor W. B. Munro of Harvard, *The Seignioral System in Canada*, New York, 1907. Professor Munro is a splendid example of the Canadian historical scholar and deserves as well of his original country and university as those of his adoption. The military system is fully described in the first Chapter of a brochure recently issued by the Historical Section of the Canadian General staff, *A History of the Organization . . . Military Forces . . . of Canada from . . . 1763 . . . Vol. 1.*

27. Ordinance of November 27, 1765, by General Murray—this ordinance also annulled all authority of the Captains of Militia.

28. The American Congress was ill-informed or careless concerning Canadians; it appealed only to the English and Protestants of whom there were few in Canada and ignored the vastly greater number of French and Catholics. In the Address by the Congress, September 4, 1774, to the People of England it is said that the Quebec Act is "hostile to British America." The Address continues: "we cannot help deploring the unhappy condition to which it has reduced the many English settlers . . . nor can we suppress our astonishment that a British Parliament should ever consent to establish in that country (Canada) a religion that has deluged your Island in blood and dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world." (To many this censure of rebellion looks like Satan rebuking sin). The upper classes of French Canada, the Seigneur and the Curé, could see nothing to be gained by joining those who thus reviled their religion—the habitant could not read. See my article, "Benjamin Franklin and Canada", *Pennsylvania Historical Magazine*, 1923.

29. Rightly, as I think: the French system came to an end under the Ordinance of November 27, 1765, and there was no provision in the English law covering the case. The feudal system had disappeared in England for more than a hundred years and no sufficient legislation had been passed in the Motherland or Colony. See Maseres quoted by Munro, p. 212, note.

30. Carleton's Despatches about this time are of more than ordinary interest, e. g. in his letter from Montreal to Dartmouth, June 5, 1775, (Can. Arch., Q 11, p. 184) he says: "The Gentry and Clergy have been very useful upon this Occasion and shewn great Fidelity and Warmth for His Majesty's Service but have lost much of their influence over the People: I propose to try and form a Militia and if their Minds are favourably disposed will raise a Battalion . . . but I have many doubts whether I shall be able to succeed." He regrets his advice to continue the English Criminal Law, and "to render the Colony of Advantage to Great Britain . . . would require the reintroducing of the French Criminal Law and all the Powers of it's Government."

31. This Ordinance, (17 Geo. III, c. 8), was made in the first instance to last for two years only, but it was extended for two years more by the Ordinance, January 16, 1779 (19 Geo. III, c. 2); until April 30, 1783, by the Ordinance of January 20, 1781 (21 Geo. III, c. 2); until

April 30, 1785, by the Ordinance of February 25, 1783, (23 Geo. III, c. 2); until April 30, 1785 by the Ordinance of April 21, 1785 (25 Geo. III, c. 1) and for another year by the Ordinance of February 20, 1786 (26 Geo. III, c. 1). A new Ordinance was passed, April 23, 1787, (27 Geo. III, c. 2), amended April 30, 1789, (29 Geo. III, c. 4,) but the Ordinance of 1777 seems to have been considered in force in Upper Canada until its formal repeal by the Act of 1793 (33 Geo. III, c. 1, U. C.).

32. Letter Carleton to Lord George Germain, Quebec, May 9, 1777. (Can. Arch., Q. 13, p. 96). Shortt & Doughty, *Const. Docs.*, p. 460.

33. Corvée means, in general, "travail et service gratuit que le paysan ou tenancier devait à son seigneur"—and all will remember the picture of such duties in Dickens' *Tale of Two Cities*. Corvée in the military sense means work, &c., done by one soldier and not by another, the soldiers taking the duty in rotation. The modern French Canadian applies the term to voluntary assistance to a neighbour in raising barns or the like (like what our farmers call a "bee") (travail fait en commun pour aider quelqu'un dans un moment d'infortune ou pour d'autres fins utiles et pressantes").

34. The letters are as follows:

"Montreal 8th January 1781

"Sir

"I have the honor herewith to enclose you a Letter from Mr. Powell & am sorry to acquaint you that the Behaviour of the Judges is so notorious & irregular, that we thought it advisable for the present to give over sending any more orders to appear in Court, as the fine from those convicted will not amount to pay the Charges for those who are acquitted—The last Court day, Mr Silvester declared in Publick Court, that it was not a Season to employ men in Batteaux, that even Horses could not stand it, when it was clearly proved that all those men deserted in the latter end of October & beginning of Novr., And that all those who were ordered after them to the 17th of Novr., Performed the Voyage without any Hindrance or Accident—Mr. Rouville likewise told Mr. Powell qu'il étoit le fleau du Pays & qu'il venoit manger les Pauvres Canadiens. Such is the language held forth by those who are to support us in the execution of our Duty—and I hope from these circumstances you'll approve of stoping prosecuting untill your further directions on that subject.

"I am much concerned to trouble you with these disagreeable reports but while I am convinced that it is a duty incumbent on me, to give you notice of every thing which concerns your Department, I hope you'll excuse me and have the honor &c

"J Maurer"

"Colonel Carleton.

Can. Arch., B 188, p. 89.

"Montreal, 6th January 1781

"Sir

"Sometime ago Captain Maurer applied to (me) in the absence of any Crown Officers to prosecute to legal conviction such of the Militia as might disobey the orders for Corvée enacted for the Transport of Provisions:

"Unpopular as was the duty, I cheerfully undertook it from a persuasion of its necessity, and not doubting but that the same reasons would actuate the Commissioners of the Peace to afford me that support their Duty and Nature of the Service required. Colonel St. George and Captain Maurer have been unwearied in their application to forward this service by giving me all the assistance in their power, but the Commrs in general consider it as a very obnoxious remain of their former Government, and throw so many obstacles in the way of convicting offenders, that the fines arising on the prosecution of above 200 will barely defray the expense of bringing the others to trial. The Legislature has provided the most summary process on this occasion, and Mr. St George has ever procured me ample proofs of the *orders and disobedience*, yet notwithstanding His Excellency's prohibition of any other exemptions than those specified in the ordinance, any plea of sickness or absence from the house when commanded is accepted and the party excused.

"This reduces the risque of punishment to a very distant probability, & I doubt not but that the officers will find increased difficulty next Season.

"Great pains haveing been taken to injure me by pressing on the people that I am a Volunteer in this Service & the Public Censure of a Judge having served to render me very unpopular, I am personally interested in the advice which Col. St George & Capt Maurer have proposed not to issue more process against the Disobedient, as an ineffectual prosecution does more injury to the service than a supposed lenity by deserting from all prosecution.

"I hope it is not necessary that I should add for myself that in this Business I have ever devoted my Time and reflection to its success. I have, &c.,

"Wm. Dummer Powell."

Can. Arch., B. 186, p. 87.

Lient. Col. Carleton.

35. Du Calvet in his *Appel à la Justice de l'État*, pp. 166, 167, says "En 1781, le nombre de ces refractaires à ces corvées s'étoit prodigieusement amplifié dans le district de Montreal, se fondant sur les droits de la nature et de la raison; et . . . les Conservateurs de Paix se déclarèrent les défenseurs et les pères des pauvres agriculteurs opprimés; et sur l'evidence des faits, ils se refusèrent à condamner des malheureux pour infractions dont la raison et la justice les absolveient. A la nouvelle de cette humaine décision, le Chirurgien-Juge, l'impérieux M. Mabane, vole en poste de Québec à Montreal, il convoque sur le champ une assemblée générale des Conservateurs de Paix; il y somme, au nom du Soverain, d'y conserver dans toute leur vigueur la teneur des loix; à cette autorité respectable, mais ici si indignement prostituée, une desobéissance de nécessité, à la Police, est punie en crime volontaire et public; les refractaires condamnés à l'amende de cinq liv. *st.*; et les impuissans d'indigence claqué-murés dans une indigne prison." And he exclaims: "Juste Ciel! des bêtes de charge qui regimbent contre un joug trop pesant, à qui on les attèle, pourroient-elles être plus sévèrement fustigées? Pauvres Canadiens, bridés, emmuselés, entravés et fouettés ainsi, sans pitié sous le garrot!" He is confident: "Les corvées sont la ruine de la Colonie par leur choix déplacé", and "c'étoit ainsi que ces vaillans conquerans se rendoient, haut la main, maîtres souverains des domiciles des marchands et agriculteurs; les femmes,

les filles, les soeurs, entroient en cortèges, dans la masse des depouillés de la victoire." For translation see p. 292 post.

36. Of the petitions for Commission as Notary Public to Haldimand, there is one from Nicolas Charles Louis Leveque of Quebec, January 21, 1779, praying to be reinstated in his office of Notary "of which he had been deprived on malicious charges"; Can. Arch., B 218, p. 122; about the same time Jean Marie Rouillet du Chatellier of Isle Jesus and Dominique Mondelet applied for reinstatement. Haldimand has no hesitation in removing from office anyone whose conduct was not pleasing to him; Sir Guy Carleton even superseded the Chief Justice of the Province, Livius, in 1778.

37. I copy from a MS. of Powell's, which I have checked with photostat copies of the originals in the Canadian Archives.

38. The western part of Pennsylvania is meant—which was seething with conflicts on a small scale between the Loyalists and the Republicans, the Indians for the most part took the side of the former—"our savages" as Powell calls them.

39. In 1780, Germain instructed Haldimand that "all prisoners from revolted Provinces are committed as guilty of high treason not as prisoners of war"; Can. Arch., B 59, p. 54; but a change soon took place and after some intermediate stages, Shelburne, the Home Secretary, in April, 1782, instructed Haldimand that all American prisoners were to be held for exchange. Can. Arch., B 50, p. 164. (The short lived Secretaryship for the Colonies instituted in 1768 had only four incumbents, the notorious Lord George Germain being the third—after Welbore Ellis had filled the place for a very short time, it was abolished in 1782 by the Statute of 1782, 22 Geo. III, c. 82, and the Home Secretary was charged with its duties).

40. The name of Brigadier General De Speth is written Spêht by Powell and he is some times even officially called "Speth": e. g., by Haldimand (Can. Arch., B 131, p. 155). His name originally was Ernst Ludwig Wilhelm von Speth, but he gallicized it to De Speth (just as in the last few years the Germans Ochs, Gruenwald, &c., have become Oakes, Greenwood, &c.). He is not to be confused with Colonel Johann Frederick Specht of Specht's Regiment, also for a time in the British service, who was a Brunswicker and died June 24, 1787, at Brunswick. De Speth took part in the Lake Champlain operations in 1776 and 1777; he was taken prisoner in Burgoyne's disastrous campaign but was exchanged and afterwards stationed at Sorel and Montreal. He became a Major General and died at Wolfenbüttel, October 27, 1800. He took command at Montreal in October, 1781. Can. Arch., B 131, p. 128, *Ibid.*, B. 129, p. 261 and until November, 1782, he carried on an active correspondence with Haldimand in French; Can. Arch., B 129, B. 130, p. 131; he was followed by St. Leger.

41. A cartel set out, August 22, 1782, with prisoners for exchange: De Speth reports to Haldimand and sends a list of prisoners on that day. Can. Arch., B 130, pp. 33, 34.

42. The purchase or other acquisition of white girls from their Indian captors was common at all times—I mention only two instances out of many appearing in the reports about that time. Owen Bowen who had been a clerk at Niagara Falls married a female white prisoner

who had three children; he complained to Haldimand from Montreal, November 20, 1783, that his two step daughters, Mary and Anne West, had been taken prisoners by a war party of Delaware Indians in 1779 and taken by them to Detroit, when Colonel De Peyster obtained possession of them by interceding with the Indians. The girls had lived with De Peyster for more than four years, and when the stepfather wrote—as he did several times—to De Peyster to send them to Niagara the answer was returned, "That the Girls could not be spared." Col. Johnson's influence had been invoked by Bowen and that of Sir John Johnson in vain. Haldimand at once ordered De Peyster to send the girls down to Montreal. (Can. Arch., B 75, 1, pp. 239, 254). De Peyster writing from Detroit, May 15, 1782, to Brig. Gen. Powell, tells of the Delawares delivering up five prisoners for 300 barrels of flour. (Can. Arch., B 102, p. 43).

43. This is endorsed in Powell's well known later handwriting: "To Murray Esq., Affair of Sarah Cole, Indian Prisoner."

44. Originally written "Mary Cole", but the word "Mary" is cancelled and the word "Sarah" interlined.

45. This is endorsed in Powell's handwriting "Richard Murray Esq. relating to Sarah Cole."

46. By the Ordinance of March 29, 1777, 17 Geo. III, c. 9, the Guinea was declared equivalent to £1.3.4, Quebec Currency: this would make the price of the girl, \$42.60. It is to be presumed that Powell was repaid; he nowhere complains that he was not as he certainly would have done if he had cause.

NOTES: CHAPTER IV

1. The late Dr. Benjamin Sulte, F. R. S. C., read a very interesting paper on Du Calvet before the Royal Society of Canada in May, 1919—he thought Du Calvet was really a Roman Catholic but I cannot agree in that view. My own paper on Du Calvet was read before the Royal Society of Canada in 1916, but it has not been printed. Dr. Brymner, the late Archivist of Canada seems to be of the same opinion as Mr. Sulte. See Can. Arch. Rep., p. XVII: the matter is of little importance and I do not further discuss it.

2. Powell is using the legal terminology: he does not mean that he applied *in propria personâ* as Counsel but that he instructed Counsel to apply for the writ.

3. Amongst other evidences of this, Benjamin Franklin writing from Passy, November 1st, 1783, to the President of Congress, speaking of Du Calvet having called upon him lately, says that he "when our Army was in Canada, furnished our Generals and officers with many things they wanted, taking their receipts and promissory notes for payment; and when the English re-possessed the Country he was imprisoned and his estate seized on account of the services he had rendered us." Dr. Sulte adduces evidence of a most conclusive character against Du Calvet's loyalty.

There does not seem to be any foundation for the charge made by Powell that the prisoner was subject to "torture" or annoyance by the priests with a view to convert him, or at all—Du Calvet himself in his long and bitter arraignment of his prisoners and jailors, while he has much to say about the barbarity with which he was treated, does not suggest anything of this kind. See also Father de Berey's reply to Du Calvet's charges against the Recollets, Can. Arch., B. 205, 274.

4. He says that he had left his home in Montreal for Quebec, September, 1780, to enter into a bond to prosecute an Appeal to the King in Council against a judgment of the Court of Appeal at Quebec in an action of Du Calvet v. Watson and Rashleigh of Montreal. The Clerk of the Privy Council at Westminster has been good enough to have an exhaustive search made and no record of such an appeal can be found: but that is not astonishing, Du Calvet's arrest and long imprisonment would account for the non-prosecution of the appeal: the papers, &c., were taken to London by Du Calvet's brother-in-law when he went to England to endeavour to obtain a discharge for Du Calvet (see *post* in the text). Du Calvet says that on that visit to Quebec he (Du Calvet) called upon the Governor and had an amicable conversation with him for quarter of an hour: and that he told the Governor that he was returning to Montreal the following day and intended to go to England in October.

5. Can. Arch., B. 205, pp. 86, 94, 96, &c.

6. Can. Arch., B. 205, p. 94, September 30, 1780; he was received by the *Canceaux*, September 29.

7. Can. Arch., B. 205, p. 114, "Off Quebec", October 17, 1780.
8. Can. Arch., B. 205, p. 121, "Off Sillery", October 20, 1780.
9. Can. Arch., B. 205, p. 123, "Off Sillery", October 20, 1780. *Ibid.*, p. 130, "Off Sillery", October 29, 1780. *Ibid.*, p. 134, Quebec, November 2, 1780.
10. Can. Arch., B. 205, p. 150, "Off Sillery", November 8, 1780. *Ibid.*, p. 156, "Off Sillery", November 11, 1780. *Ibid.*, p. 159, Quebec, November 14, 1780. *Ibid.*, p. 161, Quebec, November 19, 1780. *Ibid.*, p. 163, Quebec, November 25, 1780. *Ibid.*, p. 165, Quebec, November 26, 1780. *Ibid.*, p. 166, Quebec, December 6, 1780.
11. Rightly, *me juxta*; the Writ of Habeas Corpus is no part of the Criminal law: it is a civil right—the criminal law of England was continued by the Quebec Act of 1774 but "all causes . . . shall with respect to . . . property and rights be determined agreeably to the . . . Laws and Customs of Canada." (1774), 14 Geo. III, c. 83, ss. 8, 11. Du Calvet and some others thought that this decision was due to the personnel of the Court and that if Chief Justice Livius had presided the decision would have been different: and remembering the character of Livius and his relations with Haldimand, the possibility of such a decision cannot be excluded.
12. In Courts governed by the Common Law of England, i. e. in practically all English-speaking communities, a Court does not depart from its own previous decision—it is in general sufficient to examine previous decisions to determine the decision in a subsequent case. In Civil Law Courts, a previous decision is not binding (at least in theory), it has argumentative and persuasive force only. The Judicial Committee of the Privy Council is not bound by its previous—or any—decisions but it is not a Court to decide, it is a Committee to advise.
13. Can. Arch., B. 205, p. 182, Quebec, September 23, 1781. *Ibid.*, p. 183, Quebec, October 6, 1781. cf. *Ibid.*, pp. 184, 236, Captain Schmid's Report and Haldimand's self justification.
14. How Lord George Sackville Germain acquired and held the power he undoubtedly had in England might be a mystery did we not remember the condition of affairs in England. He was probably not a coward but his conduct at Minden was a disgrace for a soldier and he was justly dismissed from the service. But under the new King he soon attained power, and from the first he strenuously supported the most rigorous measures against the Colonists: he knew no argument but force and force to the utmost. He thereby acquired much influence with the King who honestly believed it his Christian duty to compel the Americans to obey. Germain's Viscountcy on the resignation of North's Administration was due to the King personally not to any Ministry. A good speaker, more than ordinarily able, quick to grasp and quick to dispatch business, he was a power for evil as well as for some good. The extraordinary influence of this noted statesman is difficult for us to understand: it requires the atmosphere of the Court of George III—that Germain had the warm support of the King is certain; without it, he could not have done a tithe of the mischief he did.
15. Robert Russell petitioned for a Commission as Attorney and Advocate, May 28, 1779, Can. Arch., B. 217, p. 82—his name does not

appear in the list in the office of the Secretary of State at Ottawa, but that is known to be imperfect—he was one of the Advocates in Quebec who, May 11, 1779 organized “La Communauté des Avocats”: his name occurs frequently in Court proceedings: he was fined a crown in 1784 by the Communauté for infringing the rule of precedence and “le September, 1785, il fut encore plus audacieux: il parut à la cour d’appel en habit de couleur et en cheveux sans ruban. Audience tenante, le président in du tribunal lui fit de grands reproches, le condamne à des excuses et aux éternels cinq chelins.” Roy, *L’Ancien Barreau au Canada*, p. 51 (“Les cinq chelins” are called “éternels”, because that was the usual fine for such breaches of decorum).

16. Williams was made Solicitor General in December, 1782. (Kingsford says, *Hist. Can.*, VII 196, in February, 1783)—Du Calvet with an injustice wholly natural says: “the very next day after this decision General Haldimand testified his Satisfaction with Mr. Williams . . . for pronouncing it, by creating a new office in the province for his sake. For he made him immediately his Majesty’s Solicitor General for that Province with a salary of £200 sterling a year.” “*The Case of Peter Du Calvet*”, p. 246.

17. As our law maxim has it, “Actio personalis moritur cum personâ”: the action, since it related to Du Calvet personally, abated, came to an end by his death.

Haldimand always believed that Maseres the former Attorney-General, had incited Du Calvet to bring the action—probably he required no incitement—however that may be, it seems clear that Maseres paid some part at least of the plaintiff’s costs; he also took charge, after Du Calvet’s tragic death, of his young son.

Those interested in this extraordinary case will find abundant material in the Haldimand Papers, the Archivist’s Reports for 1885 and 1888, the books by Du Calvet already mentioned and the two Royal Society Papers as well as in the Powell MSS.

NOTES: CHAPTER V

1. In the Register of the Parish of Montreal (Church of England) are found the entries of the birth of Ann Powell, January 10, christening, January 17; death, February 11, and burial, February 12, 1783; but in a Bible inscribed "This Bible is the gift of John Murray to his grandchildren the offspring of Anne Murray married 3rd. October 1775 to William Dummer Powell" are entered in Mrs. William Dummer Powell's handwriting the dates of the birth of her children. Anne is said to have been born May 21, 1782, and died, February 13, 1783. It seems equally incredible that the mother should have made a mistake and that the contemporary entries should be so far astray—but the matter is of no importance.

2. The suspension of the Habeas Corpus Act has happened too often to be a matter of astonishment or complaint—that is always a very early step in times of stress and danger.

3. As it does many to this day. Read and consider Sellar's *The Tragedy of Quebec*. The English and French of the old Province may be compared with the Irish of Ulster and those of the South.

4. Roman Catholics were promised the free use of their religion by the Capitulation of Montreal, 1760; but no right was reserved to them either of becoming members of a Legislature or of voting for such members. In the existing state of the law, Roman Catholics had no such right. Indeed, only the severer provisions of the former penal Acts had been repealed in 1778 by 18 Geo. III, c. 60.

5. No copy of the Petition has been found. I take the description from Powell's MSS. He says, "N. B. Every prayer of that Petition but one has since been granted"—the one exception being no doubt the reintroduction of the English law in civil matters. Powell in another MS. says that the petition was "to interest the King to amend the Constitution of Quebec so as to render it a suitable retreat for the Loyalists from the King's other colonies expatriated by the Treaty of Paris." In still another MS. he says it was "a Petition to the King . . . to obtain a form of government for the province which might conjure the imaginary Terrors of the Church and entice the Loyalists from all Quarters to keep an Asylum here. My name stood foremost on the Petition." He says also that he took the petition to England at his own expense and delivered it into the hand of "Lord Viscount Sydney." Thomas Townshend was created Baron Sydney in 1783 and became Secretary of State for Foreign Affairs, December 23, 1783, which position he occupied until May 1791. He was created Viscount Sydney in 1789; Powell's MS. was written in 1807. There was much confusion at the Foreign Office at this time: Townshend came in, July 13, 1782; he made way for Charles James Fox, April 2, 1783, he for George E. Temple (afterwards Marquis of Buckingham), December 19, who gave way, December 23, to Sydney. Perhaps the confusion accounts for the loss of the petition: that Habeas Corpus and trial by jury were expressly asked for is, however, certain.

6. Adhémar Saint-Martin, the delegate or Député of 1783 is not the same as the Adhémar Saint-Martin whose name appears so often in the correspondence of the period concerning Detroit. The delegate was Jean-Baptiste Adhémar, one of the most prominent and best known Notaries of French Canada by his second wife Michelle Cusson. He was born in 1736 and died in 1800. The Adhémar Saint-Martin of Detroit fame was his brother Toussaint Antoine. There were two families of Saint-Martin at Detroit, one Beaudry and the other Adhémar. These are confused by the editor of the invaluable series of the *Michigan Pioneer and Historical Collections* and by Mrs. Hamlin in her interesting *Legends of Detroit*.

7. There has been much confusion concerning the delegate DeLisle. He was Jean Delisle de la Cailletterie, a distinguished Notary Public of Montreal, who came to Canada from Nantes, Brittany, about 1764, after a brief stay in the American Colonies to the south, where he married an American lady, Miss Denton, his first wife. The delegate was a Roman Catholic and had no connection with the Protestant clergyman, Alexander Chabrand De Lisle, who was a Swiss by birth.

The confusion between the two has given rise to the supposition that he was the "Proselyte" referred to in the endorsement on the petitions (see note 8 infra). That however probably refers to the "Proselyte", a ship which at the time was engaged in the passenger and merchandise traffic between England and Canada.

8. Can. Arch., B 220, p. 135 sqq. sent to Lord North by "The Proselyte", see note 7 supra. The petitions are in the following terms:

"La Tres Humble Adresse des Citoyens de
tous Etats et autres Habitans Catholiques
dans la Province de Quebec en Canada.

"AU ROY

"Sire

"L'heureux Evenement qui par les Soins Paternal de Votre Majesté vient de repandre dans tout votre Empire les douceurs et les Advantages de la Pais nous fait esperer d'une manière bien Consolante le bonheur que nous avons de porter encore, à cette Periode, le titre de Sujets Britanniques; Qu'il nous soit permis en cette qualité qui nous fut toujours chère, d'approcher de Votre Throne et de déposer humblement aux pieds de Votre Personne Sacrée nos Tres respectueuses representations—

"Dans la quatorzieme année du Regne de Votre Majesté Il vous plut tres gracieusement par un Acte emané de Votre Parlement nous Reconnoître authentiquement sujets de Votre Majesté, et autoriser en cette Province le culte de Notre Religion et le Systeme de nos Loix Municipales. Depuis cette Epoque Tres Gracieux Souverain, des accidens et des obstacles imprevis ont Suspendus pour un tems les heureux Effets de Votre bonté Royale envers nous. Les différentes Raisons que nous avons à exposer à Votre Majesté nous paroissent appuïées sur la justice et le droit et nous les soumetons tres humblement a Votre Excellence.

"Les preuves non suspecte d'une fidelité constante et d'un Attachement inviolable aux Interets de Votre Majesté et de Son Gouvernement que nous avons manifesté dans les tems meme les plus orageux; Nous inspirent l'humble confiance d'esperer que Votre Très gracieuse Majesté toujours attentive à procurer des Peuples Soumis à Son Empire voudra

bien nous être favorable, et nous admettre sans aucune Distinction sous quelque forme de Gouvernement qu'il lui plaira d'établir en cette Province à la précieuse Participation des Graces des Droits des Privilèges et des Prerogative dont jouissent dans tous les autres partis du Globe tous les fidels sujets de Votre Majesté.

"Et Votre fidel peuple Canadien penetré de la plus vive reconnoissance ne cessera de Prier pour la Conservation de Votre Majesté et la Prosperité de Vos Royaumes.

"Pour Copie

"Adhémar

"Jn Delisle—

[Endorsed:]

"Petition to the King

Copy enclosed in a letter to Lord North No. 16, by the *Proselyte*.

"Memoire pour faire sentir le besoin ou se trouve la Province de Quebec d'avoir de sujets Ecclesiastiques, et L'Interet qu'il a d'en Tirer à Europe par l'Exercice de la Religion Catholique Romaine qui y est professée.

"Lorsqu'en l'année 1760 cette Province fut soumise à l'Empire Britannique le libre exercice de la Religion Catholique Romaine, qui y estoit seule professée, fut sous le Bon plaisir du Roy conservée et ensuite confirmée par le Traité de Paris, 1763.

"Sous la protection Royale de Sa Majesté les Habitans de cette Province ont jouit de cette Liberte sans troubles ni molestations, mais sans aucune assurance pour la suite jusqu'en 1774, qu'il plut à Sa Très Gracieuse Majesté pour l'entiere Sécurité et Tranquillité des Habitans de la dite Province declarer en parlement et de son Consentement, que les sujets de Sa Majesté professant la Religion de l'Eglise de Rome dans la dite Province de Quebec peuvent avoir, conserver et jouir du libre exercice de la religion de l'Eglise de Rome.

"Notre culte, le culte de nos Peres a donc été autorisé par la bienveillance et signale Bonté de Sa Majeste de L'avis et de consentement et sous la sanction du corps respectable qui represente la Nation dans laquelle nous nous trouvons remis et confondus. La justice et L'Equité ont dicté cette disposition ardemment désirée de tout un peuple Nombreaux montant à present à plus de 130,000 âmes.

"Un attachement sincere et décidé pour la Très Auguste Personne de Sa Majesté Sa Famille Royale et Son Gouvernement estoit le seule retour que ce peuple fidel et Reconnoissant pouvoit offrir pour un tel Bienfait: aussi avons nous la Satisfaction de voir que cette Reconnoissance affectueuse appuïée et Secondée des Vrais principes de cette religion qui nous est conservée a deconcertée les Enterprises et les Tentations des Enemis de Sa Majesté pour Indisposer les Habitans de cette Province contre le Gouvernement de Sa Majesté et la Grande Bretagne. Tous les sujets ou alliés Européens de Sa Majesté qui ont paru dans cette province pendant les Troubles malheureux qui ont si longtems menacés notre colonie rendent un temoignage autentique à la fidelité et loyauté du clergé Catholique Romain: Menaces, violences, emprisonnement, rien n'a pu ralentir le Zele d'aucun; dans les Villes et Campagnes, tous les Membres qui les composaient ont constamment et ouvertement Inculque la Maxime essentielle de l'obeissance et fidelité envers le Roy et son Gouvernement par les Voyes les plus efficaces de la Religion, Lien Sacré qui attache inviolablement les Peuples Catholiques Romains à leur Souverain. Leur Zele na pas été infructueux; et

puisque la liberté accordée aux Catholiques Romains de professer et exercer leur Religion a sy heureusement jetté les Principes d'un attachement sincere et d'une fidelité éprouvée ils esperent avec une humble confiance, qu'il leur sera pareillement accordé les moyens essentiels et necessaires pour se procurer les secours qu'ils attendent de leur Religion : Et c'est à quoi, par des raisons qui ne peuvent alors entrer dans les considerations du Gouvernement Il n'est pas assez pourvu.

"En effet la Religion ne scauroit être exercée sans le secours des Eveques et prêtres qui en sont les Ministres.

"L'epuis son etablissement jusqu' à la conquête, notre Colonie n'avoit pu se fournir par elle même, d'un nombre competens de prêtres pour en desservir les differentes Paroisses, et donner des sujets aux Seminaires, Collèges Hopitaux et communautés. Les Maisons des Jesuites et des Recolets pourvues des sujets Venus d'Europe et un nombre de l'Prêtres Europiens repandus dans les Seminaires et les Campagnes formoient plus des deux tiers du Clergé lorsque cette Province a été ajoutée a l'Empire Britannique; Cette Revolution a été pour cette Province L'Epoque heureuse qui sous L'Influence du Gouvernement de la Grande Bretagne a mis en mouvement des Ressorts de son agrandissement et prospérité, l'Agriculture et Industrie une fois encouragées la Population s'est considerablement accrues. Quantités de Terres qui n'étoient point defrichées sont devenues de fertiles Campagnes et forment de beaux etablissements; Plusieurs Nouvelles Paroisses se sont Etablies; un nouveau Collège s'est ouvert dans la Ville de Montreal a l'Instruction de la jeunesse qui ne pouvoit auparavant se procurer que difficilement et à grands frais une Education convenable, cette ville etant située lieux de la Capitale qui seule possedoit un Collège; nous devons sans contredit tous ses avantages à la tranquillité et à l'encouragement que la conquête nous a procurés; mais à la même Epoque les Prêtres ministres de la Religion et les professeurs necessaires à l'education ont cessé de nous venir d'Europe, dans l'espace de tems qui s'est écoulé jusqu'à présent, les professeurs des Collèges et la plupart des prêtres lors existants sont decedés, le petit nombre qui reste est chargée d'années et d'infirmités, et l'Experience nous demontre journellement que tous les soins du digne Prelat proposé, avec le bon plaisir de Sa Majesté, au Gouvernement spirituel de notre Eglise ne peut tirer de notre province autant de sujets ecclesiastique que les differens Besoins L'exigent, à présent plus de soixante et quinze Paroisse sont denuées de Curé, sans y comprendre plusieurs cantons récemment etablis qui se trouvent en Etat d'en former de nouvelle; les congregations ecclesiastiques et seminaire sont à la veille de manquer totalement de directeurs; Les Hopitaux et communautés manquent d'aumoniers; Les Sauvages Algonquins, Nipissignes, Six Nations, Iroquoises, Hurons et Abenakis, tous Catholiques romains et qui ont montré dans les derniers Troubles tant d'ardeur et de Zele pour le Gouvernement vont se trouver entièrement depourvus de Missionnaires: deja plusieurs Villages n'en ont point L'Education de la Jeunesse cet objet si important, qui merite toujours l'attention de tous les gouvernements, n'est bornée et negligée dans cette Province que par le defaut de maitres et de professeurs en tout genre qui puisse cultiver cette noble Emulation qui fait briller les Talents et les arts également necessaire à l'avantage des Individus, au bien general de la Société et au soutien de l'Etat, de sorte que pour tous ces objets la Province se trouve dans un pressant besoin de Secours Etrangers. Enfin il resulte de l'augmentation rapide et considerable des Etablissements qui se sont formés et se forment tous les jours par les Catholiques Romaines qu'un seul Eveque ne peut plus embrasser

tous les details de son Ministère à l'Egard du Peuple nombreux qui est confié a ses soins. Les visites pastorales dans les différentes paroisses et Missions Sauvages que les Eveques ne scauroient trop Souvent répéter pour la Consolation des Peuples, l'affermissement du bon ordre et la Corection des Abus qui peuvent se glisser de tems à autre sont devenus et deviennent de plus en plus impossible pour un seul; C'est pourquoi les Catholiques Romains en la dite Province de Quebec convaincu que la liberté de la religion implique aussi la Liberté des Moyens d'en tirer des secours qu'ils en attendant, et pleins de confiance en la bienveillance et protection Royale de Sa Majesté, dont ils ont déjà ressentis des Efforts signales, esperent qu'ils leurs sera accordé sous le bon plaisir de Sa Majesté et de son Gouvernement:

1.er. Que vue L'Etendue considerable de la Province, et le grand nombre de Catholiques Romains qui y sont etablis, il soit donné un Eveque au district de Montreal afin que tous les Individus puissent également Recevoir les Secours qu'un Seul ne scauroit immédiatement procurer par lui-même.

2o. Que puisque la Province ne scauroit fournir par elle même le nombre competent de Prêtres et Professeurs necessaires, il soit permis à faire entrer les Professeurs ou Prêtres parlant la langue du Pays dont ils auront besoin.

3o. Qu'es les sujets qui voudront venir en cette Province pour remplir les fonctions qu'ils jugeront convenables.

4o. Et d'autant qu'il est d'une très grande importance que les sujets etrangers qui seroient appelés dans cette Province puissent également meriter la confiance du gouvernement et des Peuples, et que les Prêtres residents dans cette Province qui ont été élevés dans les maisons de St. Sulpice et des Missions Etrangères, ont donné des preuves Authentiques que les sentiments de ces maisons sont d'une pureté constante en ce qui concerne la religion Et d'une Entière loyauté pour le Souverain legitime, sans prejugué de Nation, Il semble que les Elèves de ces Ecoles qui voudroient passer en cette Province seroient le plus propre à remplir ces deux objets et meritoient à ce titre la preference, a moins qu'il n'en apparaisse autrement a Sa Majesté.

"Ces demandes justes et moderées sont si sincerement liées à la liberté de Religion que les Catholiques Romains ne peuvent se refuser d'attendre avec une humble confiance qu'elles leurs seront accordées par sa Très Gracieuse Majesté; Et cette insigne faveur ajouté à la protection signalée dont sa Majesté a toujours favorisé cette Province produira la plus parfaite harmonie, affection, fidelité et loyauté envers sa Majesté et son gouvernement d'où Resultera la felicité et securité de cette Province, à l'avantage reciproque de ses colons et de la Grande Bretagne.

"Pour Copie—Adhémar

"Jn. Delisle.

[Endorsed:]

"Memorial to the King concerning getting priests from Europe. Copy enclosed in a letter to Lord North (No. 16) by the Proselyte." For translation see p. 292 *infra*.

9. In his evidence given September 18, 1787, before the Commission of Enquiry respecting the Courts of Law, Powell says: "I . . . continued to practise in the Court of Common Pleas for the District of Montreal until the month of October, 1783", Can. Arch., Q. 30, p. 359.

On a tablet in St. Francois Xavier St., opposite St. Sacrament Street, Montreal, is the following inscription: "Site de la residence de Jean Guillaume DeLisle de la Guileterie, délégué par le peuple Canadian en 1783 avec Adhémar de Saint-Martin et Wm. D. Powell afin d'obtenir

de Sa Majesté Britannique un Gouvernement Constitutionnel pour le Canada."

10. Du Calvet speaks of a conference at Maseres' house, March 13, 1784, of Maseres with Powell, Adhémar and DeLisle at which he was present and says that the deputies agreed with Maseres' five articles (1) the introduction of the Habeas Corpus Act (2) trial of questions of fact by juries (3) independence of members of the Legislative Council so that they could not be removed or suspended by the Governor (4) that the judges should not be removable by the Governor and (5) that the Governor should be deprived of the power of imprisonment for any crime however heinous. Du Calvet says: "Ces Cinq Articles si importans a la felicité et au salut de la Colonie furent debattus avec toute la maturité et le sens froid d'une politique éclairée. Messieurs les Députés, guidés par leur lumière, et les sentimens vifs de leur patriotisme, les approuverent, de leur suffrages unanimes; en leur privé nom et dans leurs individualités respectives, ils allerent même jusqu'à manifester le plus sincere desir de l'Institution d'une Chambre d'Assemblée formée sur un plan général seule mesure qu'ils reconnoissent devoir placer l'administration heureuse du Canada sur une base fixe et respectable." *Appel à la Justice, &c.*, pp. 253-259. Du Calvet thinks three more Articles necessary viz., (1) representation of Canada in the Imperial Parliament by three members from Quebec and three from Montreal (2) the Governor should be deprived of the power of cancelling or even suspending licences to Barristers, Attorneys, Notaries Public, &c., and (3) corvées should be in the discretion of the legislative body, not of the Governor, *Ibid.*, p. 260.

11. The first Mahretta War was just over; the first Mysore War was on. Warren Hastings was at the height of his power but with powerful and active enemies at home, and when the Coalition Government fell in 1783 on Fox' India Bill, his situation became perilous. Pitt's Act passed in 1784 for the Government of India had taken up the attention of Parliament and country for months. In Ireland, Flood and the "Volunteers" had extorted a partial free trade, the Poynings Law had been repealed and Grattan thought Ireland was at last a nation. It was in October, 1783, that the historic quarrel took place between these patriots: Catholic right to the franchise was not as yet admitted: there was sedition in the north as in the south and already the "United Irishmen" were adumbrated. Then as ever Ireland and the Irish question were a thorn in the side of England: Irish problems were pressing and apparently insoluble—and Quebec was but a small and distant dependency.

12. Read's *Lives of the Judges*, Toronto, 1888, p. 28, says that Powell was called to the Bar in 1779, and this has been followed by some incautious writers. The date, February 2, 1784, is from the records of the Middle Temple kindly copied for me by the Under Treasurer. Powell in his MSS. more than once gives the date as 1784, and says that he was not called to the Bar before coming to Canada as he was entitled to be, since he had kept his twelve terms at Westminster.

13. See Appendix B for the facts as they appear of record.

14. The complaint of Powell in this regard is based upon the Statutes of Massachusetts. As he left the Colony in October, 1775, he

came within the Act of April 30, 1779, as one of those who since April 19, 1775, had withdrawn from the Colony to the King's Dominions, and also under the Act of October 17, 1778. At the best, he was an alien by statute and an absentee who was prohibited by the Act of 1784 to reside in Massachusetts without a licence and then not after the Legislature rose unless he should be naturalized by Statute or the Legislature should approve the licence. Either required a petition to the Legislature which Powell thought humiliating; and naturalization required a repudiation of his allegiance to the British Crown, which he had just reaffirmed when called to the Bar in England. The term of residence stipulated for by Article V of the Treaty of Paris ran out, September 3, 1784. While it cannot be said that the State Regulation was generous, it was no worse than that of other States, and Powell did not suffer nearly so much as many in like position. See Appendix B *post*. Powell seems to have expected a generous measure whereby the expatriated sons of Massachusetts might return to their native land and there reside without renouncing their allegiance to Britain; this was quite beyond the conception of most peoples at that time and those of Massachusetts Bay were no exception.

15. This was one of Maseres' favourite measures: on his disagreement with Sir Guy Carleton and return to England in 1769 he continued in England his scheme of reform of the law of Quebec but so long as the English laws were in force there was no need of a Habeas Corpus ordinance. Forthwith after the Quebec Act of 1774 the Old Subjects in large numbers petitioned for such an Act, Can. Arch., Q. 11, p. 98; the Royal Instructions of January 3, 1775, recommended it, Can. Arch., M 230, p. 116, but Carleton was sorry he had ever recommended it, Can. Arch., Q. 11, p. 145; Haldimand in 1780 gave reasons why such an Act would be dangerous, Can. Arch., B 54, p. 354; *Ibid.*, Q. 17, 1, p. 270; the petition carried by Powell and his confreres to England in 1783 and a similar one in 1784 specifically asked for it, Can. Arch., Q. 24, 1, p. 1; *Ibid.*, Q. 27, 1, p. 431; *Ibid.*, Q. 40, p. 199, and a draft for such an Act was made, Can. Arch., Q. 56, 3, p. 618. The Ordinance was passed at Quebec, April 24, 1784, 24 Geo. III, c. 3.

16. On the introduction of the English Law by the Royal Proclamation of 1763 trial by jury was provided for by the Ordinance of September 17, 1764, if demanded by either party. This went by the board on the coming into force of the Quebec Act of 1774; many protests were made from 1777 on: the merchants of Quebec and other Canadians then in London protested against its abolition, 1778, Can. Arch., B. 43, p. 13; Haldimand was himself in favour of it, Can. Arch., B. 54, p. 354; *Ibid.*, Q. 17, 1, 270, but the Legislative Council repeatedly refused and not till he had been succeeded by Hamilton was the Ordinance passed and the "Englishman's birth right" restored; April 21, 1785, 25 Geo. III, c. 2.

NOTES: CHAPTER VI

1. The Seigneurial Tenure of land, a feudal system introduced substantially in New France by Richelieu in 1627, existed until 1854 when an Act for the abolition of Feudal Rights and Duties in Lower Canada, 18 Vic., c. 3, (Can.), was passed which replaced the former Acts (1845), 8 Vic., c. 42 (Can.), and (1849) 12 Vic., c. 29, (Can.). The country in French times was divided into large tracts, "Seigneuries", each of which had its feudal Lord holding of the King and with certain feudal rights: under him were the "censitaires" or (as they disliked that name) the "habitants", who not only paid rent but also owed certain feudal duties—e. g., the *corvée* or labour for the Seigneur, the duty to have their grain ground at his mill, &c. The French Canadian peasants, however, had by no means so hard a lot as their brethren in France and were superior to them in intelligence, and in most other respects.

2. I. e. "Own their farms" in the sense of holding the highest estate in them known to the English law—an estate in fee simple: no one can "own" land under our system in the sense of ownership as at the Civil Law—we hold of the King.

3. The tenure *en roture* was the usual tenure in old Canada and was preferred by the Seigneurs—the tenure was a base and not a noble tenure.

4. Powell speaks elsewhere of a "sordid estate"; he there uses the word in the unusual sense of "base estate", a term in the English law originally signifying such estates as were not held by military service, the only service thought becoming to a free man—but by base service, such as a villein owes his lord—"base tenure" is the same thing. In another MS. he says that the settlers feared they would be "feudal villains": by that phrase he means the common law "villeins" or serfs who disappeared from England during the Commonwealth—now "Slaves cannot breathe in England."

5. The policy of the land grants was determined in the last resort by the Home Government. In the Royal instructions to Murray, December 7, 1763, he was directed to grant land with a rental of £2 sterling per 100 acres (Can. Arch., M 230, p. 1), his Patent, November 28, 1763, giving him power to grant "under such moderate quit rents services and acknowledgments "as he and his Council should think fit: Shortt & Doughty, *Const. Docs.*, 1759-1791, p. 131: Sir Guy Carleton received the same instructions in 1768 (Can. Arch., M 230, p. 61): and the same year, he recommended the French Canadian Tenures (Can. Arch., Q. 5, 2, p. 477). In 1771, he received additional instructions to grant such lands as were remaining "in Fief or Seigneurie as hath been practised heretofore antecedent to the conquest" of the Province. (Can. Arch., M. 230, p. 114): the Draft of the Quebec Act referred to lands theretofore granted or to be granted "in free and common soccage"—our ordinary ownership of land—but this was stricken out in the House (Can. Arch., M. 285, p. 283. Shortt & Doughty, *Const. Docs.*, 1759-1791, p. 393). In 1783, Haldimand received instructions to provide for the "Loyal Subjects of the Colonies and Provinces by allotting land to them in the Provinces—to lay off land for non-commissioned officers and men

of the forces who should desire to settle in the Province and divide it into distinct Seigneuries or Fiefs and the land to be held of the Crown as Seigneur as the other lands were held of other Seigneurs" (Can. Arch., M. 230, p. 221).

6. This we shall see (when we come to speak of Sorel) is not strictly correct.

7. Can. Arch., Q. 62 A. 1, p. 339; *Ibid.*, Q. 24, p. 262.

8. Can. Arch., Q. 25, p. 220. Letter Hamilton to Sydney, Quebec, November 2, 1785.

9. Can. Arch., Q. 26, 1, p. 42.

10. Can. Arch., Q. 26, 1, p. 73. Letter Sydney, Secretary of State for Foreign Affairs to Hope, Whitehall, April 6, 1786.

11. In the County of Richelieu on the St. Lawrence and the Bay of Yamaska—above the Richelieu four and a half miles frontage by six miles deep, and below the Richelieu three miles frontage and three miles deep. The Town of Sorel (formerly William Henry) is the chef-lieu and is at the confluence of the Richelieu and the St. Lawrence; it was first settled as a fortress in 1665. The purchase was made of the Seigneurie by Haldimand for the Crown for three thousand pounds sterling, Can. Arch., B 55, p. 4, and as early as 1783, since we find the purchase mentioned in Haldimand's Additional Instructions of July 16, 1783. Can. Arch., M. 230, p. 221.

12. Can. Arch., M. 230, p. 231; Shortt & Doughty, *Const. Docs.*, 1759-1791, pp. 562, 563.

13. His representations that the settlers would now have relief were implemented as regards the Upper Colonists by the creation of the new Province of Upper Canada: as regards those of Sorel, the failure to give the same relief is part of the "Tragedy of Quebec."

14. The particulars of this extraordinary action are spread out in the documents: Can. Arch., B 208, B 209, B 211, B 212, parts 1 and 2: and they are given in more or less detail in two of Powell's MSS.—a more curious case of amateur and professional finance has seldom been witnessed. Williams was instructed to sue, April 28, 1782, Can. Arch., B. 209, p. 116. Powell says that he was made Solicitor General for the very purpose, and that is probably true. We have seen that Du Calvet thought he was appointed as a reward for his judgment against Du Calvet's application for a writ of Habeas Corpus.

15. For example, Mabane insisted on his competency to sit in judgment in the case brought on his own advice! Can. Arch., B 208, p. 27.

16. The letter to the Chief Justice is as follows:

"Quebec 22nd Oct., 1788

"Sir,—

"Reflecting on the Communication I had the honor to receive from you this Evening respecting the Assertion made at the Council Board this morning by Mr Justice Mabane that since the Peace I had taken the oath of Allegiance to one of the United States of America, I deem

it incumbent on me to trouble you on this occasion to communicate to my Lord Dorchester and the members of the Honourable Board at which so injurious a falsehood was published my unequivocal declaration that I never at any time of my Life took or subscribed any Oath or Oaths of a public or private nature either of Allegiance or Abjuration in or to any or all of the United States of America, and the only declaration I ever subscribed was on the 19th Day of April, 1775, voluntarily pledging myself to support the person, laws and Government of his present Majesty, with my life and fortune against my own Countrymen. The publicity and nature of Mr. Mabane's Assertion may perhaps justify me in stating for His Lordship's Information, If you think proper to convey it to him, what, and whom I am, my Conduct and the motives for it, since I could think for myself, not only that His Lordship and his Council may the better judge of my pretensions to a few Acres of Land but of my Claim to Support and Countenance against so cruel a Slander, aggravated by the grave Character of its Author, the manner, place, and occasion of its publication."

(Signed) "W. D. Powell"

"Hon'ble
Chief Justice."

A copy of the memorandum all in Powell's handwriting is to be found amongst the Powell MSS.—it is on ten letter size sheets and is endorsed "Narration of W. D. Powell" (in a clerkly hand not Powell's) and "Accompanying the slander of Dr. Mabane" in Powell's unmistakable hand—it was used long afterwards in the "Spanish Freeholder" defamation.

It is a history of his life up to that time: and he defies Mabane or Fraser to impeach it in any particular.

The letter to Mabane is as follows:

"Quebec, 22 October, 1788

"Sir:—

"Mr Chief Justice has this Evening communicated to me the Terms of your declaration to His Excellency Lord Dorchester in Council this morning, purporting that after I had enjoyed the Protection of His Majesty's Government during the late war in the character of a Loyalist, I had, at the Peace, quitted the Province, with a View to establish myself in the United States and had actually abjured my Allegiance and taken the Oaths as a Subject of one of the revolted Colonies. The facts which give Color to the promulgation of so injurious a falsehood, I never pretended to conceal from my Lord Dorchester, nor did I ever think an apology necessary for any part of my deliberate Conduct: but as my quitting the Province for a time and actual residence in the States form a colorable pretext to give Credit to the other false and invidious Charges, I find it owing to myself to call upon you to declare from what Source you have your Information, That I ever took the Oath of Allegiance to any of the United States, that if it proceeds from one of any Credit I may take the necessary steps to confute and punish the Slanderer.

[Signed] William Dummer Powell

Honble Mr Mabane."

17. The land was "on the south side of the Ottawa River between the upper boundary of Mr de Lotbiniere's Seigneurie and the lower

boundary of that of Monsr. de Longueuil": and it was "ordered that the Surveyor General report a survey of three thousand acres corresponding as nearly as may be with the location described by the petitioner." The land was afterwards duly surveyed and Powell received his patent for it.

The report in Council on Powell's application is Can. Arch., Q 39, p. 53, Report No. 20.

NOTES: CHAPTER VII

1. South Carolina passed an Act, March, 1784, forbidding actions until January 1, 1785, for note, bond, debt or account against a citizen of the United States previous to February 26, 1782. In March, 1787, it was enacted that all debts contracted before January 1, 1787, should (with certain specified exceptions) be recovered in three yearly instalments only: in November, 1788, the instalments were altered from one-third of the debt to one-fifth.

Maryland before the Peace had enacted that a creditor must on penalty of losing his right to recover, accept payment in paper money—the famous Continental money from the low value of which it is said comes the familiar “Not worth a Continental.” In 1780, an Act was passed similar to that of Virginia noted below. Several States had the same paper money legislation or its equivalent.

Vermont in 1779 passed an Act prohibiting the return of persons who had joined the British Army, on pain of whipping and if they remained one month, death.

Virginia in 1777 authorized the payment in the State Loan Office of debts owed by citizens of the State to subjects of Great Britain, such payment to be a discharge of the debt.

Pennsylvania had, March, 1778, confiscated the property of Andrew Allen for the crime of adhering to the Crown which was characterized as High Treason—amongst the property were certain claims by Allen against citizens of Pennsylvania.

New York, North Carolina, &c., had also confiscated the property of Loyalists.

Those interested in the claims, which could not be collected owing to the legal impediments, should read *A Brief Statement of Opinions given in the Board of Commissioners under the 6th Article of the Treaty, &c., &c.*, Philadelphia, 1800—this book shows why one international arbitration failed.

2. The confiscation Statutes of New York, North Carolina, &c., were held not to prevent a British creditor suing after the Peace; that of Georgia was held only to delay the time of payment till after peace. *Georgia v. Brailsford*, (1794) 3 *Dallas Reports*, 1. But the Courts held that the Virginia and Maryland Loan Office Statutes were valid: *Clarke v. Harwood*, (1797) 3 *Dallas Reports*, 342, *Ware v. Hylton*, (1796) 3 *Dallas Reports*, 199—the last named case is fully reported before the Supreme Court of the United States—the arguments of counsel and the opinions of the Judges are equally admirable.

3. Other posts held were Niagara, Oswego, Oswegatchie, Pointe au Fer, Dutchman's Point.

4. The two countries complained each of the bad faith of the other—it is interesting to observe that in the case of *Ware v. Hylton*, the Virginia defendant set up as a defence that Britain retained the territory of and stirred up the Indians against the United States.

5. The District of Three Rivers was created in 1790 by the Ordinance of April 12, of that year, 30 Geo. III, c. 5. In French times there

had been the three Districts and these were continued after the Conquest: but in 1764 by the Ordinance of September 17 of that year, the Province was divided into two Districts, the "intended District of Trois-Rivieres not having a sufficient Number of Protestant subjects . . . qualified to be Justices of the Peace and to hold Quarter-Sessions."

6. The very curious position of the "Ohio Country" and other indefinitely held districts will furnish the subject for another inquiry—for the present, these matters are not of importance.

7. Can. Arch., M. 230, p. 116.

8. Can. Arch., M. 230, p. 213—Dorchester's Instructions on his return to the Governorship in 1796 are silent as to Courts to be erected, Can. Arch., M. 230, p. 231.

9. The quotations are from a Report of the Merchants of Montreal to a Committee of the Legislative Council at Quebec in 1786, Can. Arch., Q. 27, 1, pp. 326, sqq.

10. Any one Justice of the Peace could try actions for a debt respecting personal estate over 2/6 (50 cents) up to 40/ (\$8.00): two Justices of the Peace up to £5 (\$20)—and might direct payment in instalments not beyond four months. Ordinance of April 30, 1785, 25 Geo. III, c. 5.

11. Dorchester intended that each District should have its own Lieutenant-Governor, but this proposition was never carried out. Can. Arch., Q. 39, p. 109.

12. Can. Arch., Q. 39, p. 122: Shortt & Doughty, *Const. Docs.*, 1759-1791, p. 651: Fourth Report, Ont. Arch., (1906), p. 157—there was another District, that of Gaspé, formed south of the St. Lawrence and east of the N. E. side of Cape Cat.

This Patent was authorized by the Ordinance of April 30, 1787, 27 Geo. III, c. 4: which recited that there were "many thousands of Loyalists and others settled in the upper countries above Montreal and in the bays of Gaspé and Chaleurs below Quebec whose ease and convenience may require that additional districts should be erected as soon as circumstances will permit." Can. Arch., Q. 62, A-2, p. 634: Shortt & Doughty, *Const. Docs.*, 1759-1791, p. 582; 2nd Ed., p. 860.

13. There was indeed a very well-known lawyer, Thomas Walker of Montreal, who occasionally went as far west as Kingston: but his home and office were in Montreal. The following is the list of Judges appointed to the new Courts:

Laneburg Richard Duncan
 Edward Jessup
and John Macdonell

(Jessup did not sit after 1790 and he was succeeded in 1792 by John Munro.)

Mocklenburg, Richard Cartwright,
 Neil McLean
and James Clark

(The Reverend John Stuart declined a Patent as Judge: James Clark did not sit after 1789 and he was succeeded in 1791 by Hector McLean.)

Nassau Benjamin Pawling,
Col. John Butler
and William Hamilton.

(Benjamin Pawling's name was a mistake: it had been intended to appoint Jesse Pawling and a new Commission issued cancelling Benjamin's name and inserting Jesse's. Peter Tenbrook and Nathaniel Petit were also Judges of this Court).

Hesse—as in the text.

14. Can. Arch., Q. 39, p. 134: July 24, 1788 is the date of the patent. "Duperon Baby of an Old French-Canadian family: one account is that his ancestor was a merchant of Three Rivers, who visited Detroit in 1703, and a little later established a branch of his family there (*Colonie Canadienne de Detroit*, p. 12). Another and apparently a better account is that Duperon was the son of Raymond Baby, of Montreal, and after serving with credit in the West under the orders of the Commandant of Fort Duquesne, came with his brother Louis after the conquest and settled in Detroit (*Les Canadiens du Michigan*, p. 185). Duperon Baby was born in 1738 and became a prominent citizen of Detroit, and a trader of great enterprise. At the time of the conquest of Canada by the British he was at Fort Pitt: he declined to take the oath of allegiance and desired to go back to Detroit, Michilimackinac and Montreal to recover his debts, and pass to France: Bouquet hesitated to let him go on account of the influence of Baby's family among the Indians. Leave was ultimately given, and Baby went to Detroit. During the Pontiac siege, he encouraged Major Gladwin and on the final cession of Canada, he seems to have become a loyal British subject—he was appointed interpreter and Captain in the Indian Department, and was a prominent and trusted official. He took a leading part in society: it is of record that his dancing bills for one winter was over £20. At the time of his appointment as judge, he was the only French-Canadian trader in Detroit, and the chief objections to his appointment (in which he fully shared) were his ignorance of law and his large business connection. He was appointed a Member of the Land Board for the district of Hesse and rendered valuable services in interpreting and otherwise. He died at Sandwich in 1789, having in his by no means long life seen Detroit owned by the French, the British and the Americans.

The family does not seem to have been of the noblesse, but it was of the highest respectability, and members of it played some part in the after history of Upper Canada.

The esteem in which the family of Baby was held by the British Commanders may appear from the following Pass among the papers of the late Sir Thomas Taylor:

"By His Excellency The Honorable Thomas Gage, Major General, and Commander in Chief of all His Majesty's Forces in North America, &ca., &ca., &ca.

"To all whom it may Concern,

"The Bearers hereof Monsrs. Babie's, are hereby Permitted to Pass from hence to Montreal, and the Officers Commanding at the Several Posts on the Communication, will be pleased to give them all Assistance, they may stand in need of to forward them with Expedition.

being Charged with my Dispatches for Govr. Burton; And likewise they will furnish them, with such Provisions, as shall be necessary for their Subsistance on their route.

"Given under my Hand & Seal at Head Quarters
in New York, this 20th. Day of July 1764.

[Signed] "Thos. Gage"

"By His Excellency's Command.

[Signed] G. Matwich"

[Seal]

There were two persons, father and son, Jacques (James), Duperon Baby—the father generally used the name Jacques, the son Duperon: there has been much confusion arising from this circumstance.

Alexander McKee (the same was also frequently written McKay), a native of eastern Pennsylvania, was Deputy Indian Agent at Fort Pitt (Pittsburg) as early as 1772: he was a Justice of the Peace and carried on a large and lucrative business there at the time of the American Revolution. He was, with others, imprisoned by General Hand, of the American forces, in 1777, but was released on parole. Threatened with a renewed imprisonment, he made his escape in 1778 with the noted Simon Girty and others and came with them to Detroit. Appointed as Interpreter and Captain in the Indian Department, he took part in practically all the operations of the Loyalist troops in that part of the world. He was present at many meetings with the Indians, over whom he had a very great influence.

He went into business at Detroit and was appointed Deputy Superintendent of Indian Affairs—later in 1794, he became a Member of the Land Board of Hesse (at Detroit) and received large grants of land. He died in 1799: his descendants are still prominent members of society in and near Windsor. He was a man of the strongest character and his services were invaluable to the British cause.

William Robertson came to Detroit from Scotland in the Fall of 1782 and became Clerk to Mr. Askin there. He soon made himself prominent in the social life of the Post and before long at least as early as 1784 set up in business for himself: about 1788 he took his brother David into partnership and left the business largely in his hands—the firm name being "W. & D. Robertson." He left for Montreal in 1790 and later went to London. When the Province of Upper Canada was formed in 1791 he was made a member of the Executive Council and of the Legislative Council of that Province; but he was never sworn in for either office. He resigned after a short time.

He seems to have returned to Detroit in 1795 as we find him in the Fall of that year associated with a number of Detroit merchants (including his brother David) in buying large quantities of land.

In September, 1796, he went to Montreal, where he lived for about four years: he returned to Detroit in 1800 or 1801; in the latter year he left Detroit for Queenston and Toronto (York). He went to London where he died in December, 1806.

Robertson took the most active part in having the Court for Hesse provided with a lawyer-judge.

15. Can. Arch., M. 230, p. 116.

16. Baby did not think it decorous to sign such a petition, but he

went with it to Quebec and used all his influence to have its prayer granted.

17. Can. Arch., Q. 41, 1, p. 91. The petition is supposed to have been drawn by Robertson: and that is very probable.

18. Can. Arch., Q. 41, 1, pp. 97, 118.

19. Can. Arch., Q. 41, p. 87. Dated Council Chamber, November 14, 1788.

20. He received the following letter:
"Dear Powell:—

"I have reason to think there will be a first Judge appointed for the district of Hesse, with a salary equal to that of the Judges of the Common Pleas here, but no fees, the Puisne Judge to be allowed fees, and no salary. If you think it worth asking for, give me authority to apply and I think there will be no difficulty in obtaining it.

"Thos. Acton Coffin."

The proposition to have a puisne judge with Powell, paid by fees, was never carried out. Powell's appointment is dated February 2, 1789: he is therein said to be appointed in the room and stead of Baby as First Justice.

21. Ordinance of April 30, 1789, 29 Geo. III, c. 3, s. 3. Can. Arch., Q. 62 A., 2, p. 647—there never was another judge appointed to this Court. The ordinance refers to the First "Judge"—the Commission to the First "Justice."

22. Called in the trade "Dernier Equippeur."

23. Mabane who carried on a private correspondence with Haldimand, writes him under date July 27th, 1789, a letter (which reached Haldimand in London, Sept. 5th), as follows:

"Powell has lately been appointed Judge at Detroit with a salary of £500 per annum; as you are no stranger to his character & conduct, you may from ye circumstance alone be enabled to form an Idea of ye views & complexion of His Lordships Administration which by rewarding such men as Powell discountenances those who had been at all times and on all occasions attached to His Majesty's Government."

Mabane who was all powerful with Haldimand was without influence with Dorchester.

See Haldimand's *Diary*, Can. Arch., B. 230—B. 232.

NOTES: CHAPTER VIII

1. I have seen the originals and have copies of some dozen of her letters from 1776 to 1791. Some of the originals are (like the manuscript account of the journey to Detroit) in the possession of Amelius Jarvis, Esquire, of Toronto, great grandson of Powell.

Anne is first referred to in the MSS. letters in 1774 on the death of her mother in a letter to William Dummer Powell from her aunt, Mrs. P. Champlin, Newport, November 15, 1774. Her aunt expresses her approbation of her "dear nephew's conduct in labouring to console his bereaved family, in particular my dear Nancy who most sensibly feels for all around her. Poor girl, she is early made to taste the cup of bitterness." Anne's last letter was in August, 1791.

2. The first stage was from Montreal to Lachine. "Mr. Clarke" was Isaac Winslow Clarke, born in 1748, the son of Richard Clarke, and with his father leading merchants of Boston, Massachusetts, who, as agents for the East India Company were consignees of some of the tea thrown into the sea at the celebrated "Boston Tea Party", December 1773; Isaac was a partner in this business. Both were Loyalists and were accordingly obnoxious to the stronger party. The father took refuge in England with his son-in-law, John Singleton Copley, the celebrated painter and father of Lord Lyndhurst. Copley had married Susannah Farnum Clarke, Richard Clarke's daughter, in 1769. The son Isaac Winslow Clarke, attempting to collect at Plymouth certain debts owing the firm, was mobbed and narrowly escaped with his life. He joined his father in England where he remained for a short time and then was appointed to the Commissariat Department in Canada. He was an officer of indefatigable zeal, and thoroughly reliable; his services during the war of 1812-15 were invaluable if unpretentious. He died at sea on his way to England in 1824 having then the rank of Deputy Commissary General—leaving his son, for many years private secretary to his cousin, Lord Lyndhurst, and two daughters, one of whom married Hon. Charles R. Ogden, at one time Attorney General of Lower Canada and afterwards Attorney General of the Isle of Man, the other married Col. William F. Coffin, historian of the War of 1812.

3. The Cascades—Soulanges Lock.

4. I think that this Mr. Smith was Charles Smyth, the second Clerk of the Court of Common Pleas for the District of Hesse. The first clerk was Thomas Smith who was a Welshman and a Captain of the Indian Department who was in Detroit some twelve years before Powell. Smyth succeeded him, August, 1791, having previously acted as Attorney in several cases. He served as clerk till the Court was abolished in 1784 (except for a time, July, 1792, till the end of the year when he was sick and William Montforton acted for him). A contemporary letter by the Honourable Richard Cartwright, a member of the Legislative Council of Upper Canada says that Charles Smyth, the Clerk of the Court at Detroit was killed with some other British residents at Detroit in the campaign in 1794 of Gen. Anthony Wayne against the Indians. Wayne certainly threatened the Fort on the Miami built by Governor Simcoe and the Militia were called out at Niagara

and Detroit in the expectation of war with the Americans—it was then that Smyth and others joined an Indian expedition and were killed by the American troops in an engagement. Doubt has been cast upon this statement of Cartwright's; but I can see no reason why a Legislative Councillor of Cartwright's prominence and capacity should not know the facts, or knowing the facts, should not state them correctly.

5. The Caleche, a well known Lower Canada vehicle with two wheels drawn by a single horse.

6. Elizabeth born January 22, 1789, and consequently now not five months old.

7. No doubt on his commission among the dissatisfied Loyalists in 1787.

8. Captain Richard Duncan of Rapid Plat a native of Berwick-on-Tweed, came to America about 1755 with his father in the 44th Foot; he served in different regiments before the Revolutionary War. He settled in Schenectady in 1775; joined Burgoyne at Saratoga in 1777 with a few men having before that time done all he could for the Loyalist cause. From Saratoga he came to Canada and served for the remainder of the war. He had had 3500 acres in Charlotte County, Vermont, under a New York grant, also 1300 acres near Cherry Valley, New York; 1150 acres above the Little Falls of the Mohawk River; 1000 acres four miles above Schohar, 3000 acres on the south side of the Mohawk and 2400 acres elsewhere in the State, all confiscated. No doubt he was correctly represented as having been wealthy. He became Judge of the Court of Common Pleas for the District of Lunenburg on its institution in 1788 but did not act after May 22, 1793; he was sworn in a member of the Legislative Council of Upper Canada, June 17, 1793, and attended occasionally until February, 1804. He removed to the State of New York and entered into business there between the Mohawk and Buffalo. There are extant several letters from him to the Lieutenant Governor of Upper Canada protesting his intention to return to the Province; but that intention was not carried into effect. The description given of his poverty is borne out by his evidence before the Loyalist Commissioners at Montreal, March 5, 1788. Second Ont. Archives Report, (1904), pp. 474-6.

9. Probably Walter Roe who became an active practitioner in Powell's Court of Common Pleas.

10. Captain Alexander Harrow, a Lieutenant in the Royal Navy was as early as 1780, Commander of the Naval Armament on the rivers and lakes of Canada, Can. Arch., B. 87, 2, p. 413, and commanding the sloop "Welcome"; *Ibid.*, p. 417; Lieutenant Governor Sinclair of Michlimackinac confined him in the Fort in that year for his insubordination and insolence, apparently through a mere misunderstanding; but Haldimand quieted the matter. He is the Lieutenant Haro (translator Hara) of whom the Duc LaRocheffoucault Liancourt speaks as commanding the King's Sloop (translated Yacht) Chippawa (translated Chippaway). See my edition, p. 18, 13th. Ont. Arch. Rep., (1916) of *LaRocheffoucault's Travels in Canada, 1795*.

Harrow was one of the first settlers on the River St. Clair in what is now the Township of Cottrellville, Michigan, 4 *Mich. Hist. Colls.*, p. 339. He built a brick distillery; and left two sons and two daughters

still living on his place in 1876, 1 *Mich. Hist. Colls.*, p. 442; 5 *Ibid.*, pp. 502-503; 6, *Ibid.*, p. 405.

11. A very common spelling at that time and for many years thereafter; the first author on Orthoepey in Upper Canada, Henry Cook Todd, in his *Notes in Canada and the United States*, 1832, spells the word in that way. See "An Early Canadian Orthoepeist", *The School*, (Toronto), VII, 28. The differentiation between "birth" and "berth" is now of course thoroughly established.

12. The Fort on the American side which was still held under the British Flag.

13. The Honourable Robert Hamilton of Scottish extraction, the son of the Rev. John Hamilton: a partner at Carleton Island of Richard Cartwright, he, on the dissolution of the partnership went to Niagara; at Queenston, he built a large stone house spoken of with admiration by LaRocheffoucault and Mrs. Simcoe, also a brewery and a warehouse; he was the most important personage commercially and otherwise in that little community. He became a Judge of the Court of Common Pleas for the District of Nassau and a Member of the Land Board. When the Province of Upper Canada came into existence he was one of the first Legislative Councillors. He and Cartwright generally had the same views on public measures; one of his sons, George, was the founder of the city of Hamilton, Ontario.

14. The Niagara frontier was at this time garrisoned by a detachment of the 60th Regiment. Having a short time before been strengthened by the addition of two Battallions, it sent the First Battallion to Halifax in 1786 and the Second to Montreal in the following year—the Third and Fourth Battallions did not come to North America.

The historian of the Regiment—*Annals of the King's Royal Rifle Corps by Lewis Butler*, London, 1913, cannot trace the movements of the First and Second Battallions—he says, p. 230, "History is silent as to the doings of the 1st and 2nd Battallions on the St. Lawrence."

The detachment sent to Niagara was under the command of Lieutenant Colonel Peter Hunter—Haldimand was himself the Colonel of the Regiment. Hunter afterwards became Lieutenant-Governor of Upper Canada (1799) in which capacity he was to meet Powell. Anne Powell died, however, before he became Lieutenant Governor and does not seem to have met him after the meeting at Niagara. He was of Scottish descent but not as often thought connected in blood with the celebrated Drs. William and John Hunter. What little is known of his early life is given by Morgan, *Sketches of Celebrated Canadians*, Quebec, 1862, p. 139; Read, *Lieutenant-Governors of Upper Canada &c.*, Toronto, 1900, p. 42; Kingsford, *Hist. Can.*, VII, 511, but the usually accurate editor of the *Mich. Hist. Colls.* Index to Vols. I-XV calls him "Martin Hunter"; in the Index to Vols. XVI-XXX, his name is correctly given. He became Lieutenant-Colonel of the 60th, September 24, 1767. He died at Quebec, August 21, 1805, aged 59 and his monument still graces the Cathedral (Protestant) in that City—Morgan gives a copy, 1. c.

"Mr. Robertson of the 60th" was James Robertson, Colonel Commandant of the Second Battallion who had joined January 11, 1776.

"Captain Watson" was Lieutenant John Watson who had joined September 24, 1787.

Captain David was a prominent Indian often called Prince David.

15. Lord Edward Fitzgerald was fifth son and twelfth child, of the

seventeen children of James Fitzgerald, twentieth Earl of Kildare and first Duke of Leinster; he was born in London, October 15, 1763. He joined the Army and made some reputation for military skill and more for bravery. He was fond of the North American Indian; and was made a Chief of the Bear Tribe at Detroit. His biographer says: "At Detroit . . . he found consolation . . . in his adoption into the Bear Tribe of native Indians, whose Chief . . . formally inducting his friend Lord Edward Fitzgerald into the tribe as one of its Chiefs, bestowed upon him the name of Eghnidai 'for which I hope he will remember me as long as he lives.'"

The Life of Lord Edward Fitzgerald, 1763-1798, by Ida A. Taylor, London, Hutchinson & Co., 1903, p. 92.

After his visit to Detroit, he went down the Mississippi to New Orleans, and being refused admission to Mexico, returned to Ireland. The French Revolution aroused his enthusiasm; and he was cashiered for taking part in a revolutionary banquet; this dismissal, coupled with other causes, made him a conspirator. He joined the United Irishmen and refused again to be a candidate for Parliament. He was a prominent leader in the Irish Rebellion of '98, was apprehended the following year, and shortly afterwards died in prison of a wound received at the time of his capture. His wife, Pamela, is variously said to have been a native of Newfoundland and the daughter of Egalité, Duke of Orleans and Madame de Genlis.

16. Captain Joseph Brant (Thayendanegea) a Mohawk Indian born on the banks of the Ohio about 1742 when his parents were on a hunting expedition, their home being at the Canajoharie Castle. His father dying when Joseph was young, his mother married an Indian whose Christian name was Barnet or Bernard contracted to Brandt or Brant. Joseph took this name, which was spelled both ways—Smith calls him 'Brandt' but the usual and correct spelling is 'Brant.' He was sent to a school at Lebanon, Conn. (the original of Dartmouth College) by Sir William Johnson and became a devout Christian. He took an active part on the Loyalist side in the Revolutionary War. Campbell's calumny of him in *Gertrude of Wyoming* "the Monster Brant" was conclusively disproved and Campbell apologised most handsomely for his mistake—but Brant did lead his Indians in some incursions of less note, and was not wholly destitute of the sternness of the Redman. He came to Canada a leader of the Six Nations and continued to the end of his life an adherent to British rule. He visited England in 1786 and was received with great distinction. He died in 1807. A very full account of his life has been written by Col. William L. Stone a work readily available. Much inaccuracy has been exhibited by some Canadian writers: e. g., he is made a hereditary chief, which he was not; he is represented as fighting in the war of 1812, which, indeed, his son did, etc., etc., Brantford is called after him. His sister Molly was Sir William Johnson's 'Indian wife' (not indeed legally married) and bore him many children.

17. Fort Schlosser.

18. This Chief was probably Red Jacket, Yau-go-ya-wathaw or Sage-ya-wal-ha, no firm friend of the British, who is said by Stone in his *Life of Joseph Brant*, New York, 1838, II, 415, to have been "not a chief by birth but had made himself such by his cunning. He was artful, eloquent and ambitious." By availing himself of the superstitions of his people he became a chief of the Senecas. "Brant always

on all suitable occasions pronounced him a coward—the greatest coward of his race. He used to say that Red Jacket was always valiant for fight with his tongue; but that although by his eloquence he persuaded many warriors to fight he was ever careful not to get into personal danger himself . . . that having sent others upon the war path, he would turn to and steal and kill their cows for his own use.” His temporarily successful intrigue later on and during the time of war, to displace Joseph Brant from his leadership of the Six Nations, is well known.

19. Fort Detroit.

20. This was to be at L'Assomption (now Sandwich) but Powell resided at Detroit until he was made, in July, 1794, a Justice of the newly created Court of King's Bench. He then removed to Newark (Niagara) and later on to York (Toronto) where with occasional absences he resided until his death in 1834.

21. Hog Island formerly known as Wah-nah-be-see (The Swan), Isle au St. Clair, L'Isle au Cochon, but after the conquest by Britain it had received the plebeian name, Hog Island. It was then about three miles above Detroit and is now the beautiful Park of Detroit, Belle Isle.

22. The remainder of the MSS. is fragmentary. It has been printed in *The Magazine of American History*, A. S. Barnes & Co., 1880, pp. 37-47.

In the Report for 1889 of the Dominion Archivist, pp. XVI, sqq., is found printed:

“Jottings From Tombstones in the old ‘English’ Burial Ground, Dorchester Street, Montreal 1866, With notes by Mr. Walter Shanley, M. P.” Amongst these appear the following:

“ANNA CLARKE
Wife of Isaac Winslow Clarke
Died 5 January, 1792
AE: 32”
“Deputy Commissary General
ISAAC WINSLOW CLARKE
Died 7 July, 1822
and
JANE DESMOND SUTHERLAND
His Wife
Died 6 October, 1836, ae. 66”

One of the saddest communications in existence is the letter from the husband Isaac Winslow Clarke from Montreal, January 8, 1792 to the brother William Dummer Powell at Detroit, containing the account of the death of Anne Clarke—her labour began Saturday, December 30 and continued four days, and then Dr. Graham delivered her instrumentally—she lingered till Thursday, January 5 and then died without a struggle.

NOTES: CHAPTER IX

1. The latest preceding census available is that made by De Peyster in 1782—it shows:

321	Head of Families
254	Married women
72	Widows and unmarried women
336	Young and hired men
526	Boys
503	Girls
78	Male slaves
101	Female slaves.

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(Exclusive of those employed in the King's Service then in the Indian Country, say 100). 13 *Mich. Hist. Colls.*, p. 54: 10 *Ibid.*, p. 613: *Can. Arch.*, B. 123, p. 273.

The number 4000 for 1788 is the estimate of William Robertson for "the Settlement of Detroit Comprehending the inhabitants settled on the River and Creeks near it", II. *Mich. Hist. Colls.*, p. 636: *Can. Arch.*, Q. 41, I, p. 97.

2. Dupéron Baby.

3. Of the 309 family names of the heads of families in De Peyster's Census of 1782, 248 are French.

4. Robertson who had intercourse with and knew "almost every inhabitant near the Settlement" says "there will not be found twenty people nor perhaps half that number who have the least pretensions to education or can even write their names or know a Letter of a Book", II *Mich. Hist. Colls.*, p. 642: *Can. Arch.*, Q. 41, I, p. 97.

5. Philip Dejean appointed judge in 1765 continued his functions under Hamilton who arrived in 1775. In 1776 Dejean with a jury of six English and six French tried a man and a woman for arson and larceny—they were convicted of the larceny but the jury "doubted of the arson"—the man was executed by the woman who was pardoned in consideration of her services as hangman. The Secretary of State, Germain, in 1779, directed an enquiry by the Chief Justice as to the criminal's guilt and ordered a *nolle prosequi* to be entered if he merited the punishment—this was done. See my address "The First Judge at Detroit", *Transactions Michigan State Bar Association*. The Presentment will be found *Can. Arch.*, B 42, p. 36: Germain's Letters, April 16, 1779, *Can. Arch.*, B 50, p. 22.

6. II *Mich. Hist. Colls.*, p. 636: *Can. Arch.*, Q. 41, I, p. 87.

7. Ordinance of April 30. 1789: 29 Geo. III, C. 3., S. 8: no such courts were in fact held: all Michilimackinac cases, civil and criminal, came to Detroit for trial.

8. William Robertson's ironical words, II *Mich. Hist. Colls.*, p. 639: *Can. Arch.*, Q. 41, 1, p. 97.

9. I have given a full account of the jurisdiction and practice of the Court of Common Pleas in the address to the Michigan Bar Association already mentioned, in a paper read before the Royal Society of Canada "Practice of Court of Common Pleas of the District of Hesse", *Trans. R. S. Can.* 1913—Vol. 7, 3rd Series, Sec. II, pp. 43, sqq: and in an article "The Early Courts of the Province", 35 *Can. Law Times*" (1915), p. 879, which may be consulted by those interested.

10. The extant Records of this Court consist of two paper covered folio volumes, and a third folio volume bound in parchment; the last in the vault at Osgoode Hall, Toronto, the first two in the Ontario Archives.

Those in the Archives were discovered by Dr. Fraser, the Provincial Archivist, in a search made by him through the Osgoode Hall vault; the other being among the Term Books of the Court of King's Bench escaped him; in going over these Term Books in 1913, I discovered it.

The Act of 1794, 34 Geo. III, Cap. 2 by Sec. 32 provided that all the Records of the various Courts of Common Pleas should be transmitted to and deposited in the Court of King's Bench and make a part of the records of that Court.

The volume found by myself has the original record of the proceedings of the Court of Hesse from its beginning, July 16th, 1789, till September 24th, 1789; then (reversing the volume) from May 19th, 1791, till August 4th, 1791, upon which day the Court adjourned to the 11th August. Some thirty-six pages have been cut out before the record for May 19th, 1791, which probably contained the proceedings from September, 1789, till May 1791.

The first volume in the Ontario Archives contains the record from August 11th, 1791, till October 20th, 1791; the second from October 27th, 1791, till January 26th, 1792, and then from August 21st, 1792, till March 31st, 1794. The Court was on that day "adjourned till July Term", but on July 9th, 1794, the Court was abolished. The records are well written and are perfectly legible.

Since the text of the above note was written, a discovery has been made of the records of the Prerogative Court of the District of Hesse for the years 1789 and 1790.

The book, half leatherbound, in which this record was kept, was taken possession of by the Registrar of the County of Kent, at Chatham, Upper Canada, in the summer of 1813, during the time of the war with the United States, the Registrar in his memorandum saying that he had taken possession of it and used it for the purposes of the Registry Office, by reason of the impossibility of obtaining a book or writing paper.

The remainder of the book is occupied with entries of the deeds registered after the summer of 1813 for the County of Kent.

This Prerogative Court, as has already been said, was a Court primarily for the proving of Wills and the issuing of Letters of Administration to intestates' estates. This was necessary under the English law, but the French law did not require the proving of a will, the will itself operating as a conveyance. Consequently the Prerogative Courts were, so far as Wills are concerned, not resorted to by the French

Canadians at all, but only by the English-speaking inhabitants, and somewhat sparingly by them.

The Prerogative Courts, however, had other jurisdictions, that is the appointment of Guardians to Infants and of Curators to the estates of debtors who were insolvent or who were out of the Country. The practice was when it was desired to appoint a Guardian to Infants to call together a number of the friends and relatives of the infants, administer an oath to them, whereupon they would select some person as Guardian (or "Tuteur") and another as Deputy Guardian, and these, unless there was some obvious objection, would be approved by the Judge. In a case of an absconding debtor or a debtor who was out of the Country, or the case of the vacant estate of a deceased debtor (that is an estate for which there were no executors or administrators) the creditors of the debtor were called together, a similar oath administered to them, and they then selected a Curator of the estate whose duty it was to guard the estate, convert it into money with all reasonable speed, and divide the proceeds *pro ratâ* amongst the creditors.

The meeting of friends and creditors seem to have taken place generally in Judge Powell's house, in Detroit; and he homologated, that is approved, the selection of Guardian or Curator in every instance.

There are no instances of dealing with wills at all in this Prerogative Court of the District of Hesse, the only proceedings being proceedings in the cases of infants and debtors.

On the passing of the First Act of the Parliament of Upper Canada (1792) 32 Geo. III, c. 1 (U. C.) which introduced the English law in respect of property, the functions of the Prerogative Court, except as to Wills, vanished as there is no provision in the English law for the appointment in that way of Guardians or Curators.

11. Published in full, Second Ont. Arch. Rep. (1904). On the Land Board Powell's hands were equally tied. These Land Boards were governed by Rules and Regulations of the Governor-in-Council of Feby. 17, 1789, and were empowered to receive applications for lands, to examine into the loyalty, character and pretensions of applicants, and the safety and propriety of admitting them as residents of the Province, and to assign to those who were approved, their allotments of land.

Powell took a very active part in the deliberations and actions of his Land Board. Of the 53 meetings held before 1792 he attended all but 5; and these were at a time when he was engaged in criminal trials. The last meeting he attended was Nov. 25, 1791; the following meetings were Mar. 2 and 16, 1792: and at this last meeting a report by Major Smith, Commandant of Detroit was read, which, after noting that Alexander Grant, a member of the Board, had been appointed to the Executive Council for Upper Canada, proceeds: "It is much to be regretted that family misfortunes and their subsequent affliction, deprive the Board at present of its most able Guide William Powell Esquire, whose opinion the Major thinks is always to be courted, whose Efforts have always been sanguine and steady and whose absence he hopes will be of short duration." The Major, John Smith, was at this time the Chairman of the Board.

Powell was continued a member of the Land Board when in 1792 their jurisdiction was limited to the Counties of Essex and Kent, but he does not seem to have attended any meeting after Nov. 25, 1791.

(The family affliction referred to was, no doubt, the death of his sister Anne, wife of Isaac Winslow Clarke, at Montreal.)

12. It has been somewhat generally assumed that the Court sat at

Detroit—this I am confident is a mistake; the records show that it sat at L'Assomption—See my Michigan Address, pp. 27, 28—the records are now available to everyone, having been published in the 14th Ont. Arch. Rep. (1917).

13. Those interested in the law on this subject will find it in the Queen v. St. Catharines Milling and Lumber Company, 10 *Ontario Reports*, 196; 13 *Ontario Appeal Reports*, 148, 13 *Supreme Court of Canada Reports*, 877; 14 *Appeal Cases*, (*Privy Council*), 46.

There are scores of instances of purchases from the Indians being validated by the act of the Crown.

14. Another daughter, Mary Boyle, had been born, December 18, 1791, and Mrs. Powell's sister had come to visit her in Detroit: the party consisted of Mrs. Powell, her sister, three sons, three daughters, a servant woman, and a boy. The story of the voyage is given by Powell in one of his MSS.—it is worth copying in part:

"She decided with Mr. Powell's approbation in October of that year to undertake a journey to New York, there to receive the large amount due on account of her annuity and proceed to England where the children would receive an education not to be obtained in Canada. Late in October, 1791, the party crossed Lake Erie in a King's ship, and after passing some days at the hospitable mansion of their friends Mr & Mrs Hamilton at Queenstown they embarked on 4th November in a well manned large Bateau on Lake Ontario. The party consisted of Mrs Powell, her sister, three sons and three daughters—(the youngest in her cradle) and a servant woman, and a boy. They had made preparations for a passage of a few days only which proved a vain anticipation—Continued gales of wind and snow storms exposed them to perils day and night. And not until the thirteenth day of their sufferings did they reach Oswego. The hospitality of Captain McIntosh gave them food and shelter and the following morning after a plentiful breakfast he aided in taking their boat up the rapids in time for them to embark at what was then called Fort Ball and cross the small but dangerous Oneida Lake. To their severe disappointment Wood Creek was frozen up and not till late in a November night could they find it possible to gain access to the Oneida Creek where in the morning they found a dwelling consisting of one room and that room inhabited by a man, his wife and infant. These people consented to the new arrivals sharing their miserable accommodation. Here Mrs. Powell's funds in cash were exhausted and but for the arrival of Mr Kane at the village she would have had no means of purchasing the mere necessities of life there to be obtained. That gentleman was so kind as to cash a fifty pound bill which Mr Hamilton of Queenston had provided her with.

"After being detained some days a slight fall of snow enabled them to move from this wretched lodgment in an ox sleigh and after passing a whole day advancing nine miles from a place called Queenstown they arrived at Utica and from there they proceeded to the Little Falls where water communication was arrested by intense frost, and to the hospitable mansion of Mr. Porteous. A letter from Mr. Hamilton of Queens-town introduced them to that most excellent gentleman. By his kindness they obtained the means of using the first snow and proceeded on their journey in various carriages and were kindly received by their friends in the vicinity of Albany and finally late in December arrived in an open waggon in comfortable lodgings in New York. Here disappointment awaited Mrs Powell for instead of meeting her brother

as she had expected she found that he was at Alexandria where he expected to meet her.

"Mr Wheaton offered to become her Banker and to escort her through this unreasonable addition to her fatigues and expenses.

"After ascertaining that her Winter passage to England was impracticable, a covered carriage called a 'stage' took them through bad roads to Georgetown, where her brother's carriage met them and let them down at his house in Alexandria. . . . It would be impossible to describe fully the discomforts of the following months. They were only terminated by their embarkation on a ship bound for London.

"Mrs. Powell six children, her sister, her brother James Murray, and her servant, arrived in London after a terrible passage. There the object of her voyage was effected by the placing her elder sons at school"

15. In Powell's pamphlet published many years later (*A Story of a Refugee*) a copy of this letter is given; it is as follows:

"Sir: I received yours of the 12th of June, which gave me infinite pleasure to hear of those resolutions you have entered into to form a new campaign, as the former proved so unsuccessful, and this last one, quite the contrary, as it gave me the greatest concern imaginable for the loss of so many brave men; . . . the exquisite pain I was in for fear anything from me may have fallen into the hands of the enemy. You desire that I should give my opinion as to the strength of this country, and how they stand affected; . . . I have already given you all the information I could get, . . . how Mr McKee has conducted matters, and the policy of the English. Last year it was in agitation to fortify the Miamies; . . . McKee, Caldwell, Elliott, La Motte, a Captain Banbury and Lieutenant Selby were very strong advocates for the completion of it, as the above Captain expected the command there. They have pitched upon a place for a Fort; but, from what motive I cannot determine, it is laid aside. The line of conduct which Mr McKee has laid down is of very intricate nature: he has got over Caldwell, Elliott, and La Motte, who are implacable enemies to the States. The embezzlement of the stores has no small share in bringing these matters about what with purchasing negros and horses, which are purloined from the country, and with land or lead, and presents to the savages to induce them to cut off the poor husbandmen from your frontier sums up but a small share of their villainy.

"The regiment that is quartered here you have a very good right to know, as they were the first who drew blood on the defenceless people at Lexington. The officer who commands them is a very quiet, easy man, and would rather attend the slaughter house or the carpenter shop, than give himself the trouble to exercise his men. I can assure you, upon my honour, that he has not had them through a field one day since they have been stationed here. This Fort has great quantities of ordnance come up here, six field-pieces, carts, waggons, ammunition, and intrenching tools, I suppose for the use of the intended Fort. All these matters are of very little consequence, as the French in particular, through my management, are in no way attached to their savage principles; they in general are well versed in the Indian tongue, and have frustrated in a great measure the above villain's plans. I'm positive, if an army was to appear, the major part of them, and the militia would join you, with plenty of provisions and every necessary you may be in want of, there being abundance of every kind here. I make no

doubt, if you was once in possession of this place, that you could raise a complete batallion for the internal protection of it.

"As to the naval department, they seemed to make a very great show: they are now building a twenty-four gun ship, which will an extra expense to the King, especially while they have such commanders. I should be very happy to give you a clear idea of everything that would be of service to you in your undertaking; but to know these things we should have them in detail; and that is in a manner infinite, our knowledge is always superficial and imperfect. I have had a great deal of conversation with Lieutenant Turner about these matters, and to give him a clearer idea I took him down to the Settlements in my Carriole, and introduced him to such friends as I could confide in (they being but few); the residue being a remnant of Caldwell's blood-hounds, the most egregious rascals existing.

"The plan I mentioned to you in a former letter, conceived by our friend Robinson and me, to abolish this infernal department; I have had no return from Europe; so that the following may, if well executed. I have mentioned it to Turner who will acquaint you with particulars more at large than I can possibly pen it.

"If agreeable to you, I think it will be the means of extirpating the savages and the heads of the bloodhounds. If you can confide in twelve or fourteen men of undaunted courage, with a resolute officer at their head, I have not the least doubt but, by what instructions I have given a few friends down the Settlement, who are ready and willing that assistance, to be able to carry out and cut off McK—, C—, E—, L. M—, and Girty. I have made sure of an asylum at Cornell's or Keasle's, until matters may be ripe. You have a number of savages now resident with you; let them be brought as far as Fort Pitt, and let them be put under the immediate care of some skilful doctor to inoculate with care; and when fit to go about, let them have instructions to infect every individual article belonging to them, and send them by route to Sandusky, the Rapids, Fort Jefferson, the Miamies, Six Nations, Wabash, and the Illinois, which will effectually prevent the . . . and the Michilimackinac Indians from coming to the assistance of those already on your frontiers. We have had accounts lately of three men and a woman being . . . and Miami savages which might have been stopped if the least motion towards it had been made by these barbarians I should have sent Turner off some time ago, if my plans were not frustated by M'Kee, who insinuated to the commander that it was dangerous merely to gain time, and he and his; . . . only waited for the ice to get good to go with Girty (a noted villain) and a prisoner he had got who was at the party who buried the entrenching tools, with intent to dig them up, and secure the cannon which were hid on some part of the field of battle. Some time ago a Commission came up to try a criminal, and Mr M'Comb was appointed one of the Judges.

"I was obliged to administer the oath of allegiance to him, I had some doubt whether he would not make some difficulty in taking it: but, upon my honour, he swallowed it with as good a grace as you or I would a glass of Madera. You must be very cautious how you let him or your brother know anything of our correspondence, as I am confident it would be of very dangerous consequences to me. Things have a different aspect since Mrs P left this place.

"I hope my endeavours may have the desired effect. I should be very happy to hear from you the first opportunity.

"I am, Sir, with the greatest respect, your most obedient, humble servant

[No signature]

"Major-General Henry Knox

Secretary at War, Philadelphia, Feb. 2d, 1792"

16. For example, in "*The Gazette of the United States*", July 23rd, 1792, the following appeared: "By a gentleman of veracity from Canada we are informed that when he passed Three Rivers, he met an escort who had Judge Powell of Hesse District in Upper Canada with them, a prisoner, and in irons. The charge against him was said to be treason . . . letters having been detected written in his name, and as reports say in his hand, giving information to his friends in the United States how Detroit may be easily carried. This gentleman was formerly of Boston in New England; and when our informant saw him he was on his way to Quebec by order of the Commanding Officer at Detroit."

Malignity and party feeling did not allow the slander to die. Robert (Fleming) Gourlay, who became so noted some years later and whom we shall meet again, says in the *Statistical Account of Upper Canada*, Vol. 2, page 517, (after nicknaming him "Pawkie") "it is said he was once arrested, put in irons and hurried from top to bottom of the Province on suspicion of carrying on a treasonable correspondence with the Americans . . . After getting clear of the handcuffs, he continued under a cloud but at last got into favour with Governor, and by that favour gained his seat on the Bench and many more *favours*."

One would have thought the loyalty of Powell above suspicion; but we have seen it questioned by Mr. Justice Mabane; and later, Powell's brother judge in the King's Bench, Mr. Justice Thorpe, expressed a strong doubt on the subject.

17. Father of Queen Victoria.

18. The well known Colonel Thomas Talbot years after this time and after his quarrel with Powell, denied that Simcoe had said anything of the kind to Powell: Powell devotes a long MS. to confuting Talbot, I think, with success.

NOTES: CHAPTER X

1. The division of the Province of Quebec into two Provinces i. e. Upper Canada and Lower Canada, was effected by the Royal Prerogative: see 31 Geo. III, c. 31, the celebrated Canada Act. The message sent to Parliament expressing the Royal intention is to be found copied in the Ont. Arch. Report for 1906, p. 158. After the passing of the Canada Act, an Order-in-Council was passed, August 24, 1791 (Ont. Arch. Rep., 1906, pp. 158 seq.), dividing the Province of Quebec into two Provinces and under the provisions of sec. 48 of the Act directing a Royal Warrant to authorize "the Governor or Lieutenant Governor of the Province of Quebec or the person administering the government there, to fix and declare such day as they shall judge most advisable for the commencement" of the effect of the legislation in the new provinces, not later than December 31, 1791. Lord Dorchester (Sir Guy Carleton) was appointed September 12, 1791, Captain General and Governor in Chief of both Provinces and he received a Royal warrant empowering him to fix a day for the legislation becoming effective in the new Provinces (see Ont. Arch. Rep., 1906, p. 168). In the absence of Dorchester, General Alured Clarke, Lieutenant Governor of the Province of Quebec, issued November 18, 1791, a proclamation fixing Monday, December 26, 1791, as the day for the commencement of the said legislation (Ont. Arch. Rep. 1906, pp. 169-171). Accordingly technically and in law, the new Province was formed by Order-in-Council, August 24, 1791, but there was no change in administration until December 26, 1791.

2. See the list dated March 15, 1790, in the *Wolford Manor Papers*, I, 333; a second list also containing Powell's name for both Councils is at p. 376—Powell headed both lists in both papers, showing Dorchester's estimate of him. Sir John Johnson's list is to be found in these Papers, I, 398.

Writing from Montreal, December 7, 1791, "Secret and Confidential" to Dundas, Simcoe sends Sir John Johnson's list of Legislative Councillors at the head of which is the name "Wm. D. Powell, Hesse." Can. Arch., Q. 278, pp. 27, 35—this list Johnson had given to Simcoe himself.

3. That Simcoe had a strong dislike for Dorchester is well known: he showed it on many occasions. The jealousy between these two valuable public servants makes very unpleasant reading. Powell gives the origin of this feeling as follows: "In fact Colonel Simcoe has conceived himself to have been ill used by the Governor in Chief, Lord Dorchester, when commanding the Forces at New York. Two partisan Corps, the Queen's Rangers and that commanded by Col. Tarleton, were quartered in Staten Island: and some depredations had been charged very peremptorily upon the Queen's Rangers, whose uniform was with difficulty distinguished from that of Tarleton's Corps. The Commander in Chief, supposing some neglect of discipline from the non discovery of the culprit, stopped all promotion in Simcoe's and it was not until aroused by this Punishment that they bettered themselves, and fixed the Act complained of on Tarleton's. This incident was never forgotten or forgiven by Gen. Simcoe, who lost no occasion to mark his antipathy to the Noble Lord during his Lieutenantancy in Upper Canada."

Simcoe was appointed to the command of the Queen's Rangers October, 1777, a light corps or "partisan corps" as the phraseology was: and he has told the history of the operations of the Corps from the end of 1777 to the conclusion of the American War in a (now) very rare volume printed for him at Exeter, England. At pp. 182, 183, he says, "Being cantoned with other corps on Long Island, the depredations which were committed drew upon the Queen's Rangers the displeasure of Sir Guy Carleton, and the denunciation of his precluding the officers from their just promotion, Captain Saunders who then commanded them, conscious that they were innocent, addressed a letter to the Commander in Chief." He adds: "The officers of the Queen's Rangers prided themselves—and justly—in preventing, as much as officers by precept, example, and authority, could do, plundering and marauding." "It was proved before a Court Martial that those depredations which had drawn down upon the Rangers the Commander in Chief's indignation had been committed by men of the Legion." "The Officers of the Queen's Rangers seem to have been oppressed with every circumstance that could wound the hearts of men who were soldiers on the best principle; but this cloud soon passed away . . . Sir Charles Grey was appointed to succeed Sir Guy Carleton." *A Journal of the Operations of the Queen's Rangers From the End of the Year 1777 to the Conclusion of the Late American War*, by Lieutenant-Colonel Simcoe, Exeter. Printed for the Author. There is an American reprint.

Whatever can have been the reason for the feud, there can be no doubt that Simcoe throughout his whole official career in Canada was on ill-terms with Dorchester, grudged him his superior station and authority, and made no attempt to act harmoniously with him—dislike and jealousy are all too manifest.

Simcoe certainly expected the appointment of some one from Detroit as Executive Councillor—he wrote from Quebec, November 19, 1791, to Dundas: mentioning the Executive Councillors already named—Osgoode, Robertson, Grant and Russell, he adds: "I understand a gentleman from Detroit is to be added . . ." Evan Nepean the efficient Under Secretary of State, had written him September 19, 1791, "Your Executive Council will be limited to five viz: Osgoode, Robertson, Evans, Grant, Russell, and a Canadian. For the Legislative Council eight are named in the instructions and two vacancies are left for Canadians." *Wolford Manor MSS*: Robertson's *Simcoe Papers*, Vol. I. Simcoe being limited to Canadians, i. e. French Canadians, cannot fairly be blamed for omitting to name Powell in this letter which continues thus: "I wish that Mr Jacques Baby of Detroit may be appointed to the first vacancy both in the Executive and Legislative Council as I understand that he is a most proper person in that District from whence it is but justice that a French gentleman of indisputable loyalty should be selected—and the other vacancy I think it would be proper to empower me to dispose of as I think fit, to the Speaker or some Member in all probability of the House of Assembly", *Can. Arch.*, Q. 278, p. 9. Nevertheless the excuse of forgetfulness and oversight will not hold.

4. The appointment of Osgoode has never been explained: the absurd story that he was the natural son of George III needs no refutation.

5. At that time and for many years thereafter, the Judge presiding over the Court for the trial of criminal cases sat in that Court under two Commissions—one of Oyer and Terminer which enabled him to try

all indictments found by a Grand Jury in his Court—the other of General Gaol Delivery which enabled him to try all prisoners in the gaol by whatever means they were there and whether indictments had been found against them or not. The Judge has also a Commission of Justice of the Peace.

6. See Simcoe's letter to Dundas, Quebec, January 5, 1792, *Can. Arch.*, Q. 278, p. 40: he says: "Chief Justice Smith has given me his opinion that I shall hear nothing from Judge Powell on this subject" (i. e. the illegality of the Courts sitting under the existing Commissions, &c.).

Kingsford, *Hist. Can.*, VII. 342, suggests that Powell actually sat: and this has been more than once stated. But the diary of John White (a copy of which is in my possession) shows that Osgoode arrived at Kingston, June 29, 1792, and that he presided over the Court, August 23. Osgoode's commission is dated, July 27, 1792.

A case of murder was on the list for trial: Powell's willingness to overlook the apparent illegality is rather startling if it is true: he says nothing of it and we have only Chief Justice Smith's opinion that he would act.

7. Simcoe writing to Dundas from Niagara, August 20, 1792 says that he has granted the request of Mr. Justice Powell for leave to go to England on his private affairs proposing to return early in Spring—he was to go "through the Genesee Country." Simcoe adds "the behaviour and conduct of Mr Powell as far as my knowledge has been in every respect such as becomes the station he holds in His Majesty's Government." *Can. Arch.*, Q. 298, p. 217.

8. His memorial to Dundas asking for an enquiry is dated London, February 29 (sic) 1793: it will be found in the *Can. Arch.*, Q. 280, 2, p. 484. In an MSS. he says, speaking of this visit: "Mr P had subsequent to the appointment of Mr Osgoode received assurance that nothing opposed his elevation to the Head of his Profession in the Colony when recommended by the Lieutenant Governor."

9. From a delightful letter from his sister Jane to him dated January 21, 1793. In the letter, too, she speaks of the pleasure Powell's father took in a story of his life at Detroit: "My Father is much pleased that you have given a written account of what you suffered to Lord Dorchester, and is highly gratified by that Nobleman's friendship for you: but his mind dwells more upon your four Boys rowing up the river than upon the material business that sent you to this Country. He is charmed into good humour whenever he recollects it, and twice when I have found him buried in thought he has broke out with 'Fine sight. Wish I had seen it'—and when I enquire what fine sight he meant, the story has been told again with fresh pleasure."

That Powell made a favourable impression on the Home Secretary, Dundas, appears not only from his own MSS. but also from Dundas' letter to Simcoe from Whitehall, April 24, 1793. "Mr Justice Powell who brought me your letter of the 27th September last will upon his return from hence to Upper Canada deliver this to you. Nothing has ever appeared before me which in anywise contradicts the favourable report which in the above mentioned letter you have made of that gentleman's conduct and behaviour in the station which he fills and I make no doubt of his continuing to deserve the character you have given him." *Can. Arch.*, Q. 279, I, 218: *Ibid.*, Q. 278, A, p. 15.

10. They were endeavouring to obtain the arrears of an annuity of £120 per annum left to Mrs. Powell by her aunt Mrs. Inman on her death in 1783—the story is long and neither pleasant nor interesting, and I say no more of it.

11. This provision was without precedent in Colonial Constitutions: it has not received the attention it deserves at the hands of constitutional writers, and seems to be unknown to most. Sec. 6 of the Canada Act (1791) 3 I Geo. II, c. 31, enacts that “whenever His Majesty his heirs or successors shall think proper to confer upon any subject . . . by Letters Patent under the Great Seal of either of the said Provinces (of Upper Canada and Lower Canada) any hereditary title of honour, rank or dignity of such Province . . . it shall . . . be lawful for His Majesty, his heirs or successors to annex thereto . . . and hereditary right of being summoned to the Legislative Council of such Province . . .” Writing to Dundas from London, June 27, (or possibly 29) 1791, Simcoe says: “The utmost attention should be paid that the Customs, Manners and Principles in the most trivial as well as serious matters should be promoted and inculcated to obtain them due Ascendancy to assimilate the Colony with its parent State, and to bear insensibly all their habitual influence in the Support of that British Constitution which has been so wisely extended to that Country.” Can. Arch., Q. 278, p. 228.

Writing to Portland from Navy Hall, October 30, 1795, Simcoe says: “I should be very happy was there sufficient property and qualifications in any Members of the Legislative Council to see the provisions of the Canada Act . . . immediately completed by an hereditary seat derived from the Title of Honour being vested in the Families”, Can. Arch., Q. 281, 2, p. 11.

12. 1792, 32 Geo. III, c. 1 (U. C.) c. 2—it has been thought strange that notwithstanding the passing of the latter Act assented to October 15, 1792, Powell did not try more cases in his Court with a Jury—but a careful examination of the record shows that he tried no issue of fact—there are judgments by default or confession, &c., some writs of enquiry for the Sheriff to act upon with a jury, many decisions on pleadings &c.; but there were five cases in which a *venire* was granted (a writ to have a jury summoned) and the only two cases in which issues of fact came up were tried by a jury—the trial of one of these cases had to be postponed because the jury could not be warned as it was impossible to get across the river by reason of the ice. *Meldrum & Park v. Borel*, March, 18, 1794.

13. Simcoe writing to Dundas from Navy Hall, Niagara, November 23, 1792 said he had filled in “the blank in the List of Executive Councillors and Legislative Councillors for the Gentleman of Detroit with the name of James Baby, the son of a respectable French Gentleman of that District lately deceased and the nephew of Mr Baby of the Council of Lower Canada . . . his brother was lately brought in the Assembly” and he adds “I cannot find another Canadian Gentleman in that District proper to appoint.” Can. Arch., Q. 279, I, pp. 181, 183. The brother referred to was Mr Francis Baby one of the Members of the First House of Assembly for the Riding of Kent, William Macomb being the other.

14. The Districts were deprived of their German names and vested with English substitutes by the Act of (1792) Geo. III, c. 8. (U. C.)—instead of Luneburg, Mecklenburg, Nassau and Hesse they became Eastern, Midland, Home and Western.

15. This will be found in the reprint of the Journals in the 7th Ont. Arch. Rep. (1910) at p. 46.

16. The quotations are from Simcoe's letter to Portland from Navy Hall, August 2, 1794, Can. Arch., Q. 280, I, p. 250. The fragment of the Journals of the Legislative Assembly for 1794 found by the able and indefatigable Archivist, Dr. Alexander Fraser, among old papers in the Parliament Buildings, which is all that we have of the proceedings of that Session stops at June 11, 1794: and therefore we cannot test the accuracy of Simcoe's account of the proceedings in that Chamber. In the *Life and Letters of the late Hon Richard Cartwright*, by the Rev. C. E. Cartwright, Belford Bros., Toronto and Sydney, N. S. W., 1876 (a work of extraordinary interest and all too short) at pp. 59 seq., will be found Cartwright's views of the legislation—his reasons for objecting are the needless expense, inconvenience, and delay.

17. (1794) 34 Geo. II, c. 2 (U. C.).

18. This is now long obsolete: Blackstone in his 3rd volume gives full particulars of this practice. The defendant is arrested by the Sheriff's officers: and if the declaration i. e. the statement of the plaintiff's case, is filed in the office of the Court, he may be ordered to give special bail i. e. security that he will appear in Court, &c.,—otherwise common bail is entered which is a mere empty archaic form.

19. Notwithstanding the cogency of these arguments there can be no doubt that the institution of the Court of King's Bench and the centralization of the law in the Province have been of the utmost value in the administration of justice.

20. Chief Justice William Smith died at Quebec, December 6, 1793: Osgoode applied at once, and on December 12, for the place, Can. Arch., Q. 280, 2, p. 512: February 24, Dundas gave his official Warrant and Mandamus—but Osgoode did not present it until July 29, 1794, on which day Dorchester issued a Commission to him as Chief Justice of Lower Canada. The King's Bench Act of 1794 was assented to July, 1794, so that Osgoode was technically head of the King's Bench for Upper Canada for twenty days: but he never sat in it and he has left no trace in our jurisprudence. December 11, 1794, he received a Patent as Chief Justice of the Court of King's Bench of the District of Quebec in the Province of Lower Canada. He resigned in 1801 and went to England where he died in 1824, aged 70.

Mr. Thomas Mulvey the Under Secretary of State of Canada has been good enough to furnish me with copies of Osgoode's several Patents. See my *Upper Canada Sketches*, Toronto, 1922, pp. 101 sqq. for a full account of Osgoode.

21. Writing to John King, the Permanent Under Secretary of State for Home Affairs from Navy Hall, June 20, 1794, he says: "I shall feel an irreparable loss in Chief Justice Osgoode. I hope to God he will be replaced by an English lawyer." Can. Arch., Q. 280, I, p. 176. The pious wish was fulfilled more than two years afterwards when John Elmsley was appointed Chief Justice of Upper Canada.

22. Powell exaggerated the humiliation to which he was subjected of "my removal to a Secondary Seat in the new Court of King's Bench with a diminished income from the office of Judge and a necessary sacrifice of property on my removal to the new Seat of Government." There was a necessary sacrifice of property but the official income remained the same, viz: five hundred pounds sterling: this is shown by the yearly estimates of record, all of which for many years I have examined—there may however have been casual advantages in his Detroit position.

NOTES: CHAPTER XI

1. It will be remembered that Magna Carta, to get rid of the expense and inconvenience occasioned by the Courts following the King wherever he was in the Kingdom, provided Chapter XVII, "*Communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo*,"—"Common Pleas shall not follow our Court but shall be held in some certain place." Thereafter the Court of Common Pleas sat in a "certain place", that is Westminster.

2. Thomas William, born October 25, 1784, of whom his mother writes many years after in the Family Bible: "Died June 16th, 1804, after 14 days absence from his sorrowing mother who lived to lament & mourn this severe dispensation of Providence. The remains of the dear child are deposited in the churchyard at Kingston by those of the children of the Honble. Richard Cartwright." (The Bible by the way is a "Breeches Bible"—Genesis iii, 7, reads "they sewed figge-tree leaves together and made themselves breeches").

He had been sent to Kingston to be educated with the children of Richard Cartwright but died very shortly after his arrival. Cartwright's letter containing the sad news is extant—it reads thus:

"From
"Richard Cartwright
"To
"W. D. Powell

"Kingston,
"June 18th, 1804.

"My Dear Sir:—

"The Vanity of Human Hopes, and the precariousness of earthly Enjoyments are everywhere inculcated by Religion and Philosophy, and however little such Considerations are attended to in the Hour of Prosperity, the shifting Scenes of Life never fail to press them occasionally upon the most favoured Mortals. That you and my respected friend, Mrs. Powell, should have such frequent occasions for the Exercise of Fortitude and religious Resignation, gives me the most sincere concern; and it wrings my heart to be again the Messenger of Evil Tidings to you. From such an Introduction you will too readily anticipate what is to follow. Little did I suspect when I wrote you by Frederick, that I should so soon have to tell you a different Tale. Thomas, and two of my own children, had for a day or two been troubled with a slight cold, and on the Evening of the 14th, after taking some honey which Mrs. Cartwright gave him he went to Bed with his usual good spirits. In the morning he did not rise to his breakfast, but said he would take his Tea in Bed; yet he drank but little of it, and hardly touched some Currant Jelly that was offered to him; appeared to be feverish, though not to any considerable Degree. Finding, however, that the Fever did not abate, we had his feet bathed in warm water, and sent for Dr. Gamble, who gave him some Medicine, which had the intended Effect in procuring the Evacuations considered proper in such Cases, and my Son Richard remained with him all night. I was with him very early in the Morning, and contrary to my Expectations, finding

him no better, I again sent for the Doctor, who from a Coldness in his hands, supposed that he was going to have a Fit of the Ague, and after remaining alone with him by his Bed Side for some Time, went away, promising to return in less than an hour; in the Interval my Eldest Daughter Hannah, who was sitting with him to give him his Barley Water, came running into the adjacent room to her Mother, to say that Thomas wanted her, and the moment she appeared he cried out 'Dear Madam' stretched out his arms to her, uttered a shriek, and had something like a Fit. He however soon recovered from this, told me he found himself much better, asked for a Bit of Toast, which when brought he was unable to eat, and to several questions put to him by the Doctor, answered very rationally and distinctly, and told him among other things, that he had not been well two months together for more than a year. We again bathed his Feet, and I suggested blistering, which the Doctor assented to, and went and brought a Plaster. But alas! he was not to be rescued from the hands of death; and while the necessary Bandages were preparing he expired without a Struggle or a Groan. It was then about Noon, and thus he was cut off in the short space of about thirty-six hours. In the midst of your own and his Mother's severe affliction, it would be impertinent to speak of our own distress on this melancholy Occasion, and I shall only add that during his Illness, and in paying the last sad Duties to his Remains, we have acted as we would have done had he been our own Son.

"I send back his little Baggage in Charge of the Solicitor, who will be able to inform you of any further particulars. With the sincerest Sympathy all my Family condole with yours on this mournful Event, and I am, my dear Sir,

"Yours very truly,

"Richard Cartwright."

"Dr. Gamble" was Dr. John Gamble, born 1755 at Enniskillen, Ireland, who studied medicine at Edinburgh and came to this Continent in 1779, landing at New York. He entered the Royal service as Surgeon and served during the Revolutionary War. On the Peace, 1783, he went to New Brunswick where he practised until 1793 when he joined the Queen's Rangers at Niagara. When the Regiment was disbanded in 1802, he removed to Kingston where he practised until his death in 1811: his fourth son, Clarke Gamble, Esq. Q. C., was long the Nestor of our Ontario Bar.

"The Solicitor" was Robert Isaac Dey Gray, the first Solicitor General of Upper Canada whose tragic death by drowning in the "Speedy" disaster is one of the best-known stories in our early Upper Canadian history.

Hannah, Cartwright's eldest daughter, died young following her brother James to the grave and she was followed by her brother Stephen, all of consumption. She is spoken of in beautiful and loving terms by the Reverend Dr. Strachan in the Funeral Sermon which he delivered on the death of Richard Cartwright.

3. The Chief Justice was a Member and the Speaker of the Legislative Council during the whole period till almost the very end of Upper Canada's separate political existence. Osgoode, Elmsley, Alcock, Scott, Powell, Campbell, Robinson, all were Speakers—in 1838, Mr. Justice Jonas Jones, a puisne Judge was made speaker during the absence in England of the Chief Justice—he was the only puisne Judge except Powell ever summoned as a Member of the Legislative Council. In the

Legislative Council of (United) Canada, Robert Sympson Jameson, Vice Chancellor of Upper Canada was the first Speaker: he resigned in 1843 and was succeeded by Hon. René E. Caron—since which time Judges have been out of politics. A seat in the Executive Council was also held by the Chief Justice. See my article "Judges in Parliament in Upper Canada", 3 *Minnesota Law Review* (1919), pp. 163, sqq.

4. There have been many inaccuracies in the various accounts of our first Chief Justice e. g. Read, *Lives of the Judges*, p. 23, says that he was appointed Chief Justice of Lower Canada, February 24, 1794. Such mistakes arise from misapprehension of the existing practice. When a Chief Justice, Councillor, &c., was to be appointed, the Home Government issued a Royal Warrant or Mandamus for his appointment—on the Mandamus being produced to the Governor, he caused a Commission to issue under the Great Seal of the Province to the appointee—it was under the Commission not the Mandamus that the officer acted. In view of the confusion existing, I made inquiry in the office of the Secretary of State and found the following documents referring to Osgoode's appointment as Chief Justice of the two Provinces:

1791, December 31. Official Warrant given by Henry Dundas, Secretary of State for the appointment of Osgoode as Chief Justice of Upper Canada.

1792, July 21. Official Commission by Simcoe at Kingston, Upper Canada, appointment Osgoode as Chief Justice of Upper Canada.

1794, February 24. Official Warrant and Mandamus by Secretary Dundas for the appointment of William Osgoode as Chief Justice of Lower Canada.

1794, July 29. Official Commission by Lord Dorchester of William Osgoode as Chief Justice of Lower Canada.

1794, December 11. Official Commission and Patent by Dorchester of William Osgoode as "Our Chief Justice of Our Province of Lower Canada and in the office aforesaid Chief Justice of our Court of King's Bench of the District of Quebec in Our said Province." (That is, of course, to distinguish it from the newly-established Court of King's Bench at Montreal of which James Monk became Chief Justice on the same day).

There are also various Commissions of Oyer and Terminer and General Gaol Delivery issued to Osgoode.

From the above, it is apparent that Osgoode remained Chief Justice of Upper Canada until July 29, 1794; and therefore, technically, he was a member of the Court of King's Bench in Upper Canada for a very short time.

Osgoode's application to Dundas is dated from Newark, Upper Canada, February 26, 1794. Can. Arch., Q. 280, p. 512. James Monk applied by letter to Dundas, December 19, 1793, and was notified by Dundas of Osgoode's selection by a letter from Whitehall, March 6, 1794, Can. Arch., Q. 77, A. p. 106: Dorchester was notified by letter from John King from Whitehall, March 22, 1794, Can. Arch., Q. 77, A. p. 117—the latter communication stated that Osgoode's Mandamus would go to him by the same conveyance. Dorchester acknowledged receipt, May 11, 1794, Can. Arch., Q. 77, A. p. 123.

5. The entry is

"Home District
Newark.

In B. R.
Michaelmas Term, 34 Geo. 3d.
October 11th, 1794.

Present, The Honble. W. D. Powell

Dixon Watson, Plff	}	Leave was given to file declaration notwithstanding the affidavit was not returned with the Writ.
Gilbert R. Berry		
Deft.		

On Motion of A McDonald Atty. for Pltf."

This was a simple case where there was no "Special Bail" i. e. the defendant was not actually arrested but fictitious bail, so-called "Common Bail", had been put in by the plaintiff for his appearance: when the defendant did not appear, the plaintiff might upon proof of service of the Writ, &c., and filing with the writ the affidavit of personal service, enter an "appearance gratis" for the defendant and proceed as though the defendant had in fact himself appeared.—(1794) 34 Geo. III, c. 2, s. 8.

In the case, the affidavit of personal service had not been filed but the Court disregarded the technicality and allowed the plaintiff to proceed with his action.

6. Powell's opinion is set out, Can. Arch., Q. 281, 1, p. 24, and is referred to in Simcoe's letter to Portland from Niagara November 10, 1784, Can. Arch., Q. 281, 1, p. 23.

This opinion of Powell's, I should have thought perfectly sound but for the decision of the Privy Council in the case of Mr. Justice Willis who in 1828 raised and insisted upon the point that there must be the whole three judges or the Court is not properly constituted. For this and similar transgressions he was "amoved" by the Lieutenant-Governor, Sir Peregrine Maitland, and on his appeal to the Privy Council, he was held to be wrong. This did not decide the precise point of the validity of a Court composed of only one Judge; but the Privy Council did not disapprove of the existing practice in Upper Canada which allowed one Judge to constitute a Court.

From a list made up on June 19, 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.

7. Peter Russell was the Receiver General; much of his correspondence is taken up with requests for increase in salary, allowances, lands—the current jibe was that he was Receiver-General because he was generally receiving. He became Administrator of the Government on Simcoe's departure, 1796, on leave of absence, and even when in that position, he had the indecency to issue Commissions to himself as a Judge *pro tem* until stopped by Portsmouth's stern rebuke. See Can. Arch., Q. 284, pp. 16, 19. He even complained, Powell says, of Simcoe issuing a Proclamation calling together Parliament, instead of leaving it for Russell to do, thereby depriving him of £75 of official fees.

Russell even after Elmsley's arrival gave himself a Commission for Hilary, Easter and Trinity Terms, and sat with the C. J. during these

terms except the last two days, Powell being in England—the C. J. sat alone the last two days of Trinity Term. Powell returned before Michaelmas Term; but Russell the day before Term gave himself a Commission for that Term also; the C. J. demanded to know his authority for so doing: Russell did not give his authority but he did not sit. He wrote to Portland, the Secretary of State, from York, U. C., November 19, 1797 “presuming to hope that the practice formerly approved of by Portland in his letter to Simcoe of May 9, 1795”, might still be approved. He again wrote Portland stating the objections of the C. J., January 21, 1798, Can. Arch., Q. 284, pp. 139, 141; and Portland told him, June 8, 1798, that he was receiving half Simcoe’s salary and to discontinue the practice as it was bringing the Executive and the Judiciary into one hand. Can. Arch., Q. 284, p. 129.

8. By the Act of (1797) 37 Geo. III, c. 4 (U. C.) The Journals of both Houses for that year are missing—Powell says: “At that period (1797) a new Chief Justice arrived who at an early day rescinded the various Rules, I had adopted to facilitate the Practice of the Court and to accommodate it to the Circumstances of the Colony—and this was done in such haste and with so little reflection that he was under the necessity of calling upon the Legislature to enact them, ashamed to reestablish them as Rules of Court by which injudicious Appeal He destroyed effectively all the respectability and ability of the Establishment which tied down by enactments, ill comprehended by the Law makers clashed at every step and instead of relieving the Suitor and reducing the Costs, embarrassed the one and raised the other, besides almost compelling the Court to evade by Shifts, Anomalies and Inconsistencies which could not be reconciled.”

9. His proposition was—“that a provision be made declaring that all Lands in Upper Canada not granted under Seal were held at the King’s Will, determinable by the delivery of a patent Grant for the several tracts pretended to. But, in consideration of the very large sums of money expended on the lands by the supposed proprietors, that His Majesty’s will should be determined by a rule adopted by the Legislature, and *not dependent upon circumstances of favour or interest*. This rule should be general—that in all cases where the land was at the time of application for a Grant in the possession of the original Certificate or Ticket Holder, the deed should be made to him and his heirs—That when the original Certificate or Ticket Holder should have died leaving a Will and not having during his life burdened or transferred his supposed estate, in such case the deed should be given according to his Will—That when the original Certificate or Ticket Holder should have died intestate, without having transferred his land, the deed should be given to his heir-at-law, subject as in the case of descent to the Widow’s Dower and payment of such debts as by the Law in England bind the heir.—That when the original Certificate or Ticket Holder living should not be possessed of the Land, the deed shall be given to the actual Holder and possessor of the land claiming the deed under the following restrictions—that where the actual possessor cannot produce the Certificate or Ticket of occupation duly assigned from the original Holder, or a Sheriff’s Sale thereof regularly authenticated and followed through the various intermediate claimants or pretenders, he shall not *sub jure* be entitled to a deed for the land until public and sufficient notice shall be given to advertise the Holders or their descendants.” Powell suggested that on such legislation being passed, there

should "be an immediate suspension of all new grants of land except to those claiming under subsisting instructions; and an assiduous application of the Provincial Government to remedy effectually the confusion created by the too long withholding of the grants."

10. The paper is still extant among the *Powell MSS.*, of which I have copies.

11. Letter from Powell to the Duke of Portland from Upper Canada. July 21, 1796, Can. Arch., Q. 228, 2, p. 621.

12. Powell's letter to John King is as follows:

"Upper Canada 1st March 1796.

"Sir:

"I had hopes that my standing at the Bar with the long and unimpeached discharge of my Duty as the first Magistrate of this new Colony before its Separation from Lower Canada, would have aided the recommendation of the Governor in Chief to continue me at the Head of my profession, when I learned that the appointment was rendered an object for a very respectable Member of the English Bar, and that it was not thought expedient to place a native American in that situation.

"By the removal of Mr. Osgoode to Quebec, I have been left alone in the administration of the Law, civil and criminal, in the province for near two years; for the temporary Commission to Mr. Russell for each Term serves merely to give a Quorum to the Bench, as that Gentleman pretends to no Information or Experience that can enable him to share in the Labour or responsibility.

"Having been so long left without the aid of a Chief Justice, I presume that my unfitness is rather for the Council than the Bench; should such really be the Case, and that in fact no impediment to my promotion on the Bench exists with his Majesty's Ministers, as Mr. Secretary Dundas was once pleased through you, Sir, to assure me, may I presume to request that you would mention me to his Grace The Duke of Portland, as the person originally proposed by Lord Dorchester for Chief Justice of this Province.

"As the Lieutenant-Governor can want no advice in the administration of the affairs of the Province, I should prefer during his Command an Exclusion from his Councils, on every occasion, where the Character of the Chief Justice might not be committed by such exclusion. Conscious of the many obstacles placed in the way of my advancement, I have not struggled against them by any painful exertion, and now only after an Interval of two Years, submit my pretensions merely that I may not be wanting to my public and personal Duties—I have the Honor to be with perfect Consideration.

"Sir

Your Most Obedient
and devoted servant
Wm. Dummer Powell.

"John King Esquire.

[Endorsed:] "Mr. Justice Powell,

Up. Can. March 1st, 1796."

"May 9th.

Can. Arch., Q. 282, pt. 2, p. 614. His subsequent letter to King is in Can. Arch., Q. 282, 2,682.

13. He did not sit in Court from November 12, 1796 to November 6, 1797.

14. (1797) 37 Geo. III, c. 3 (U. C.) This formed the original "Heir and Devisee Commission." The Act of 1797 was limited to three years: but in 1805, the Act Geo. III, c. 2, was passed authorizing the issue of similar Commissions to the Members of the Executive Council and the Justices; this was extended by various Statutes and the power to appoint such Commissioners (in later years limited to Judges) continued until abolished in 1911 by the Act 1 Geo. V, c. 17, s.43 (Ont.). The Commission sat from time to time for a century, and quietly and without ostentation determined the right of thousands of settlers and saved hundreds of thousands of dollars expense in litigation. With the settlement of the country and the growing certainty of title arising in part from the Statutes of Limitations, the Commission's usefulness dwindled and at length disappeared. The Records of this useful body are kept in the vaults at Osgoode Hall from March 13, 1810 (Present Hon. Thomas Scott, C. J., Hon. John McGill and Alexander Wood, Esq.) to the last meeting January 1896. In the first book is a memorandum "The number of claims reported under the Will and Devisee Act from 1805 to 1817 inclusive is 336."

15. Brant was somewhat discontented at this time and made threats of abandoning what he considered his Treaty with Britain. There is very considerable correspondence during Russell's regime concurring Brant and his claims. Powell's opinion as to the complete independence of the Indians in their villages (Can. Arch., Q. 284, p. 94 dated at Mount Dorchester, January 3, 1787) would not be thought sound at the present time: his advice was practical and received the approval of the authorities in England as well as that of the Colonial Executive. See Can. Arch., Q. 284, pp. 58, 69, 83, 89—the last showing the Indians considered themselves independent allies and their grant of land on the Grand River a compact of one nation with another. Chief Justice Elmsley had heard Brant express himself to that effect in Montreal, *Ibid.*, p. 95. Powell afterwards recanted his opinion as to the status of Indians as allies—the whole matter is fully discussed in my judgment in the case of *Sero v. Gault* (1921) 50 Ontario Law Reports, p. 27.

NOTES: CHAPTER XII

1. From the time of its removal to York in 1796 and until the War of 1812, the Court sat in a brick building on the South side of Parliament (now Front St.) Street at the foot of Berkeley Street between Parliament Street and the Bay—now the site of the Toronto Gas Works. This building had been erected by the Governor and had been originally intended for a Government House. Can. Arch., Q. 297, p. 17. There were only two rooms, which were occupied by the Houses of Parliament, the Court of Appeal, the Court of King's Bench, the District Court, and the Court of Quarter Sessions, also as a Church. It was burned by the Americans in the capture of York, April, 1813. I do not burden the text with any account of the practice of the Court or of the cases disposed of—such matters are of interest only to the lawyer.

2. Elmsley was of the Inner Temple not the Middle Temple as Mr. Read says, *Lives of the Judges*, p. 43: he was admitted in 1786 and called in 1790. Those recommended by him to King were "Henry Allcock 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 Editions of Comyn's Reports, Benjamin Winthrop and John Williams both of Lincoln's Inn and well-known to your brother Edward." Can. Arch., Q. 283, p. 302. Elmsley to King, Under Secretary of State, from Upper Canada, October 25, 1797. Allcock's name is very frequently spelled with one "l"—in his correspondence and in his judicial, legislative and other capacities he had occasion to sign his name very frequently—in these signatures he invariably used two.

3. For a time, i. e. from 1837 until 1847, there were four Puisnes instead of two—the Act of 1837 4 Wm. IV. C. 1. (U. C.) authorized the increase: but on the institution of the Court of Common Pleas in 1849 under (1849) 12 Vic., C. 63, (Can.), the number was reduced to the original two.

The Court of Queen's Bench was succeeded by the Queen's Bench Division in 1881 under the Ontario Judicature Act of that year—becoming the King's Bench Division on the accession of King Edward VII—I was (1906) the last Puisne Justice appointed to that Division—it disappeared January 1, 1913 when the Act of (1909) Edward VII, C. 28, was brought into force by Proclamation.

4. He was not a stranger to Canada. We have seen that he was stationed at Niagara in 1789—he is entitled to credit for an act of great humanity and consequence. When General (he being then Colonel) Hunter had commanded at Niagara in the early settlement of the country, his prudence and firmness had saved people of the young Colony from starvation in a season of dearth, by opening the King's Provision Stores for their relief; a measure for which the ordinary man would not have assumed the responsibility, and which the then Commander-in-Chief, Lord Dorchester, however much he approved it when done (as he did) would not have been prepared to authorize in advance.

5. Powell more than suggests that the scare concerning a Spanish

invasion was got up by the Officers to excuse the sale of a large quantity, running into the tens of thousands of acres, of land dedicated to the use of the Indians at a price of from 1/- to 3/- per acre. It was pretended that the money was needed to build a block house at York, and for the protection of the Province—the circumstance that Administrator, Attorney General, Secretary of the Province and Clerk of the Executive Council all received fees for the Grants may however be sufficient to account for the Patents; and it must be remembered that Simcoe intended to build a Block House on Gibraltar Point in 1793, but the project was vetoed by Lord Dorchester at that time—the cost being estimated at £785 sterling. Can. Arch., Q. 279, 2, pp. 513, 522; *Ibid.*, Q. 280, I, 36.

6. One extraordinary result of this action of Hunter's has not been recorded or if recorded not noticed. Chief Justice Elmsley affected to consider the Home District as so much distinguished from others as to require the Sign Manual to the Warrant for execution of criminals condemned there; and upon the conviction of one Humphrey Sullivan at York, for forgery, January 20, 1800, he transmitted the Warrant for Execution to be signed by the Lieutenant Governor at Quebec. Those about the Lieutenant Governor feeling the impropriety induced His Excellency to change the date from the true day and place at Quebec to the other Province; but when this warrant came to the Sheriff, he peremptorily refused to act upon it, as illegal: and it became necessary to send a company to meet the Lieutenant Governor at the line, that he might stand within the Province to sign a new warrant. Can. Arch. *Letters from Hunter to Heads of Departments*, pp. 36, 45. Sullivan had been convicted of forging a promissory note for \$250.00 in the name of David Bedford—Hunter refused to grant a pardon or commutation (March 24, 1800).

7. All this with the exception of Allcock's part is to be read in the official correspondence of this and subsequent times—very painful reading it is. But in justice to the Lieutenant Governor it should be said that in all other relations than that of land proceedings and the fees on it, Hunter's administration was admirable; so far as appears it was quite unexceptionable when he was present in the Province, and this Powell candidly admits. The fee system was practically universal—even the Judges had to pay fees: e. g. we find William Jarvis the Provincial Secretary, July 11, 1794, sending a Bill to Powell for fees on his King's Bench Commission and also on his Nisi Prius Commission to hold Trial Courts in the Eastern and Western Districts each for £5/19/2.

Governor's fee	£3/10/0
Secretary's	1/ 3/4
Attorney General's	1/ 3/4
Register's	2/6
	<hr/>
	£5/19/2

He did not pay for his King's Bench Commission and received another Bill which he did pay January 18, 1796. It was higher by 16/8.

Governor's fee	£3/10/ 0
Secretary's	1/ 3/ 4
Attorney General's	2/ 0/ 0
Register's	2/ 6
	<hr/>
	£6/15/10

8. The correspondence is set out in the *Can. Arch.*, Q. 291, Q. 292, Q. 293—see the Order-in-Council, Q. 293, p. 150—the Committee disapproving the project of appointing a Judge of Chancery.

9. This he asserts without contradiction in a letter to King from York, December 24, 1801. *Can. Arch.*, Q. 293, p. 128: he was educated at the Chancery Bar, *Ibid.*, Q. 292, p. 12.

10. Hunter did, indeed, recommend Allcock for a seat in the Legislative Council in succession to John Munro. *Can. Arch.*, Q. 292, p. 12. Letter from Hunter to Lord Hobart from Quebec, February 20, 1802—this makes it almost certain that had he thought it necessary he would have recommended him for the Chief Justiceship. Hunter writing to Hobart from York, June 27, 1803 says, "Allcock afforded me constant and very material assistance in the conducting of public business in no way connected with the office of a Puisné Judge, the office he then held in the Province." *Can. Arch.*, Q. 294, pp. 59, 60.

11. The proceedings in the House of Assembly will be found in the Eighth Report of the Ont. Arch. (1911): see also *Can. Arch. Rep.* (1892), pp. 32 sqq: *Can. Arch.*, Q. 304, 306.

As Powell took no active part in the Thorpe episode, I do not enlarge upon it. Thorpe was an Irishman who had placed Castlereagh under obligations to him by services of an undisclosed character—the facts of Thorpe's nationality and patron, the date and secrecy of the services are sufficiently significant—he was appointed Chief Justice of Prince Edward Island, 1802, and a Puisne Justice of the King's Bench of Upper Canada, 1805: he came to Canada under the extraordinary misapprehension that he was to act as a spy for the Home authorities and a mentor for the Colonial Administration. His effusive offers of service were disregarded by Gore, and Thorpe early allied himself to the discontented element whose leaders were Willcocks and Weekes both thoroughly disloyal, the former afterwards deserting to the enemy in the War of 1812 and found killed in an American Colonel's uniform. Thorpe haunted the House of Assembly, advising and encouraging the malcontents—at length his open turbulence became intolerable and he was suspended by direction of the Home Administration. Powell when in England for a purpose which will be given in the next chapter, had been informed by Cooke the Under Secretary that Thorpe had been suspended and that Castlereagh would do something for him if he put it in his power by proper conduct. On his return to the Colony, Powell with Gore's approbation informed Thorpe of what he had heard—to give him an opportunity of resigning—and gave him to understand that he might have leave of absence and an advance payment of his salary if he applied before the formal order arrived from England. Thorpe, however, did not take that course, relying upon his influence with Castlereagh. He was suspended and went to England: afterwards appointed Chief Justice of Sierra Leone, he returned to England with complaints against the Government of that Colony—this time he was cashiered and he never received further official appointment. Much of the official correspondence is printed in the *Can. Arch. Rep.* for 1892. See my article "Scandalum Magnatum in Upper Canada", 4 *Journal Crim. Law and Criminology* (May 1913), p. 12. Thorpe was the only Judge of this Province to be elected to the House of Assembly—see my article, "Judges in the Parliament of Upper Canada", 3 *Minnesota Law Review* (March, 1919).

Much of Thorpe's anger arose from the circumstance that he was not appointed Chief Justice, but Scott was put over his head, "a being

... who has neither talent, learning, nerve nor manner ... also despicable in the mind of the people." Can. Arch., Q. 305, p. 173. For Powell's advice to Grant see Can. Arch., Q. 304, pp. 22, 26. Grant sought his advice through the Attorney General Thomas Scott.

12. Allcock asked for leave of absence, December 20, 1803, Can. Arch., Q. 296, pp. 275, 277; but he sat in Court through Hilary Term ending July 14, 1804; thereafter, Powell sat alone until Michaelmas Term, November 4, 1805 when he was joined by Mr. Justice Thorpe.

13. Powell's hints but does not expressly state that Scott had rendered valuable services like those of Allcock to Hunter. Thorpe does not hesitate to say that Scott had been attorney for the merchants of Lower Canada and that it was through their influence and that of their patron, Sir William Grant, Master of the Rolls, that Castlereagh had made him Chief Justice, and "now the only step wanted is to give him the Chancery, and then the property of half the inhabitants will be sacrificed to the merchants." Can. Arch., Q. 310, p. 34. It may be from my family connections with Scott but I can find nothing worse in him than amiable mediocrity and a strong desire to keep out of trouble.

I do not say anything of Mr. Justice Cochrane who also came from the Chief Justiceship of Prince Edward Island: he became a Puisné Justice of the King's Bench, June 25, 1803 and continued such until he was drowned in the "Speedy" disaster when on his way from York to hold the assizes at Presqu'isle Point, then called Newcastle, October, 1804.

NOTES: CHAPTER XIII

1. Powell writing to Dorchester from Upper Canada, January 20, 1799, says: "However my Inclination may second this Spirit, your Lordship knows I have not the Power to indulge it. Without Patronage in Europe, in a species of disgrace here, where my local Information and Zeal for the Service were an unpardonable libel on the new Government, I have no hope of pushing the young man in the line, even if I could raise the Price of a Commission. Under such circumstances, having five sons and three daughters to provide for, will your Lordship permit me to crave your Lordship's interest, to place him in the Royal Military Academy at Woolwich to take his chance in the artillery or Corps of Engineers. I would not presume to ask your Lordship's Protection for an unworthy subject, but from my own observation and report of his Tutors and Guardians can assure your Lordship that the youth has good Talents, correct manners and no vice. He is now near fifteen has read the latin classics and made the usual School Progress in Arithmetic, drawing and the common exercises." Powell MSS. Jeremiah was then at the house of his uncle, Dr. Murray, Norwich, England.

2. Dessalines' answer is worth giving *verbatim*:

"Feb. 1805.

"Je serai bien aise de vous faire voir la nature de Galons & autres Epaulettes que vous m'avez vendu, que Je croyois de l'or, mais que se trouve faux et qui n'est autre chose que de cuivre doré. Je suis fache, Messieurs, que vous receviez de pareil drogues pour venir me les vendre pour du bon. Je n'ai pas marchandé avec vous, c'est pourquoi Je me trouve diablement puni. Quant vous viendrez Mons, Powell a Saint Marc. Je vous les ferai voir." Powell MSS.

3. Some have not hesitated to call Miranda a Pirate. He was that in international law, but no more so than William of Orange; and Powell has been called a "wild scapegrace" but the voluminous correspondence including letters to, from and about him, still extant, indicate that he was an honest, capable merchant of correct habits and principles. There nowhere appears anything to indicate even boyish indiscreetness, much less dissipation or recklessness.

4. The eldest daughter was Anne, then 18; the granddaughter was Mary Boyles, daughter of William Dummer Powell, Jr; she and her sister Anne Murray (who afterwards married William C. Gwynne in 1835) had been left destitute on the death of their father in 1803 and were taken into the home of their grandfather, the Judge, and there cared for. Mary Boyles afterwards married William Botsford Jarvis, Sheriff at Toronto.

5. The *Toronto* Yacht built in 1799 on lot 41, First Concession of the Township of York, on the Humber by Joseph Dennis an American, was of much note for a score of years. See John Ross Robertson's

Landmarks of Toronto, III, 303. This yacht is mentioned in scores of contemporary letters, &c. See *Can. Arch.*, Sundries (1809), U. C. for Report of Chewett & Ridout, Surveyor General, to Halton, Gore's Secretary, September 16, 1809.

6. John Powell, the eldest son of the Judge.

7. Mary Boyles Powell who after the death of her fiancé, Attorney General, John Macdonell, from wounds received at the Battle of Queensston Heights, October 12, 1812, married his friend, Samuel Peters Jarvis.

8. Anne and Elizabeth.

9. Thomas Scott, the Attorney General, became Chief Justice of Upper Canada, August 6, 1806.

10. La Guayra still a port of some pretensions in Venezuela, but a vile hole, *crede experto*.

11. Sir Alexander Forrester Inglis Cochrane, a noted Admiral then commander in chief at the Leeward Islands; during the war of 1812, he was appointed to the command of the North American station; his wife was Maria widow of Captain Jacob Waite, Bart., R. N.

12. Charles IV was the King but he was entirely under the influence of Godoy, "Prince of the Peace." (Note 23 *infra*.)

13. George Cranfield Berkeley became Vice-Admiral in 1805 and was appointed to the Halifax Station; he is sometimes blamed for his irritating conduct toward the Americans but he followed the existing rule and tradition of the British navy. In December, 1808, he was appointed to the command of the Portugal station; his wife was Emily Charlotte, sister of the Duke of Richmond.

14. See note 11, Chapter II *ante*.

15. Sampson Salter Blowers, a celebrated United Empire Loyalist who became Attorney General and afterwards (1797) Chief Justice of Nova Scotia. It is not generally known that Portland had offered the Chief Justiceship to John White, Attorney General of Upper Canada and White had accepted the office; but that political reasons made it necessary to give the appointment to Blowers; *Can. Arch.*, Q. 286, 3, 462.

16. Thomas Barclay of Annapolis N. S. was born in the Colony of New York and a pupil of John Jay's; he took the Loyalist side in the Revolution and attained the rank of Colonel. He afterwards practised law in Nova Scotia and became Speaker of the Legislative Council; he was for a time British Consul in New York. He was the British Commissioner to determine under Jay's Treaty of 1794 the true River St. Croix, and under the Treaty of Ghent, 1814, to determine the ownership of the Islands in Passamaquoddy Bay. From a letter from Lord Hobart to Hunter from Downing Street, April 2, 1803, it appears that Barclay intended to settle part of his family in Upper Canada, if he could obtain a sufficient grant of land. *Can. Arch.*, Q. 294, p. 42.

17. Edward Cooke who expressed so unfavourable a view of Powell's advice to Grant.

18. He did in fact receive the half of the salary of the Chief Jus-

tice for the period of the Chief Justice's absence without diminution of his own: the Chief Justice, Allcock, had received half and Powell got the residuum.

19. Viscount Castlereagh.

20. Napoleon had by this time thrown off all appearance of being subject to any authority: the decrees were in every sense *his*.

21. Jane, wife of the Reverend Edward Warren, Vicar of Tolpuddle, Dorset; and Margaret, unmarried, living at the family residence at Ludlow, Salop. (See note 19, Chapter 1, *ante*).

22. The celebrated Dr. Edward Jenner.

23. Alvarez de Faria, Rios Sanchez y Zarzosa, Manuel de Godoy, Duke of El Alcudia and Prince of the Peace, born 1767; of slight education, he at 17 entered the Royal Guards and before long became a favourite of the Queen of Charles IV; through her, he acquired complete influence over the King. By signing the discreditable Treaty of Basle with France, 1795, he received by popular acclaim the title, "Prince of Peace." At the time of Powell's visit, Godoy was in full favour but early in 1808 both he and his master were forced to flee the populace of the capital. Charles abdicated, March, 1808; Godoy fled but was taken and imprisoned until released by Napoleon; he lived with Charles and his wife at Rome until 1833 when he returned to Madrid. He received a small pension from Louis Philippe and died in Paris, 1851. He was an amiable, good natured man of great personal beauty and charm of manner but with no depth of character or strength of intellect.

24. James Robertson of the 60th Regiment. (See note 14, Chapter VIII *ante*.)

25. General Frederick Maitland was appointed Lieutenant Governor of Grenada in 1805 and remained in that office till 1810.

26. Sir Horne Riggs Popham, Read-Admiral, was charged with having withdrawn his squadron from the Cape of Good Hope without orders after the conquest of Cape Town and the whole colony in the summer of 1804; he was tried by Court Martial at Portsmouth, March 6, 1807 and the following days and "severely reprimanded." This was perfunctory and was followed by no bad results on his future career, personal or professional.

27. A French Refugee who settled in Upper Canada for a short time.

28. Prince Edward Augustus, Duke of Kent, was the father of Queen Victoria; he died in 1825; the Duke of Sussex was Augustus Frederick, who died in 1843; they were the third and fifth sons of King George III.

29. "Egalité."

30. George Prince of Wales, afterwards Prince Regent and King George IV.

31. The well known Earl of Selkirk who cut so large a figure a little later in the Colony; see Chapter XVI.

32. James Monroe of Monroe Doctrine fame sent by President Jefferson as special envoy to France (1803); also to England (1803) and the same year to Spain to adjust a question of the Louisiana boundary. He returned to the United States in 1807, was elected President in 1816 and re-elected four years thereafter.

33. The office having charge of the Colonies, "The Plantations": M. Landecherry mentioned below is in the Passport called Dn. Pedro Landecherry.

34. Percy Clinton Sydney Smythe, 6th Viscount Strangford, became (1862) Secretary of the Legation at Lisbon; in 1806, he was named Minister Plenipotentiary *ad interim* and remained until near the end of 1807.

35. Calesino or Calesin—a light chair.

36. Don Ambroso O'Higgins, Marquis de Osorno, born about 1720 in the County Meath, Ireland, with the family name "Higgins" and christened Ambrose. He went to Peru and became successively a pedlar and a soldier of fortune. In the latter he was successful; he became Lieutenant Governor and (1795) Viceroy of Peru, dying in 1801. This "nephew" was his natural son, Bernardo O'Higgins, born 1780 and educated in England; later, he served on the popular side in the wars for South American independence and became the Liberator of Chili. He died in 1846.

37. Henry Richard Vassall Fox, 3rd. Lord Holland, went with his wife in 1802 to Paris, thence to Spain where they lived until the spring of 1805. She was the celebrated Lady Holland of Holland House fame.

38. A very strong carriage adapted for mountain travel.

39. See Appendix D for further notes.

NOTES: CHAPTER XIV

1. The correspondence between Powell in the Colony and Gore in England now in the Public Library at Toronto, contains much of great value concerning the history of the times. It does not seem to have received the attention of historians.

2. In a letter to Windham, Secretary of State for War and the Colonies dated January 27, 1807, Gore asks for the appointment of Powell to the Executive Council—he shows that of the Six Members, Scott, Baby, Grant, Russell, Shaw and McGill, Grant and Russell were too old and Shaw had resigned—that Powell had been much in the confidence of Lord Dorchester and had been employed by him in 1787 in conjunction with the Deputy Surveyor General to examine and report on the state of the Loyalist settlement. *Can. Arch.*, Q. 306, p. 31. Windham "laid the request before the King", *Ibid.*, Q. 306, p. 206: Gore recommended Powell, Claus and Talbot for the Legislative Council—Letter to Castlereagh from York, U. C., March 20, 1809—Powell being "a Gentleman who has discharged the duties of his important office with probity and honour for upwards of twenty years and whose local knowledge particularly fits him for such a situation". *Ibid.*, Q. 312, 1, 34—he pressed the names of these three, July 20, 1809—Letter to Castlereagh, *Ibid.*, Q. 312, 1, p. 100—and Castlereagh agreed—Letter to Gore, September 8, 1809. *Ibid.*, Q. 293 A. p. 134. Claus took out his Mandamus and was sworn in February 3, 1812 as a Member of the Legislative Council.

3. As early as 1793, Simcoe had been informed by the Secretary of State that it was not deemed advisable to increase the number of the Executive Council, *Can. Arch.*, Q. 278, A. p. 15.

4. David McGregor Rogers, a Member of the House of Assembly, had been appointed Register of Deeds for Northumberland and Durham: displeased by a vote of his in the House, Gore dismissed him and appointed Thomas Ward in his place—Rogers refused to give up the papers, and proceedings were taken in the Court of King's Bench for a peremptory mandamus to oust him. The case came on before the Court composed of Scott, C. J. and Powell J. and the Court held in favour of Rogers, July 15, 1809. Both the Attorney General Firth and the Solicitor General D'Arcy Boulton were angry at the decision but the Law Officers of the Crown in England decided that the Court was right.

5. I do not here go fully into the Firth troubles: they began with a claim for fees and an unfounded claim that all documents should pass through his hands. The presumptuous conduct of Firth became at last unbearable and he went to England with his grievances with which he besieged the Secretary of State for years. Perhaps the statement made by the Chief Justice and Mr. Justice Powell will suffice to show his character and his conduct in the Colony: It is dated at York, September 24, 1812, and reads in part as follows:

"This unfortunate Gentleman very early betrayed that confidence in his own acquirements and contempt for the capacity of all others which

is manifest in his Memorial, and those Sentiments led to such improper conduct at the Bar and had so dangerous a Tendency in Example that respect only for the high station he filled, could have excused the long forbearance of the Bench . . .

"In his first appearance, he betrayed so much peevishness that the Court was constrained to animadvert upon his conduct: at every succeeding Term and Assize, this quality became more conspicuous and the Court was obliged to interfere not only to protect him from the personal chastisement of the practitioners whom they could not protect from his Insults but on more than one occasion were compelled to the alternative of imposing silence upon the King's Attorney or to abandon the Bench. Absurdities which could not proceed from Ignorance were pressed upon the Court with so much pertinancy and indecorum that it is not surprizing if the reiterated censure called forth by such improprieties should induce a perverse Imagination to ascribe to the Bench personal ill-will.

"The only particular erroneous judgment mentioned by Firth was at Nisi Prius a proceeding to cancel a King's Patent the Chief Justice directed a verdict for the plaintiff to obtain a solemn adjudication of the Bench." They proceed to point out that the so called wrong decision in *Rex v. David McGregor Rogers* was upheld by the Attorney-General and Solicitor-General in London. *Can. Arch.*, Q. 317, p. 241. See my article, "William Firth the Third Attorney General of Upper Canada", *Canadian Bar Review* (1923), 326, 404.

6. Perhaps this is as well shown by the letters to him asking his influence in obtaining Government appointments as in any other way—e. g. when in the fall of 1808, Solomon Jones, the Judge of the District Court at Johnstown wanted his son Jonathan to be appointed Clerk to succeed Charles Jones, he had Cartwright apply to Powell—See Cartwright's letter to Powell from Kingston, November 26, 1808, *Can. Arch.*, Sundries, U. C. 1808

7. General Isaac Brock's Commission, April 9, 1812, as Administrator of the Government during Gore's absence contains the clause, "We have judged it expedient that the Administration of the Civil Government during the absence of the said Governor and Lieutenant Governor should for the present be vested in the Military Officer Commanding the Forces in the said Province." *Can. Arch.*, Sundries, U. C. 1812.

8. He says: "A long intimacy with this Gentleman (i. e. Brock) had acquired his Confidence and he readily followed the advice I gave him on the first news of the Invasion.

"He called his Assembly, addressed them as a Soldier and finding them hesitating He accepted a half measure as to Military Power reserved to himself the discretion of exercising Military Law and having published an answer to the Bravo Manifesto of Genl. Hull, he undertook that which no other officer in the service wd have thought justifiable with his means & resources against such an Enemy so situated. The success little less than miraculous did not efface from his mind its rashness to which however he attributed the success and, abandoned as he thought himself, decided to persevere and fell a Sacrifice to that decision falling at the head of a handful of men in a hopeless moment of Indignation."

9. Powell says: "This gallant youth had been called to the High Station of Atty. General at my Special Intercession with a view to

relief from doubtful Characters sent from England & a desire to encourage the youth of the country." We may be reasonably certain that the fact that Macdonell was the fiancé of Mary Boyles Powell, Mr. Justice Powell's daughter, was no detriment to him.

10. Powell says, "The Admirable Success of this first attempt encouraged me to urge almost an inconsistency upon Major General Sheaffe in the appointment of Mr. J. B. Robinson to succeed Mr. McDonell. This young gentleman was in fact under age and not called to the Bar at the Moment, but these Irregularities would be removed in a short time & Genl. Sheaffe yielding to my importunity made the appointment which I procured afterwards to be confirmed" (he adds with bitterness) "and have met my Reward." Some at the time and some since have attributed Powell's recommendation of Robinson to the supposed fact that he thought Robinson was a suitor—and a favoured suitor—of his daughter Anne. Powell indignantly denies this.

11. Robinson's appointment was as Acting Attorney-General: the Solicitor General D'Arcy Boulton, an Englishman, was a prisoner in France, and on his return was made Attorney General (he is one of the exceptions referred to in the text—but he was not an English Barrister: Robert Sympson Jameson appointed in 1833 was an English Barrister). After the Union there were foreign born Law Officers of the Crown.

12. Before the Chief Justice Scott, six were convicted; before Powell, four, and before Campbell five—fifteen in all: eight were executed and three died in Kingston Gaol. See my Paper, "The Ancaster Bloody Assize of 1814", *Ontario Historical Society Papers*, 1923.

13. It may be worth while to give Powell's estimate of the Administrators:

"The good feeling very generally manifested to Sir Isaac Brock did not extend to Sir Roger H. Sheaffe, against whom a very general combination of militia and regular officers about the Staff proved little short of Mutiny, and by this apprehension of his Conduct, Excuse was afforded to the workings of Envy and Jealousy—which could not brook the Honours bestowed upon him by his Sovereign.

"His return to the Eastern Division of the Army made way for Major General de Rottenburg a german Gentleman whose Talents could afford no shadow of offence to the most jealous, but whose mild and unassuming manners disgusted the more vehement; and after one season, he gave place in the Administration as in the Command to Sir Fredk. Robinson a gallant soldier but entirely wanting the qualities for the arduous Station uniting a civil and military command: his successor Sir Geo. Murray was a very different character; highly gifted, of great experience and equally fitted to direct an Army or a Cabinet. Had he been spared a few months, much of the evil occasioned by his predecessor would have been redressed but his old Commander the Duke of Wellington calling for his assistance, he left us but too late to witness the glorious field of Waterloo where his representative as Qr. M. General lost his life.

"Sir F. P. Robinson succeeded to this Gentlemen and was at the Peace relieved by Lt. Gov. Gore, returning to his Government."

14. (1816) 56 Geo. III, c. 9 (U. C.) Powell presented a Petition to Gore, March 1, 1816, asking for compensation for the investigation of

and report upon 2083 claims under the Acts of 1797, 1799 and 1802, Minutes of which he had preserved: he stated that he had received no compensation and that "the circumstances of the late war so affected your Petitioner's means of subsistence that he is constrained to submit to your Excellency's consideration his humble claim to an adequate remuneration for that laborious and useful service."

(As is shown by a Memorial of the Judges to the Governor, January 10, 1814, Can. Arch. Sundries, U. C. 1814—they received in cash only about 52½% of their nominal salary—the salary was payable in England—not in Canada,—income tax was deducted and then instead of being sent out cash the Judges received "Army Bills"—the following is the statement:

On the sum of.....	£ 100
Income Tax	10
	<hr/>
	£ 90
Commission at 2:½%	2/ 5
	<hr/>
	£ 87/15
Discount on Exchange 25%	21/18/9
	<hr/>
	£ 65/16/3
Loss on Army Bills 25%	13/ 3/3
	<hr/>
Real value of £100 salary	£ 52/13
	<hr/>

The Memorial also showed the enormous advance in price of the necessities of life—a phenomenon which follows every war and is not unknown today. The following prices are given as a sample:

Bread before the war, loaf 1/. Jany. 1814 2/.
 Beef, lb. 6d. Jany. 1814 1/.
 Wood, cord 7/16. Jany. 1814 15/.

Gore sent Powell's petition to the Assembly with a certificate from John Small, Clerk of the Executive Council that Powell had reported on 2083 claims in sixteen reports in 1798, 1799, 1800, 1801, 1802, 1803 and 1804 and from Thomas Ridout Surveyor General that Powell had furnished and continued to furnish extracts from his Minutes of Claims of essential service to his Department. The vote of £1000 passed without opposition. See 9th Rep. Ont. Arch. (1912), pp. 235 sqq.

15. Gore writing to Bathurst from York, April 29, 1816—Can. Arch., Q. 320, p. 191—says that "Scott's age and infirmities . . . obliged him to resign the claim of the Legislative Council. I was constrained to call Mr. Justice Powell to it by Commission but as I could not reasonably expect that he should meet the expense of a Table which custom had imposed upon that situation I engaged to provide a salary of £400 a year which the Assembly had unanimously voted, but which from circumstances connected with the public interest as well as the personal feelings of that gentleman was not accepted."

The Records of the Legislative Council for 1816 are lost but from those of the Assembly for the same year it appears that Scott was Speaker of the Council, March 23, and Powell, March 25, 1816. His resignation "owing to the length and fatigue of the session" and "old

age calls upon me to retire" is dated, March 21, 1816, Can. Arch., Q. 320, p. 195. Powell's appointment as Honorary Executive Councillor appears, Can. Arch., Q. 311, 3 p. 447, as Ordinary Executive Councillor, *Ibid.*, p. 380, see also *Ibid.*, p. 363.

16. The Legislative Council passed a Bill for the regulation of trade between Upper Canada and the United States and levying duties upon imports: when the Bill reached the Assembly, Col. Nichol, a well known member of that House moved that the House should on the morrow, February 21, 1816, resolve itself into a Committee of Privilege to take into consideration the infringement of their Privilege of exclusively dealing with imposts, &c.—this was unanimously carried: the Committee sat two days and formulated Resolutions, unanimously adopted by the House, that no grants of money could constitutionally originate anywhere but in the Assembly and that the Bill infringed the privileges of the House. The Council requested a Conference, and the House appointed a Committee with instructions to leave the Bill and the Resolutions with the Committee from the Council: this was done without reply.

17. Deficits occasioned by payment beyond the Civil List granted by the Imperial Parliament, were until this year, 1816, made up out of the Military chest of the Troops on this Continent.

18. Gore writing to Bathurst from York, Upper Canada, April 29, 1816, Can. Arch., Q. 320, pp. 191—says:

"I am in Justice bound to represent to your Lordship the long and useful services of Mr. Justice Powell from the first establishment of this Colony to preside over the Judicial Establishment of which I am well assured, that Mr. Powell who was then an English Barrister was drawn from his practice in Lower Canada and appointed first Judge in the County before its separation . . . He organized the Court of King's Bench (as it now is) in 1794 and presided over it 2½ years until a Successor to Mr. Osgoode came from England . . . Since the accession of Mr. Scott his Talents, Firmness and application have been the support of the Court . . . His Majesty's Law Officers in England . . . have invariably agreed with him on all points of difference with his Colleagues and the Law Officers here. . . During eight years in the Executive Council, I have witnessed and been benefitted by Mr. Powell's experience in Colonial Affairs as well as his diligence and Firmness in support of the true Interests of the Crown and just liberality to the Subject." After saying that Powell had been of great use in Military Matters, Gore continues: "I cannot forbear to recommend him to succeed the present Chief Justice."

19. The Seventh Provincial Parliament of Upper Canada.

20. Gore's original action was wholly justified by the Instructions he received from the Home Administration: but his petulant conduct in dissolving the House deserves and has received the most severe criticism.

Powell's account is as follows:

"The attention of his Majesty's Government being attracted to the flood of American citizens rushing into this Province, a despatch from Downing Street called for and enjoined all possible caution in the admission of such characters. In obedience to this injunction, the Governor was advised to restrain certain Commissioners, appointed to ad-

minister the oath of allegiance, to withhold it from all new comers until specially authorized by him on application at the seat of government.

"The operation of this order is explained by reference to two Acts one of which requires every male from 16 to 60 to be enrolled in the Militia—yet prohibited such enrolment before taking the oath of allegiance to be recorded by these Commissioners. Another Act in a Period of danger from the too great influx of disaffected persons from the British Isles & the Continent of Europe as well as that of America had authorized two Magistrates under certain circumstances to banish from the Province all such as had not resided six months continued in the Province and had not taken the oath of allegiance.

"Certain land holders who derived benefit from the influx of any characters who brought money to purchase land were opposed to this order & persevered in acting in opposition to it.

"The Lieutenant Governor struck the name of one such character (Nichol) out of the Commission and he had influence to bring the measure before the Assembly which having proposed some strong resolutions on the Subject & others considered to trench on the Prerogative, was suddenly dissolved by the Governor."

In my "Robert (Fleming) Gourlay", *Ontario Historical Society Papers*, Toronto, 1916, pp. 19, 20, the matter is thus put:

"While Americans were invited by the Statute passed in 1790, 30 Geo. III, c. 27, to 'come . . . with their families . . . to any of the Territories belonging to His Majesty in North America for the purpose of residing and settling there', each white person over 14 years of age immediately after his arrival to take the oath of allegiance, etc., the Home Authorities after the war of 1812-14 thought it not wise to allow Americans—presumably Republicans—to enter and take up their residence in Upper Canada. Accordingly, January 10, 1815, instructions were issued by Downing Street to prohibit all settlement from the United States. Governor Gore in October, 1815, sent a circular to all who had power to administer the oath of allegiance, 'the Chief Magistrate of the place where such person shall arrive' (30 Geo. III, c. 27, s. 3), directing a report of all immigrants residing in each district and such as should thereafter arrive; and forbidding the administration of the oath to such American immigrant or to the son of a U. E. Loyalist without special authority from the Governor. Before this circular, these Americans upon taking the oath of allegiance could hold property; thereafter not being allowed to take the oath they could not, the sale of land was checked and settlement was impeded. The Honourable William Dickson, a member of the Legislative Council, a Commissioner for Taking Oaths, etc., was also the owner of a large quantity of land which he desired to dispose of. He disobeyed the instructions, claiming—and in this claim he was clearly right—that no executive officer could over-ride an Act of Parliament. The matter was warmly debated in Parliament. The House passed Resolutions as to the Statute of 1790 and an earlier Statute of 1740, 13 Geo. II, c. 7, whereupon, April 7, 1817, the Governor peremptorily prorogued Parliament, it having met only February 4. An Address had been voted to the Government asking what steps had been taken to allot lands to the volunteers and militia who had served during the recent war; and resolutions were to be submitted dealing with the settlement of the Province and the admission of Americans."

NOTES: CHAPTER XV

1. I have given from Gourlay's own words a full account of his life in the work mentioned in note 20, Chap. XIV, *ante*. The following is an outline of his career before coming to Canada: Robert Gourlay (he adopted the middle name "Fleming", his mother's maiden name, in 1833) was born in Fifeshire, Scotland, in 1778, the son of Oliver Gourlay of Craigrothie, a respectable Laird who had been a lawyer. Robert attended classes at the University of St. Andrews where he took the course in Philosophy; he then attended the University of Edinburgh for two years, studying chiefly chemistry and agriculture. He was employed for a time by the Board of Agriculture at London to make certain enquiries and seems to have given more satisfaction to his superiors than they to him. Returning to Fife, he devoted much time to farming, to the condition of the poor and to the Militia, receiving a commission as Captain in the Royal Fifeshire Yeomanry Cavalry. He clashed with the local aristocracy and became as he says "the butt of brute ignorance and illiteracy", the real reason being a childish resentment at what he considered a slight by the Earl of Kellie. Thinking that he could alleviate the cause of the poor better in England than in Scotland as well as improve his health, he, in 1809, took a large farm, Deptford Farm, in Wiltshire, the Duke of Somerset being his landlord. He seems to have been a successful farmer but he fell out with the Duke and some of his neighbours by reason of a series of pamphlets he published on the poor, and from other reasons. In 1807 by his marriage with the niece of the wife of the Hon. Robert Hamilton, (the mother of Mrs. Gourlay being the sister of Mrs. Hamilton), he became entitled to certain lands in Upper Canada, and shortly afterwards he bought and paid for an equal quantity adjoining. The Honourable William Dickson, Legislative Councillor, who was a second cousin of Mrs. Gourlay, came from Upper Canada to England in 1810 and stayed with Gourlay in Wiltshire for a week. He then spoke highly of Canada and pressed Gourlay to emigrate: at length in 1817, Gourlay decided to take a look at his property and the Colony, having no intention, however, of making his home in Upper Canada.

2. The Act (1804) 44 Geo. III, c. I. (U. C.) provides: "That from and after the passing of this Act, it shall and may be lawful for the Governor, Lieutenant Governor, or Person Administrating the Government of this Province, for the Members of the Legislative and Executive Councils, the Judges of His Majesty's Court of King's Bench for the time being respectively, or for any person or persons authorized in that behalf by an instrument under the hand and seal of the Governor, Lieutenant Governor, or Person Administrating the Government for the time being, or any one or more of them, jointly or separately, to arrest any person or persons, not having been an inhabitant or inhabitants of this Province for the space of six months next preceding the date of such warrant or warrants, or not having taken the oath of allegiance to our Sovereign Lord the King, who by words, actions, or other behaviour or conduct, hath or have endeavoured, or hath or have given just cause to suspect that he, she, or they is or are about to endeavour to alienate the minds of His Majesty's subjects of this Province from

his person or government, or in any wise with a seditious intent to disturb the tranquillity thereof, to the end that such person or persons shall forthwith be brought before the said person or persons so granting such warrant or warrants against him, her or them, or any other person or persons duly authorized to grant such warrant or warrants by virtue of this Act: And if such person or persons, not being an inhabitant as aforesaid, or not having taken the oath of allegiance, shall not give to the person or persons so granting such warrant or warrants, or so authorized as aforesaid, before whom he, she or they shall be brought, full and complete satisfaction that his, or her or their words, actions, conduct, or behaviour had no such tendency, or were not intended to promote or encourage disaffection to his Majesty's person or government, it shall or may be lawful for each or any of the said persons so granting such warrant or warrants, or so authorized as aforesaid and he and they is and are hereby required to deliver an order or orders in writing, to such person or persons, not being such inhabitant or inhabitants as aforesaid or not having taken such oath of allegiance, requiring him, her or them to depart this Province within a time to be limited by such order or orders, or if it shall be deemed expedient that he, or she, or they should be permitted to remain in this Province, to require from him, her or them good and sufficient security to the satisfaction of the person or persons acting under the authority hereby given, for his or her, or their good behaviour, during his or her or their continuance therein."

3. Gourlay thinks that it was promoted by Powell: he says: "the Provincial statute before us was framed in the Cabinet in London and sent abroad to be palmed on the poor sycophantish wittlings of the province by some *pawkie* well paid politician perhaps trebly installed in power with a seat in the Executive Council, a seat in the Legislative Council and on the Bench." But there can be no doubt that the act was in no way the production of Chief Justice Powell: he was not a member of Parliament at the time of its enactment, nor did he approve of it. It will be observed that when a suspected person was brought upon warrant, if he had not been a resident for six months or if he had not taken the oath of allegiance, he might be ordered to depart the Province. Powell in a private letter to Sir Francis Gore, January 18, 1819, says: "I almost persuade myself that the English lawyer who drew the Bill, wrote in one of the clauses "or" for "and" which makes all the difference between a just enactment and the most absurd tyranny which ever disgraced a Legislative Act." And he points out that the enactment "subjects Earl Bathurst (the Secretary of State) if he should pay a visit to this Province, and his looks should offend Isaac Sweezy (Gourlay's accuser) to be ordered out of the Province by that enlightened magistrate and upon disobedience to be imprisoned and tried and if that disobedience which constitutes the offence is found by a jury, to be banished under penalty of death should he remain or return without the slightest enquiry into the Cause of Justice of the worthy Magistrate's suspicions that he was a suspicious character." The latter part of the Act is not copied here as the Chief Justice correctly sets out its import and effect in the language just quoted. See my *Robert (Fleming) Gourlay*, p. 41.

4. Samuel Smith was administrator after Gore's departure, June 10, 1817, till Sir Peregrine Maitland's arrival, August 13, 1818: the prosecutions for criminal libel were begun in Smith's time—against Powell's

advice and against Gore's recommendation. In a letter from Powell to Gore he says: "Your sound advice to let Gourlay run his race was in unison with all here and when I absented myself for a few weeks in the early summer, I did it in assurance that such would be the Policy of the Government . . ."

John Beverely Robinson, the Attorney General, writing to S. P. Jarvis, Secretary to the Hon. Samuel Smith the Administrator of the Government, York, June 13, 1818 (Can. Arch. Sundries, U. C., 1818) says on the reference to him by His Honour of the recent publications of Gourlay "the object is at once to vilify the government and to gratify malignant spleen": they were "plainly grossly libellous and . . . I cannot abstain from prosecuting the author and publisher . . . when ascertained unless I am expressly directed by His Honour to forbear . . ." Henry John Boulton the Solicitor General advised that the publications were grossly libellous and dangerous (*Ibid.*, June 15, 1818) Smith did not forbid: he was as concerned as Robinson himself at the evil tendency of Gourlay's publication. The publisher Bartimus Ferguson of Niagara was arrested on an *ex officio* information and punished by fine and imprisonment, narrowly escaping the pillory—and instructions were given by the Attorney General to arrest Gourlay "in the Midland District on evidence I have obtained of his having distributed there the seditious papers." The Government, i. e. Smith, incited thereto by Dr. Strachan had been very anxious to prosecute Gourlay and his followers for their meeting at York, etc.; but both Powell, July 7, 1818, and Robinson, June 29, 1818, reported that such meetings did not come within the law but were protected by the Bill of Rights which virtually repealed the old state of 13 Charles II. C. 5 forbidding such meetings.

5. Powell wrote to Gore: "His two early friends (i. e. Dr. Strachan and William Dickson) anticipated the instructions of the Executive Government and, it is declared, contrary to its intention subjected him to the operation of the Sedition Act which in its present condition is the opprobrium of the Province and perhaps the only just cause of complaint existing. Your friend, Claus, who is unaccountably under the influence of Mr Dickson and him (i. e., Strachan) delivered to Mr Gourlay their suspicions that he was a person not fit to remain in this country and receiving a confirmation of this opinion from Thomas Clark and Isaac Sweezy which was not satisfactorily removed by Mr. Gourlay, ordered him to withdraw from the Province."

Of Dickson, his relative by marriage, Gourlay speaks always with bitterness, of Claus with contempt, while Isaac Swayzie he charges with having been a spy and a rascal generally. But "A better hearted man than Clark I never knew. During the years 1812, and 1813, he over-exerted himself in the King's service and came home wounded and worn out to recruit among his relations. He stood connected with me as Dickson did. He was second cousin of my wife, and spent some weeks with us in Wiltshire, Summer, 1814."

The first draft of this Chapter stated that the prosecution "was probably against the desire of the Governor": I have reason to change this statement. It is evidentiary of the absolute truthfulness of Gourlay, who was incapable of mistating a fact though often woefully in error as to the proper interpretation, that his own writings state the facts most strongly against himself. It was from the perusal of these writings only that I formed the impression that his prosecution was a purely local affair without the knowledge and against the wish of the official set at York. But a perusal of the private and other letters in

the Canadian Archives in the Sundries U. C. series has satisfied me that it was inspired from the Capital. In the first place there is an opinion of the Judges, Chief Justice Powell and Puisne Justices, William Campbell and D'Arcy Boulton, November 10, 1818, on a question submitted to them by Sir Peregrine Maitland as to the effect of the Act of 1804. Their opinion is as follows:

"The word 'Inhabitant' is used in its popular sense as in divers other Statutes of this Province especially in that of the 56th of the King imposing Statute Labour on all inhabitants comprehending Persons who have no settled abode and that it denotes any person being in the Province for the continuous term of six months although not an inhabitant householder in the strict sense of the word to entitle to any franchise the inhabitant of a Town or Vill.

"Although otherwise than for the purposes of this bill we might admit proof of having taken the oath of allegiance in any of His Majesty's Dominions as satisfactory, yet we are of opinion in conforming with the spirit of the Act that the oath of allegiance to except the prisoner from its operation must have been taken within this Province

"We are further of opinion that such an inhabitant having resided six months and taken the oath of allegiance by an absence for one month in a foreign country within the six months immediately preceding the warrant of arrest leaving no fixed residence behind him becomes subject on his return to the full operation of the Statute."

Then we find a letter from Isaac Swayzie, Niagara, December 16, 1818 to Major "Hilliard" i. e. Hillier, the Governor's Secretary, "Since my leaving York my time has been taken up attending to suppress Gourlay's seditious publications B. Ferguson is in close custody I hope in my next to be able to inform you of Gourlay's letter being in safe keeping or of his being sent across the River. . . When you write please to inform me of the health of His Excellency and Lady."

After the whole disgraceful business was over, William Dickson wrote Hillier in shameful glee from Niagara, August 23, 1819:

"The happy termination of prosecutions instituted by His Majesty's Attorney General against individuals and more particularly against Mr Gourlay the Grand Promoter of Discontent in this County I have every reason to believe you will be gratified at learning. The Assizes for the District were held on Monday the 16th and closed yesterday.

"The Court was composed of Mr Chief Justice Powell, Mr T. Dickson, and Mr T. Clark, Associates, Mr Robinson as Crown Officer. The good sense of Juries with Mr. Robinson's luminous exposition of the law and of the facts in every case with his suavity of manner for which he is so conspicuous has purified our political atmosphere and restored to the County its wonted tranquility. The opening of the Court produced nothing of moment—the latter end of the week brought on the trials of the Niagara printer for publishing a seditious libel and Robert Gourlay for disobeying the order of two Legislative Councillors to depart this Province. Both these prosecutions have terminated in the conviction of the parties. The Printer remains in confinement till the next sittings of the King's Bench when he will be removed to York to receive the judgment of the Court. The Modern Reformer left us twenty-four hours after conviction pursuant to the Act of the 44th of the King to the utter shame and confusion of all his adherents. Mr Swayzy the Member was prosecuted by Gourlay for defamation of character; his attempts here were abortive."

These letters taken in connection with Maitland's official reports

make it almost certain that the prosecution was planned from Toronto if executed at Niagara.

6. Of even so great a lawyer as Mr. Adam he wrote: "The opinion (of Mr. Adam) is an excellent specimen of the misconceptions, shallowness, confusion of ideas and bad reasoning which constituted 'the glorious irregularity of the law' and by which lawyers 'take away the key of knowledge.'"

7. As was pointed out in the opinion given to Gourlay by Mr Adam "an eminent Counsellor" whom Gourlay later retained to draw a petition for him, but who, he says, "entirely mistook the object which I had in view" and gave an opinion upon his legal rights—"it is true that it appears from his affidavit 13th January, 1819, that he had taken the oath on or before that day, but it does not state when." All those were amenable to the Act who "not having taken the oath of allegiance . . . have given just cause to suspect that . . . they . . . are about to endeavour to disturb the tranquility" of the Province: taking the oath of allegiance after the suspicious acts would be wholly unavailing.

Gourlay commenting upon this opinion says, "Mr Adam rests importance upon my not having taken the oath of allegiance as prescribed by the Act when it was not necessary for me to take the oath of allegiance at all. My Natural allegiance was protection enough. I never thought anything more was required for procuring my enlargement but the fact that I was a native born British subject." He does not pretend to have taken the oath, but adds: "The fact that I was a native born British subject was notorious. Dickson knew this well; Chief Justice Powell never pretended ignorance of it and upon the knowledge of this alone he was bound to set me free."

The onus being thrown upon Gourlay by the Act, he should have proved that he had taken the oath of allegiance before the acts of which he was accused. This he did not do—nor can this have been an oversight: at his appearance before the Legislative Councillors, he says that he told them he had taken the oath of allegiance, whereupon Dickson asked if he had done so within the Province, and moreover the original information and warrant of arrest, the order to depart the Province and the warrant of Commitment all set out that Gourlay "had not at the time of such information taken the oath of allegiance to our Sovereign Lord the King." Gourlay nowhere in all his voluminous writings, mainly concerned with his wrongs, states, when, where, or under what circumstances he did take the oath of allegiance, and Mr. Adam "collected from page 6 of his petition to the House of Commons at Westminster that he had not taken the oath of allegiance before his commitment." It is not without some significance that he never at any time proved (except so far as his affidavit is proof) or offered to prove that he had taken the oath, either before the Magistrate or the Chief Justice or at his own trial later.

8. The remand to prison endorsed on the writ by the Chief Justice states that the prisoner "required to be admitted to bail as not being a person subject to the provisions of the Act." Gourlay says he made no such application and probably he did not in so many words: but the Habeas Corpus Act, 31 Car. II, c. 2., provides that upon a prisoner coming before a Judge, the Judge shall discharge him from his imprisonment taking recognizances for his appearance at the next assizes and unless he seems to be detained on a legal process. An application for

discharge under the Habeas Corpus Act is an application to be admitted to bail.

He did not apply to either of the other Judges as he should have done had he thought Powell's law was bad. At that time an application might be made to every King's Bench Judge in turn or to the Court in Term; and the refusal of one Judge to discharge a prisoner was no bar to another application. If the defect in the material could, it should have been supplied and a fresh application made.

Campbell, before whom Gourlay had been tried, at Brockville, and Boulton were both available and continued so, but no further attempt was made to obtain freedom from imprisonment.

9. "If such person . . . not being such inhabitant as aforesaid or not having taken such oath of allegiance shall be duly convicted of any of the offences hereinbefore described . . . he . . . shall be adjudged . . . forthwith to depart this Province . . . and if such person . . . so convicted as aforesaid shall remain in this Province after the expiration of the time to be limited by the said judgment without license from the Governor . . . such person . . . shall be deemed guilty of felony and shall suffer death as a felon without benefit of clergy."

10. The convulsive laughter is put by some e. g. Dent in his interesting but inaccurate *Story of the Upper Canada Rebellion*, Toronto, 1885, as having occurred at the trial; but there was no such episode at the trial.

11. If the Chief Justice did define the word "Inhabitant" in some such way as Dr. Dunlop reports, he had ample authority for his definition in a case then recent, in which the Court of King's Bench in England had defined the word: *King v. Mitchell* (1809) 10 *East*, 511.

But we have seen that he and the other Judges had considered the meaning of the word in the Statute and had determined otherwise. The matter is wholly unimportant; whatever the meaning of "inhabitant", the duty of the Judge was clear as was the duty of the Jury.

Gourlay crossed the line and shortly after went to England: he presented many petitions to Parliament and the King and Prince Regent, and continued his litigation with his landlord. At one time he worked on the road for a time breaking stone and in the hope of improving his health. He was in 1824 confined in an Asylum in London. This he charges (absurdly enough) was by British tyranny to make him appear insane. It really followed a personal assault on Henry Brougham in the Lobby of the House of Commons—Gourlay's own account of it is hard to reconcile with perfect sanity. The imprisonment lasted for three years and eight months. He had long periods of sleeplessness and his health was no doubt severely impaired by the severity of his imprisonment at Niagara. It would seem manifest that his mind was also somewhat affected, the *perfervidum ingenium Scotorum* which he always had, became more perfervid, and he self centred continually brooded over and talked and wrote about himself and his wrongs. He applied for but failed to obtain the Chair of Agriculture in the University of Edinburgh and the University of London, and at length recrossed the Atlantic, reaching New York in December, 1833. From New York, February 26, 1834, he sent a most extraordinary notice to Sir John Colbourne, the Lieutenant Governor, that he would think himself at any time justifiable to enter the Province "there by force of Arms to regain my property, maintain my rights and avenge my wrongs." Afterwards when the Rebellion of 1837 broke out, he expressed his abhorrence of

the movement and supplied Sir Francis Bond with valuable information as to the movements of "Sympathizers" in Ohio, crossed from Detroit to Sandwich and traversed the Western District; returning for his trunk to come to Toronto, he was taken sick and was laid up, unable to travel, for sixteen months. Hearing of the arrival of Lord Durham, he came to Canada to see him. Missing the Earl at the Falls, he followed him to Quebec but failed to procure an interview; he therefore lampooned him as a "Durham Ox." He remained in Canada for some time and kept frequently writing to the Governors. In 1839, the House of Assembly requested the Governor to annul the sentence passed upon him so as to enable him to make his permanent domicile in this Province, whereupon Gourlay made a public protest that he "would consider any offer of pardon, clemency or favour from the present Lieutenant Governor injurious to his interests and derogatory to his person." In 1841, he presented another petition claiming a Commission to investigate the circumstances of his conviction and inquire into the truth of all the allegations: and the Committee of the House recommended that the Legislature should declare his sentence null and void and compensate him for his losses. The Report was adopted by the House, the Governor paid him £50 for immediate expenses; but a Committee of the Legislative Council made a careful report which was adopted showing the perfect legality of the sentence. This Report (said to have been prepared by the Hon. Mr., afterwards Mr. Justice, Sullivan) which seems to be carefully written and to contain an irrefragable argument in favour of the legality of the sentence, Gourlay calls "false, frivolous, and *veracious, mawkish, and impertinent.*" The following year he was granted an annuity of £50 per annum; but this he refused with scorn (except as to one payment) still seeking an investigation. He went to the United States again late in 1842, but the next year again petitioned the Canadian Parliament. In Boston in 1843 he began the publication of a small magazine, "The Banished Briton and Neptunian" of which 39 numbers appeared, the last late in 1845, and all, with one exception, full of his troubles—a full set, probably unique, is in the Riddell Canadian Library at Osgoode Hall, Toronto.

The Country had taken on a new life with the Act of Union in 1842, and it was impossible to attract and keep public interest by old stories. Gourlay and his wrongs were allowed to pass out of mind; he returned to Scotland and after a short visit to Canada in 1857, and an unsuccessful attempt to enter Parliament, he remained in his native land, dying in Edinburgh in 1863.

His book *Statistical Account of Upper Canada* (1822) in two volumes with a third called *General Introduction* is not very rare; these volumes, with the *Banished Briton* are well worth reading and add much to our knowledge of the Province a hundred years ago—care must be taken, however, to allow for the personal equation.

The more one reads of Gourlay the more clearly appear his truthfulness, his love of the poor, his desire to do good to his fellow man, and his unwearied diligence, but the more also his egotism, his irritating wrongheadedness, his megalomania never far and sometimes not at all removed from actual unsoundness of mind. His influence has been vastly overrated; the claim sometimes made that he was the Father of Responsible Government, he would have laughed at—he scorned and despised Responsible Government and those who strove for it. He would have made an admirable despot but he could not bear that anyone should be listened to but himself and he cared nothing for majorities—he was an *Athanasius contra mundum*, more than once.

NOTES: CHAPTER XVI

1. The Imperial Act of 1803, 43 Geo. III, c. 138 enacted that the Governor or Lieutenant Governor of Lower Canada might appoint Commissioners to act as Justices of the Peace to commit for trial any person charged with an offence in the Indian Territories to be conveyed to Lower Canada for trial. It was under such a Commission that Selkirk acted when he sent east his prisoners at Fort William; but he made the mistake of directing them to be sent to Sandwich, which was in Upper Canada and they were rightly diverted to Lower Canada by Lieutenant Governor Gore and Chief Justice Powell. The Act further provides that such persons may be tried in Lower Canada, but "if the Governor . . . shall . . . think that justice may be more conveniently administered in relation to such crime or offence in the province of Upper Canada, and shall by an instrument under the great seal of the province of Lower Canada declare the same then . . . every such offender may and shall be prosecuted and tried in the Court of the Province of Upper Canada." Selkirk through his York Agent, Alexander Wood, applied for an Upper Canada Commission of Justice of the Peace and he was included in the Commission for the Western District in 1816. Can. Arch., Sundries, U. C., 27 May, 1816.

2. They were there admitted to bail; the further proceedings in their case do not concern this narrative.

3. This was certainly a novel justification for defying a warrant—it has never been repeated so far as can be found in the Reports; and it is rather to be wondered at that one who was himself a Justice of Peace should advance it as an excuse.

4. In his MSS. Powell says what happened was this: "While I learned from his Lordship that in order to surrender himself to me at York he had made a vast and dangerous detour through the uninhabited territory of the United States, I did express regret that his Lordship had not remained there until the period for meeting his trial at Sandwich", and he adds "The presence of Mr. Baby, the Senior Executive Councillor of the Province, from a few minutes after his Lordship's arrival until his departure, would seem to guarantee that I did not gratuitously commit myself to censure either as a Knave or fool." Apparently there was a misapprehension as to what was said—or it may be that Selkirk placed his own construction on Powell's courteous words of regret.

5. Fort William was in Upper Canada and the Court of Lower Canada did not acquire jurisdiction over that place under the Act of 1803.

6. The lawyer or the curious may find the matter discussed in the 24th edition of Archbold's *Criminal Law*, p. 98, and in *Rex v. Hayes No. 2*. 9 *Canadian Criminal Cases*, p. 101.

7. The curious "deal" by which this was brought about may be read in the correspondence, official and semi-official, of the times.

8. The Assize Judge or Commissioner of Oyer and Terminer and General Gaol Delivery could only recommend, he could not control, the Attorney General as representing the Crown in a Plea of the Crown or Criminal Charge. The Bill of Indictment against which Powell advised was made a ground for the charge that the prosecution was only for the purpose of assisting the schemes of the North West Company of which Robinson was the Upper Canadian representative. I am not concerned here with Robinson's conduct but with that of Powell; and Powell cannot be justly accused of taking part in the scheme if there was one. Powell traces from this time the marring of the harmony between his familiar friend and protégé, Robinson, and himself.

9. It seems clear that from the earliest times in England a private prosecutor was permitted to examine his witnesses before the Grand Jury and that in indictments for High Treason, a King's Counsel might attend to prosecute for the King. In Upper Canada, the private prosecutor was relieved from prosecuting criminally, and at the time in question his prosecution was conducted by the Attorney General or Solicitor General. There does not seem room for doubt that the Attorney General was well within his rights, and the Chief Justice's ruling was sound. See the question discussed in Chitty's *Criminal Law*, I, 316, 317 and less fully in Archbold, p. 100.

10. It seems quite clear that the agents of Selkirk circulated pamphlets throughout the Western District translated into French where the French population was numerous, and that some at least of the Grand Jury were furnished with copies. This publication contained what were alleged to be the facts and was full of attacks upon the North West Company, attacks upon the veracity of the witnesses to be called, etc., etc., a gross contempt of Court for which the offenders should have been laid by the heels. Some writers on Lord Selkirk and his troubles see only one side; a perusal of the many papers of the Canadian Archives will convince the candid reader that while Selkirk was sometimes hardly treated, he was far from blameless himself. It is all too plain that he believed—apparently with reason—that he had the favour of the Western District and most of his complaint when reduced to essence is found to be that he could not choose his own forum.

11. Robinson had been spoken to when in England by an agent of the North West Company to act for the Company in civil cases and he considered himself their Counsel for civil matters—he had in fact received nothing from them by way of fees and of course no civil retainer could interfere with his duty in his capacity as Attorney General. Nevertheless it would have been well had he left the prosecution of Selkirk at the instance of the Company to the Solicitor General, Henry John Boulton.

12. A bill was introduced by the Attorney General in the House of Assembly which authorized the trial in any District in Upper Canada of "crimes and offences committed in any District" but "not within the limits of any Township or County." While the Bill is perfectly general in its language, it may be that it was the trouble with Selkirk and his associates which showed the necessity or at least advisability of such a measure. The Bill passed the Lower House and afterwards the Legislative Council—in the Council, one word was struck out, the word "heretofore" before the word "committed." Much is made of this in the subsequent correspondence but the change is of no consequence in any view. The reports of Powell to the Secretary of State give a full

account of the legislation. The Bill was passed in November 1818; it is 59 Geo. III, c. 12. (U. C.).

13. To be tried under the provisions of the Imperial Act of 1803, 43 Geo. III, c. 138 (Imp.).

14. *Report of the Proceedings connected with the Disputes between the Earl of Selkirk and The North West Company at the Assizes held at York, Upper Canada, October, 1818.* Montreal, 1819.

15. There is a vast mass of correspondence, crimination and recrimination in the Archives at Ottawa, but for practical purposes all of value will be found in Chester Martin's work mentioned in note (16) *infra*.

16. Dr. George Bryce, *The Romantic Settlement of Lord Selkirk's Colonists*, Toronto, n. d. pp. 149, 150,—a most interesting and valuable work, and clearly a labour of love.

Prof. Chester Martin in his useful *Lord Selkirk's Work in Canada*, Toronto, 1916, gives a full account of the trials—his statement that "Upper Canadian Barristers declined to allow those of Lower Canada to practise before the Upper Canadian Courts" is based upon a misunderstanding of the situation—the exclusion of other than Upper Canadian Barristers from practice before the Upper Canadian Courts was not the work of the Barristers or of the Judges, but of the Statute of 1797 which created the Law Society of Upper Canada; the same rule prevails in England, Ireland, Scotland and all the Provinces of the Dominion.

17. The fact is that while Selkirk was ardently desirous of doing good to his fellow countrymen, an honest patriot and philanthropist, he made the mistake of taking the law into his own hands; he set his knowledge of law against that of those who were trained in the science, and so put himself frequently in the wrong. Perhaps he did as well as most could do in the difficult circumstances in which he was placed; and certainly there was much wrong done him; but there is no justification for his monstrous charges against those charged with the administration of justice in Upper Canada, or for his suspicion of improper motives in all their acts. He died at Pau in the south of France in 1820.

NOTES: CHAPTER XVII

1. Powell goes so far as to say "he had been induced to offer me many Indignities but as I knew the motive and despised it no resentment was expressed on my part." His daughter Anne writing to her mother from 23 Dean Square, Norwich, September 6, 1818 says "Pray say a good deal about Sir P. and Lady Sarah (Lennox, Lady Maitland) . . . I hope Papa will a little conciliate the great man and make some allowance for the undue influence which Knaves and flatterers must obtain over a man in power if he is ever so wise or so good." Mrs. Powell in some of her letters speaks of the coldness of the Governor.

Gore's letter to Bathurst recommending Strachan as Honorary Member of the Executive Council is dated from York, U. C., November 11, 1816, Can. Arch., Q. 320, p. 368—the Order in Council appointing him passed, July 24, 1817, *Ibid.*, Q. 323, p. 13: February 29, 1820, Maitland recommended him for the Legislative Council, Can. Arch., Q. 328, 1, 24, 26: he was duly appointed and took his seat the same year.

2. The words quoted are those of Professor Geo. M. Wrong—a Professor of History, an Anglican not of the ultra High Church school, who is to be relied upon for impartial judgment: *Life of Lord Elgin*, pp. 76, 77. Powell says of Dr. Strachan—"a divine whose Talents had raised him to notice and Importance. The ambition of this person was without bounds and with very considerable abilities and strength of mind, he possessed a recommendatory Quality which I could never attain, that of serving his friends before the public. This virtue gave him Support and extended his Influence even to the control of public measures. A warmth of devotion to his friends . . . made a conspicuous figure in the unfortunate discussion between the Earl of Selkirk . . . and the Associate Merchants trading in the North West."

3. See, e. g., Kingsford's *Hist. Can.*, IX, 245.

4. Mr. Tarte said "We fight like blazes in the Cabinet"—and everything indicates hot dissension in Sir Peregrine Maitland's Council.

5. Powell's opinion which apparently has not received notice from our historians will be found in a letter from Maitland to Bathurst from York, June 4, 1819. Can. Arch., Q. 325, p. 172, "The Chief Justice affects to comprehend under the word Protestant in the 31st of the King all denominations that are not of the Church of Rome." "31st of the King" means the "Canada Act" of 1791, 31 George III, C. 31.

6. See the statement in the Proceedings of the House of Assembly for 1821—11th Rep. Ont. Arch. (for 1914), pp. 97, sqq., 120, 122, 123, 161, 162.

7. *Ibid.*, pp. 163, 164.

8. Robinson indignantly repudiates the suggestion that he had anything to do with the measure: Maitland is equally strong in his assertions of innocence. Powell does not hesitate to accuse both of underhand dealings—his manuscripts concerning this transaction are most

unpleasant reading and are quite unworthy of him. Failing in the faculties, physical and mental, can alone excuse their querulous and ungenerous tone. Dr. Strachan writing to Major Hillier, York, March 21, 1822, *Can. Arch.*, Q. 331, p. 78, gives his account which is probably accurate:

"In this letter which Strachan wrote for the purpose of refuting certain injurious statements made against him by Chief Justice Powell, he sets forth the circumstances under which Robinson was appointed. His statement is supported by another made by a number of Members who composed a Conference to consider as to the mode of laying before the King the facts of the case against Lower Canada. The Chief Justice had been given leave of absence about this time, and Strachan was concerned to learn that he had gone to England, as he feared that the same statement, if repeated there, would do him injury.

"The resentment which the Chief Justice entertained against him, proceeded, Strachan had reason to believe, from his having taken an active part in forwarding Robinson's appointment as Commissioner to England. Soon after the opening of the Session, a Conference was formed consisting of six members of the Assembly and three from the Council to take into consideration the relations with Lower Canada. The Address to the King was decided upon, and Strachan and Robinson were chosen to draw up a draft to be placed before the conference.

"Conversation naturally turned to the question, as to who was best fitted to be chosen as Commissioner to present the Address, and knowing confidentially that the Lieutenant Governor had spoken to the Chief Justice on the subject, Strachan discouraged discussion of the matter.

"Others in the Conference who did not know of this, saw no reason for repressing discussion; and it was declared that the Assembly were unanimous in the desire that Robinson should be sent. Supposing that the Chief Justice would willingly relieve the Governor from any pledge which might have been given, Strachan felt free to join in the Address, and agreed that Robinson be chosen.

"To Strachan's surprise, he learned that the Chief Justice was deeply offended by the preference being given to Robinson; and Strachan says that during the remainder of the Session, he acted so strangely as to alienate the friends of the Government from him completely. On several occasions, he was found protesting against the measures of the Council after they were known to be sanctioned by the Governor.

"The Chief Justice also addressed a letter to Robinson, containing several injurious reflections against him—Robinson laid the letter before his fellow conferees, who drew up a statement of the facts. They declared the allegation that Robinson was a popular candidate for the office to be totally groundless and unjust; the selection of the Commissioner was discussed by them wholly on public grounds and they were convinced that he was the fittest person to perform the duties required. In fact Robinson showed a strong reluctance to go, as it would be inconvenient from the standpoint of his private business. He would go no further than to say that if there were no obstacles in the way but his private inconvenience, he might be induced to accept, provided that the appointment was made by the Executive Government, and with their perfect concurrence and approbation."

9. I have set out the various dissents in an Article, "Judges in the Parliament of Upper Canada", 3 *Minnesota Law Journal*, (February 1919), p. 176—apparently they were printed for the first time in that article.

10. Dr. Strachan writing to Hillier, Maitland's Secretary, March 21, 1822, says "immediately at the close of the Session the Chief Justice went to Bermuda for the benefit of his health . . . really to England . . . at Kingston and New York, he animadverted on the Executive . . . His resentment against me rises from the idea that I prevented him being Commissioner to England and getting the Attorney-General appointed instead." *Can. Arch.*, Q. 331, p. 78. He leaves his justification to the Governor: but he gives his account of the matter. He says that six Members of the House and three Legislative Councillors met and decided on the Address, that the Attorney General and he were applied to draw it up and that as the Attorney General could not conveniently leave the country, Maitland asked Powell; but when the Houses had selected Robinson instead, Powell had assented—Powell however was deeply offended.

Powell's own account of his change of plan he gives in a letter to Maitland on his return to York—dated August 15, 1822:

"Upon my return from the absence Your Excellency so graciously permitted, I find that my conduct and pursuits have been the subject of popular animadversion and misconstruction: Will Your Excellency permit me to offer a concise report?"

"When I perceived my mind giving way to a destructive irritation which I could not control, I sought relief in absence from the scene and proposed to visit the South of France, and to remain out of England, until the affairs of the provincial mission should be decided.

"An express intimation by your Secretary, that my leave of absence would, if desired, be special for England, and your Excellency's adding to that favor the offer of a personal introduction to Earl Bathurst and private recommendation of an absolute claim still unrelinquished, induced me to direct my course at once to England—

"On board the Packet Ship, Mr. Small gave me to comprehend that his object was to resign in favor of his Son; as mine had been a Candidate for the office of Clerk of the Court, when Mr. Small received it, I lost no time to apprise my friend who was acquainted with that circumstance, and request that Mr. Small's application should be resisted until Your Excellency should be consulted, and referred to a note on that subject submitted by me to Your Excellency on another occasion, but I forbore even to announce my leave of absence to Mr. Wilmot until after the arrival of the Attorney General.

"I then had an interview with the under Secretary in which, the only matter discussed, relating to Canada was a clause in the Canada Act, on the subject of the Provincial Assembly, when Mr. Wilmot informed me that he had prepared a Bill for the arrangement of the difficulties between the two Provinces.

"I never saw Mr. Wilmot afterwards or had any communication with the office, but to enquire if my leave of absence would be strictly limited to the six months, and if my salary would be paid in England during my absence, to both which enquiries I received most gracious & satisfactory answers, which I attributed entirely to Your Excellency's personal kindness in the mention of my name to Earl Bathurst—

"In this I was confirmed by Mr. Wilmot's letter, and as my domestic misfortune dispensed with a longer residence in England, I retired for a short time to France.

"Upon my return to England to embark for Canada, I enquired in Downing Street for any Commands and was informed a mail had recently been closed for the June packet, and that it enclosed a favor-

able answer to Your Excellency's recommendation of my claim for the arrear of salary.

"It was my duty to have made acknowledgments for this goodness on receipt of Mr. Wilmot's letter, but I was then sinking under various calamity and for the moment, forgot all my duties—

"That of gratitude to your Excellency . . . and ever will, whilst I remain

"Yours most obliged & most devoted servant,

"His Excellency

Wm. Dummer Powell"

"Sir Peregrine Maitland

Can. Arch. Sundries, Upper Canada, 1822.

11. He writes, January 19, 1822, Can. Arch., Q. 331, p. 28—that in 1797 he had made a representation to Portland as to the inadequacy of the salaries of the puisné Justices of the King's Bench, that Portland agreed that the salary of the Puisnés should bear the same proportion to that of the Chief Justice which that of the puisné Barons bore to that of the Chief Baron of the Exchequer and consequently that they should receive £750 per annum—he also says that Allcock received the equivalent of that sum by being paid before he entered the Province while he (Powell) had to be content with £500. He repeats this on his arrival in England, Can. Arch., Q. 332, 2, p. 419; and it is made clear that it had been intended that the increase should begin, January 1, 1797, but that the Under Secretary, King, had made a mistake in not including it in the estimates and consequently he was paid at the increased rate only from January 1, 1799, *Ibid.*, p. 422. The amount was afterwards the subject of considerable discussion and the final result does not appear—probably he was paid the £500 lacking for 1797 and 1798. See Can. Arch., Q. 332, pp. 419, 421, 422, 423.

Powell's actions and state of mind are thus described by Robinson in a letter to Major Hillier dated London, 56 Gower St., Bedford Square, July 13, 1822, Can. Arch., Sundries U. C.:

"As to the Chief, after all that I heard before I got here, and after all I know & saw of him here nothing you have said surprises me—It is easily explained—In running away from the Province in the strange way he did he felt on a little reflection that he had taken a step which he would find it very difficult to account for on any rational principle to others & not very easy I should think to reconcile to himself—He has therefore been driven to a multitude of inconsistencies, to use a very mild term, in endeavoring to make that appear the result of cool & sensible deliberation which was only the dictate of ungovernable will, and of capricious mistaken resentment—At Kingston he first felt the absurdity of his situation, and was driven to begin the line of conduct in which he has it seems by your letter persevered since—tho at variance with his most solemn professions at the very moment of his departure—At New York I found he had contrived to leave the impression that he was going to England on the same business that I was; He led people here, on his arrival, with whom he was probably not aware that I was likely to meet, to entertain precisely the same idea, while at the same moment, to McGillivray & others whom he knew I could see he spoke most mysteriously & with affected horror of the objects of my mission, and declared that he most decidedly disapproved of the whole measure—The first time I saw the Chief after my arrival was at his brother in law's, Murray's, where I called soon after my arrival, & whose family thro' our introduction have been for these five years on the footing of familiar acquaintance with Mrs. Robinson's friends—He never had

called before our arrival to let Mrs. Murray know of our movements—You remember his note to me the very day, I believe, before his departure from York in which he disavowed the intention of imparting anything to me & hoped I wd. forget the irritation, I think it was, of an old & feeble mind led to distraction by some mysterious influence—Yet he not only could not tolerate me it seems here, but his resentments extended to my brother, who never had anything to do with him but to execute commisss for him in Montreal, & to Mrs. Robinson also for he came near none of us—and at last ran back again without having the civility to let us know of his departure—How mighty foolish all this is—I should be sorry to have any business in hand, that required so much mystery in my movements—Nothing can be more absurd not even Peter McGill's dispatches, than the impression which the Chief's first letters by your account seemed to have produced on the minds of Grant & others—

"The intentions of the Govt. might have been guessed at when he wrote, but certainly not known, for they had not made up their minds to anything definite nor reduced anything to detail till a month after my arrival.

"It was hinted even last year that an union was thought of, and so it was, & wd. I dare say have been proposed at all events during this session. But he assured the Chief when he wrote knew just about as much of it and no more than Mr. McGill—He assured me that he never spoke a word on the affairs of the Province while in England—and I have much more satisfactory evidence that he knew nothing of any one provision in the bill for more than a month after it was drawn—That he was not *desirous* of having a great deal to say upon the affairs of the Province I don't mean to say, on the contrary I have very good reason to believe that if he was not consulted it was not because he did not seek it—This you may rely upon—He never saw Lord Bathurst, till long after the measures were decided upon by the Ministry—I imagine he did not see him during his stay here upon any subject.

"He was urging I know some private applications, for money & abt. the Crown Office, and I believe had no personal communications with Mr. Wilmot even about these points. I never have thought of asking whether he succeeded, but I will the next time I see Wilmot—His visit here, considering the situation he holds must I think have been the most mortifying thing possible to him in every way, but it has been all his own doing—Lord B. never mentioned his name to me, nor have I ever spoken of him in the office except in answer to a singular question put to me by Mr. Wilmot abt. him a day or two before he went away & to which my answer was that he was a man of talents & had been very useful in the Colony—His ridiculous conduct latterly was known perfectly well to Mr. W. I had no doubt, & with respect to his private applications I had no desire to thwart them but quite the contrary—except by the bye, now I think of it, the next clerk of the Crown ought to be a professional man as I have always heard the Chief maintain—tho' witht. that limitation if it should fall vacant in his time nothing would be more proper than the Govt. should accede to his nomination of a successor—It is somewhat whimsical that the Chief should have told a friend of ours here that he came home to *prevent* Small from succeeding in getting the reversion of the office for one of his sons—as if he had run after Small instead of poor old Small running after him—

"You will of course make nothing of this a subject of conversation—Had it not been for your letter I should have said nothing more of him

till I saw you—The Chief I must say has succeeded in astonishing me, but I should have myself . . . surprised, knowing that wherever it might become necessary . . . nothing could be more easy than to refute any idle story he might raise—since however he has gone rather beyond my expectations it is well you should know the truth, merely for your own satisfaction. The Govt. have been very patient & very industrious—They have heard every suggestion & availed themselves of every source of information—Monk, Ogden, McGillivray, Sir John Sherbrooke, Caldwell, every one they could hear of, of consideration in either province, except our Chief Justice, they have had frequent communications with upon the important measures in agitation: With him they have had none—I have no personal desire that this shd. be known, but it is right that *you* should be undeceived—The truth is I am quite willing that he should enjoy the responsibility, if he is willing to claim the merit, of everything beyond the provisions necessary, for doing us justice in our financial concerns, for as to all else I am yet too doubtful of the wisdom of the change to be desirous of being thought the author of it, tho' to prevent worse measures I have taken a great deal of trouble to modify, and may be so far considered to have countenanced these—

“I wrote to Sir Peregrine on account of “The Bill”—You will oblige me by burning this letter & only recollecting eno' of its contents to enable you to correct any absurd statement you may hear. I detest family feuds, and have no wish to be thought to entertain any unfriendly feeling towards the Chief's. I have no resentments & if I had, I could never extend them beyond the fair object of them. That Mrs. P. & the ladies shd. think the Chief has some little reason for his conduct, is natural. Grant ought to know better—as to the Chief himself I have no other feeling towards him than a proper sense I trust of his illiberal, childish & inconsistent conduct.”

NOTES: CHAPTER XVIII

1. In the Register of the Parish of Montreal (Church of England) Can. Arch. Rep. for 1885, p. LXXX—is found the entry, "Anne Powell christened April 8, born March 10, 1787." Her mother's entry in the Bible referred to in Note 1 to Chapter V agrees with this date.

2. One of her letters is rather amusing; she having quite completed her education and living with her aunt Mrs. Warren at the Vicarage at Tolpuddle, writes to her father in York expressing her desire to return to her home and establish a school. The Chief Justice answered referring in ironical terms to her great proficiency in Latin; her reply from Tolpuddle Vicarage, February 6, 1818, begins with an equal ironical statement comparing her Latin with his. She said that she had intended to teach an English School in Canada, but submitted herself most humbly to his orders. The letter closes by saying that as he had not said definitely that he wished her to return that summer she would give up the thought of it. She was not a favourite with the aunt who deprecated—if she did not resent—some of her wilful actions. She remained in England another year and then returned to Canada, visiting in the meantime, her mother's relatives at Norwich.

3. In one of his many manuscripts, Powell attributes this rumor to the Rev. Dr. Strachan: "Dr. Strachan's infamous suggestions, that the protection I had afforded to his Pupil from his youth originated and were continued with the only view of promoting a union between my oldest daughter, preposterous in every sense, from the inequality of age, the female exceeding by ten years at least the age of Mr. Robinson." (Robinson was born in 1791).

4. There is in existence, Can. Arch., M. 762, the original letter from Robinson to Powell dated at London, December 6, 1816, in which alluding to a letter from Dr. Strachan in that sense, he says: "Henry Boulton who lived with me knew no more than you did . . . the very morning I told him of it I went to you in Piccadilly meaning to tell you . . . I am taking it for granted that the sentence of Dr. Strachan is intelligible to you—it evidently alludes to a possible persuasion existing in your mind that I was to become connected in your family. Did I ever give yourself or any one member of your family the most distant cause for such a persuasion?"

5. In a letter to her mother from 23 Dean Square, Norwich, England, September 6, 1818, she says: "How happy I am to find you are pleased with Mrs. Robinson; she is I believe thoroughly amiable; poor thing, hers is a romantic history; that was her Father who was lost in so miserable a manner; his death in a less tragical way could not have been considered as a misfortune; her calling her child James Lukin is indeed strange, but that to her is like John Robinson to us; and what's a name? I hope nothing will ever interrupt the friendly intercourse between the families; gratitude as well as a sincere respect and liking for us all, will ever make it the wish of J. B. R. to cultivate an intimate friendship with you all, and those who know how inestimable such a

friend is, will never neglect him, even did they love him less than I think you all must."

6. W. B. Robinson, brother of John Beverly Robinson, writing to Mr. S. P. Jarvis from York, January 28, 1822, says: "Do you know the Chief (i. e. Chief Justice Powell) left this rather mysteriously last week? It is said he is gone to England. Miss Powell too has been behaving in a manner truly worthy of herself. She insists upon going to England with John and has written him some of the d——ndest Letters you ever saw. He of course will have nothing to say to her, but she declares she will follow him to New York and embark in the same ship. Say nothing of this I tell you in confidence. Poor Mrs. Powell certainly is to be pitied."

7. Her conduct had been intensely mortifying to her father and mother and it seems scarcely reconcilable with perfect sanity—indeed the Chief Justice had thought in England of applying in Lunacy. Anne herself resented her mother's attitude. Writing shortly before this time to her sister Mary at Queenston (then become the wife of S. P. Jarvis) speaking of her niece, Mary, she says:

"She is sometimes allowed to be a rod in the hand of those who certainly hate me, & I hope without cause—That a Mother is the tyrant & a Daughter the victim, can alone excuse the part my brothers & sisters have taken—May God forgive them their error & teach them to feel when called upon to discharge the sacred trust more strongly than my parents have done the delicate tie between a christian Parent & Child—In justice to my self I ought to say much to you of existing circumstance—but I will not run the risk of agitating—That I have everything that can most cruelly hurt a woman of my feelings & in my situation to contend with I feel and I pray God to give me strength to persevere. When I think of my nights & days & look at myself in the glass my own appearance does astonish me—Fancy me with all my idle fears of dark & solitude shut out from all intercourse with the rest of the family as soon as night comes—think of the mother who cannot rest on her pillow until she has made the heart of her daughter hate—& govern your temper Mary lest it one day stifle every good feeling. Farewell, Mary, God help & preserve you & may his grace & the love of our Lord Jesus Christ support you in your trying hour; a fortnight ago I thought no hardship could be greater than that I cannot be with you."

The Chief Justice writing to his wife from London March 23, 1822, after he had heard of his daughter's escapade congratulated his wife on a liberation from so infernal a persecution as that you have experienced "since I left you", and he adds "I begin to perceive that she is actuated by the diabolical purpose of distressing Mr. and Mrs. Robinson which feeds the vengeance of a disappointed woman." *Can. Arch.*, M. 762. Writing to his wife, February 9, he said: "Miss Powell's conduct is so uniform that it occasions no surprise—vanity, folly and malice are so blended in her composition that I can only express mortification when I hear of her and sincerely pity Mrs. R. if any lukewarmness of her husband should expose her to their action." *Can. Arch.*, M. 762.

8. She was assisted in her flight by her two nieces the daughters of her deceased brother William Dummer Powell, Jr. Their grandmother, Mrs. Powell, writing to her daughter Elizabeth (at Niagara) from York "one o'clock Sunday morning" says:

"I refer you to Mr. William Robinson for the scene, or part of it,

that has been exhibited in this house since 11 o'clock, appearances of connivance on my part by furnishing your worthless sister with sleigh and horses, and her audacity in keeping a servant employed to watch the Att (orney)-G (eneral) 's motions, have involved us in such disgrace that I fear it can never be conquered; we are the subject of conversation from the Gov (ernment) House to Forest's Stable; to say no worse the Girls have acted weakly; led to concealment of what common feeling should have led them to communicate to me; I have dismissed one servant for disobeying positive orders; an immediate removal of our torment must ensue; but both Grant and I stand pledged that she goes not the Kingston road for 48 hours: I every minute thank God that you are not here; she is impenetrable to the disgrace her want of feminine indeed of decent feeling has caused. Mr. R. can detail conversations between her and his brother which afford positive proof of this; what we are to do, I know not; I wish Mr. Jarvis was here, or that W. R. would take her to Buffalo, but I dare not ask it; neither you or Mary could have anticipated what has been witnessed by your affectionate,
A. P."

9. See the Postscript to a letter from Eliza Powell at York, June 12, 1822, to her sister Mrs. S. P. Jarvis (*Powell MSS.*)

10. Letter to his wife, February 9, 1823, (Can. Arch., M. 762): cf. letter to his son in law, S. P. Jarvis, from London, March 14, 1822, *Ibid.*

In a letter to his wife, February 10, 1822, he says: "What is to become of the miserable wretch I know not for certainly neither of her aunts can or will receive her and I am as much of an Alien beyond the payment of her Pocket Money of £25 as any she leaves behind." *Ibid.*

11. The tradition of this disaster still lives. The incumbent of Templetrine, the Rev. J. W. Whitley, has been good enough to furnish me with the story of one of the spectators, practically as follows: "The Albion struck on a rock, still called the Albion rock, some distance from the shore, and was then driven in close to the cliffs at the west side of Garretstown Strand." (Garretstown Beach and cliffs are situated in the parish of Templetrine and are about 2 miles from Templetrine churchyard). "When the ship was in the latter position, a woman was seen standing in the wind and she had one hand raised aloft with a purse 'of gold' which she offered to anyone who could save her life. (Whether her voice could be heard or whether the offer could be understood by her motion I cannot say). Various attempts were made to set up communication by ropes between shore and ship without success. And in a very short time after the latter came close to the shore, the woman was knocked down by a wave and swept overboard and was no more seen until her body was recovered, when it was identified as that of Miss Anne Powell."

"The Shipwreck of the Albion, 1822" is the subject of a poem by the Philadelphia poet William B. Tappan—*Poems by William Tappan*, 3 Vols. 12 mo.; and a song was well known about the 50's of the last century, one of the "come-all-ye's", which is in part as follows:

THE LOSS OF THE ALBION (ship)
 (Tune of "John Barleycorn")
 (From a song-book in use in the fifties)

Come all ye jolly sailors, bold,
 That plough the raging main,
 Come listen to my tragedy
 Whilst I relate the same
 The loss of the "Albion" ship, my boys,
 All on the Irish Coast,
 And most of our passengers and crew,
 They were completely lost.

'Twas on the 10th of April,
 From New York we set sail,
 Kind Neptune did protect us
 With a sweet and pleasant gale.

Until about the twentieth,
 The storm began to rise,
 The raging billows loud did roar,
 And dismal were the skies.

Our Captain was washed overboard
 Into the boundless deep,
 Which caused all that were on board,
 For to lament and weep.

.
 We had a lady fair on board
 Miss Powell was her name,
 Whose name deserves to be engraved,
 All on the list of fame.

She wished to take her turn at pump
 Her precious life to save,
 No sooner was her wish denied,
 Than she met a wat'ry grave."

(This I owe to the kindness of Mr. A. F. Hunter, M. A. Secretary of the Ontario Historical Society who took it down from the lips of one who used to sing it more than half a century ago).

A clipping from a newspaper sent by Powell to his wife gives the subjoined account.

He says: "The prominent figure is traced of our Daughter struggling to the last with almost superhuman energy." Letter May 4, 1822. Can. Arch., M. 7. 62. In a letter (*Ibid.*), of May 3, 1822, he said that her "conduct so thoroughly marked alienated reason."

The following is from a newspaper clipping:

LOSS OF THE SHIP ALBION

(Extracts of letters addressed to the agents of the ship)

"Kinsale, April 22, 1822.

"On my arrival at this place early this morning, I was informed of

the melancholy fate of the ship *Albion*, Captain Williams, one of the line of packet ships from New York to Liverpool.

"She was cast away before daylight this morning, near a place called Garret's Town, and I grieve to say poor Capt. Williams is no more: there were twenty-two passengers on board in the cabin, fifteen men and seven women, all of whom have met a watery grave with the exception of one young man from Boston; I understand he is so exhausted, he could not give the names of the others, or any particulars. Seven of the crew are saved, one of the mates and six men.

"I am informed there was a considerable sum in specie on board; part of the deck only floated ashore. Last night was very tempestuous; it seems that the ship lost her masts about one o'clock, carrying a press of sail off the land which was the cause of the misfortune; and it was about three o'clock this morning that she struck on a ledge of rocks and went to pieces. I understand a few bales of cotton are come on shore. It is my intention to render any service in my power to the unfortunate survivors.

[Signed] "Jacob Mark
Consul to the United States."

"Garretstown, April 22, 1822.

"About four o'clock this morning I was informed that a ship was cast on the rocks near your dairy farm to which place I immediately repaired, and at about the centre of the two farms, found a vessel on the rocks under a very high cliff; and at this time, as it blew a dreadful gale, with spring tide, and approaching high water, the sea ran mountains high; however, I descended with some men as far down the cliff as the dashing sea would permit us to go with safety, and there had the horrid spectacle of viewing five dead bodies stretched on the deck, and four other fellow creatures distracted, calling out for assistance without our being able to render them any, as inevitable death would follow. Among those in this perilous situation was an unfortunate female, who, though impossible (from the roaring of the wind and sea) to be heard, yet from her gestures and stretching out of hands, we saw her, distracted, call on us for assistance; at the time (sic) the greater part of the vessel lay on a rock, and a part of the stern (where the poor woman lay) projected over a narrow creek that divided this rock from another—here the sea ran over her with the greatest fury, and she kept firm hold which it much astonished me she could do; but soon we perceived that the vessel was broke across, where she projected over the rock, and this part of the vessel rolled into the waves, and we had the heart-rending scene of seeing the female perish.

"The three men lay towards the stern of the vessel, one of whom stuck to a mast which projected towards a cliff to whom, after many attempts we succeeded in throwing a rope, and brought him safe ashore; another we also saved, but the constant dashing of the waves put an end to the sufferings of the other.

"The vessel proves to be the *Albion*, of New York (packet ship) Captain Williams, which place she left on the 1st inst, for Liverpool, with a cargo of cotton, raw turpentine, rice, &c and with about 28 passengers; her crew consisted of 24, and of the whole there have been saved but two. The bodies of five men and two women have been picked up, amongst which the sailors tell me is Major Prevott, of the 6th regiment, who came in her as a passenger. The vessel is now completely gone to pieces.

[Signed] "John Purcell."

NOTES: CHAPTER XIX

1. The part taken by John Beverley Robinson in this scheme when he went to England on an entirely different matter is well known but that is not within the scope of the present work.

2. Letter of February 25, 1824, Can. Arch., Q. 335, 1, 220.

3. The pamphlet is before me as I write, an 8vo. of 36 pages. "No. 1/ The Answer/ to the/ Awful Libel/ of/ The Spanish Freeholder/ against/ The Cardinal Alberoni/ By Diego/ Upon my right hand rise the youth; they push away my feet, and/ they raise up against me the ways of their destruction/ Job Chap. XXX, 12/ Observer Press, York, U. C." The style imitates that of the libel and is almost equally vituperative, a production wholly unworthy of a Chief Justice—or a gentleman.

4. Can. Arch., Q. 338, 1, 14, 18, 23, 28.

5. Letter from Maitland to Bathurst, January 31, 1825, Can. Arch., Q. 338, 1, 14. Memo of answer, *Ibid.*, 17; see also *Ibid.*, Q. 338, 2, 508. We find Powell complaining to Bathurst of "the vituperous dispatch of Sir Peregrine Maitland."

6. A memorial sent to Goderich (afterwards Earl of Ripon) in 1831, after Powell's retirement from the Bench reads thus:

"York, Upper Canada,
"28th November, 1831.

"The Memorial of William Dummer Powell, respectfully sheweth:

"That your Memorialist was thirty-six years upon the bench in Upper Canada, and until the year 1821, respected by his superiors. In that year he was Chief Justice of the Court of King's Bench, and Speaker of the Legislative Council, when that branch of the Legislature thought proper to declare, that it was breach of privilege to arrest one of their officers for debt, and discharged him from the legal arrest of that court, in which Mr. Powell presided.

"On this occasion your Memorialist's opposition to their claim of privilege exposed him to the indignation of the majority, and the insult of being threatened, that, on the next process issuing under sanction of his name, he should appear at their Bar, to answer for Breach of privilege.

"Believing that the statute of 10th Geo. III was the law, and apprehensive of any difference of opinion between the Judiciary, and the Legislative Branches, your Lordship's Memorialist conceived it his Duty to possess his Majesty's Representative, of this important subject, but his Excellency assured him, that both houses, and the Crown lawyers favored the privilege from arrest.

"Being constrained during the session to declare his dissent on the Journal, to several enactments which he considered illegal and unconstitutional, he was required by the Lieu. Governor to cancel or withdraw them, as breach of privilege in the Speaker; and they were cancelled, so as not to be transmitted to the King's Government, and his subse-

quent dissent to enactments was privately communicated to the Head of the Government in writing, until, at the age of seventy, your Lordship's Memorialist entreated permission to withdraw from service, on a pension; this request was referred by Sir Peregrine Maitland, for opinion and advice, to the Executive Council when the two members of the Legislative body reported to his Excellency, that your Memorialist was unworthy that grace, and had been, from about the Period of their declaration of Privilege from arrest.

"My Lord, this Report was made to your Predecessor, who nevertheless commended your Memorialist to his Majesty for a pension & retirement which was most graciously accorded.

"He has enjoyed the pension six years, if such a life can be called enjoyment; experiencing hourly litigation, without any rule of law.

"If, my Lord, this expression should revolt, let it produce enquiry and reform.

"The Individual who ventures to apprise your Lordship as a public functionary, having the National honor under his care, as respects her colonies, claims, in this last public act of his life, such an enquiry as may satisfy posterity, that Truth cannot always be concealed.

"Most respectfully,

"Your Lordship's

"Most obedient humble servant,

"Wm. Dummer Powell."

7. See Term Book, K. B., 1824-1827.

8. Journals Legislative Council, U. C., 1825, p. 2.

9. January 13, 1826, the Assembly passed the 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 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.

10. In July, 1828, we find him living at Dorchester in the County

of Dorset, England. In 1833 he caused to be printed at the "Patriot" office, York, a pamphlet of 46 pages entitled "Story of a Refugee." It contains an outline of his life and is now rare. However, all the facts contained in the pamphlet, and many more, appear in one or more of his numerous manuscripts. In these later years it is too painfully obvious that he was in a state not unlike that of Gourlay, filled with his own wrongs, real and supposed, and thinking a formal vindication the most important thing in the world. He lost all sense of proportion, and the egomania of old age was generally conspicuous.

11. Being the owner of Lot No. 25, in the 3d Concession from the Bay (his wife owning lot 26 immediately to the east) he applied to the Right Reverend Charles James Stuart, Lord Bishop of Quebec, for the consecration of part of it "for the purpose of inhumation of himself, his wife and posterity" "which he had caused to be fenced in and in which he has erected a vaulted Temple." The Bishop assented to the prayer; and Powell and some of his family were interred in the ground so consecrated. When it was determined to turn the plot to other uses, the bodies were reverently raised and placed in St. James Cemetery where they lie under a broad stone

Sacred
To the Memory of
The Hon. William Dummer Powell
Formerly Chief Justice of this Province
An eminent lawyer and an upright Judge,
who after a long life devoted to the
Cause of Justice and Humanity
Died at Toronto on the
6th. September, 1834,
Aged 79 years.

ALSO ANNE
Widow of the late
Hon. William Dummer Powell,
Died 10th March, 1849,
Aged 93 years,
Also Elizabeth
their daughter
Died 1st December, 1855.
Blessed are the dead who Die in the Lord.

APPENDICES

APPENDICES

APPENDIX A

DESCENDANTS OF WILLIAM DUMMER POWELL

William Dummer Powell and Anne his wife had issue

- | | |
|-------------------|--|
| 1. John | born 1776, August 26, |
| 2. William Dummer | " 1778, February 15, |
| 3. Grant | " 1779, May 24, |
| 4. Anne | " 1782, May 21 (died Feb. 13, 1783). |
| 5. Jeremiah | " 1784, January 29, |
| 6. Anne | " 1787, March 10, |
| 7. Elizabeth | " 1789, January 22 (died Dec. 1, 1850). |
| 8. Mary Boyles | " 1791, December 18, |
| 9. Thomas William | " 1784, October 25 (died Jan. 16, 1804). |

1. John married Ellen Shaw in 1808 and died in 1827; he was Register of certain Counties, Clerk of the Legislative Council and afterwards Clerk of Assize to his father. He had two children: viz:—

(a) John who was Alderman of Toronto in 1837 and gave the alarm of the Rebels' approach; he was afterwards Mayor of the city.

(b) Mary Sophia, who married William Henry Coxwell and had issue, Louisa (afterwards Mrs. Valancy Fuller) Elizabeth (Mrs. Clarkson) and John Powell Coxwell.

2. William Dummer, one of the ten lawyers who in 1797 formed the Law Society of Upper Canada; his runaway marriage with Sarah Stevenson in 1801 was one of the romances of the time; he died September 23, 1803, and lies buried in the Presbyterian Burying ground at Stamford (his mother writes that he "died . . . under circumstances aggravating the anguish of his unfortunate mother"). He left two daughters, Mary Boyles (who married William Botsford Jarvis, the first Sheriff Jarvis of Toronto) and Anne Murray, born 1804 (who married William C. Gwynne, 1835).

3. Grant, a surgeon for a time at Ballston Springs, Saratoga, New York, served as a surgeon in the war of 1812, married Elizabeth Bleeker, of Albany, and left one son and five daughters (a) Anne Jane (who married Charles Seymour) (b) Charlotte (who married John Ridout of Toronto) (c) Elizabeth van Rensselaer (who married first John Stuart, Barrister of London, Upper Canada; being divorced by him, she married, second, John Grogan a Lieutenant in an English Regiment stationed at Toronto; (d) Margaret who died unmarried; (e) William Dummer who lived at Guelph, U. C. and had issue John

Bleeker and Grant; (f) Catharine who married, first, L. Mercer and, second, Sheriff McKellar of Hamilton.

5. See *ante* Chapter XIII, died unmarried.

6. See *ante* Chapter XVIII, died unmarried.

7. Elizabeth died in 1855, unmarried.

8. Mary Boyles, having been engaged to John Macdonell, Attorney General, after his heroic death married his friend Samuel Peter Jarvis.

9. Thomas William died young, unmarried.

(b) Charlotte Ridout daughter of Grant Powell had issue Grant Ridout and Elizabeth Harriet who married John W. Langmuir and had issue Charlotte Elizabeth and Violet Harriet (who married Gwyn Francis, Esq., of Toronto).

(c) Elizabeth Van Ransselaer daughter of Grant Powell by her marriage with John Stuart had issue Mary Agnes (who married Captain Kingscot) Caroline (who married Alfred Wyndham) and Albert; by her marriage with Mr. Grogan she had issue May (who married Pacha Johnson of the Egyptian Police, Cairo); John who died in India in 1880; William and Elizabeth (who married General Purvis, R. A., and left issue).

(g) Grant Powell, the son of William Dummer son of Dr. Grant Powell married Elizabeth Margaret Hurd and had three sons, the elder being William Dummer who married Alice Murray and had issue Elizabeth Katharine, William, Edward, Gladwyn, Grant and Margaret (who married J. Gormally and had issue Phillip, Grant, Ethel, Robert and Winnifred). Grant and Margaret Powell had a second son Arthur Wellesley who married Lily Soule: and a third son Robert Wynyard (who married Elizabeth Torrance and had five children).

(f) By her first marriage Catharine daughter of Dr. Grant Powell had issue Anne (who married Mr. Lount of Barrie); Elizabeth (who married Mr. Morton of Hamilton) and Lawrence (who married Nora Farmer of Woodstock).

APPENDIX B

DISPOSITION OF THE PROPERTY OF JOHN POWELL IN MASSACHUSETTS

John Powell, when he left Massachusetts with Howe in March, 1776, had certain real estate in the Colony: even if he had had the desire to return—and he certainly had not—it would not have been safe for him to do so. The Legislature composed of “the Council and House of Representatives in General Court assembled,” on October 16, 1778, passed an Act, Chapter 24 of that year, wherein it was recited that many named persons (including “John Powell, Esqr . . . of Boston in the County of Suffolk”) and many other persons “had left this State or some other of the United States of America and joined the enemies thereof and of the United States of America, thereby not only depriving these States of their personal services at a time when they ought to have afforded their utmost aid in defending the said States against the invasions of a cruel enemy, but manifesting an inimical disposition to the said States and a design to aid and abett the enemies thereof in their wicked purposes.”

The Act provided that if any of these persons should return to the state, he should be arrested and kept in close custody until he should be sent out of the state to some place within the dominions of Great Britain, the penalty of death being affixed to a return to the state after such transportation.

The Legislature of “The Province of Massachusetts Bay” at its 4th Session (1777-1778) by Chapter 38 of that Session, passed April 9, 1777, made provision for the property of “such persons who have left the Province and fled to our enemies for protection.” Section 1 enacted that when it should “appear to the Judge of Probate of any County by a certificate . . . of the major part of the selectmen or committee of correspondence . . . of any town . . . that any person being an inhabitant of that town had absented himself . . . for . . . three months or upwards, leaving estate real or personal . . . to the value of twenty pounds or more within this state and that they . . . verily believe such absent person voluntarily went to our enemies and is still absent . . . without this state . . . the said Judge is authorized and empowered to . . . appoint some discreet person to be agent for the estate of such absentee.” The agent was to give security and thereafter to have full control of the estate. The agent was within three months to file an inventory; he might sell the real estate (if the personal property did not pay the debts) at auction, pay the creditors and retaining “his reasonable charge for negotiating the business”, pay the surplus to the Treasurer of the State.

A proper certificate being lodged with the Probate Judge of the County of Suffolk in which Boston is situated, Shrimpton Hutchinson of Boston was appointed agent for the estate of John Powell—from the fact that his bondsmen were John Powell’s two brothers, it is certain that the agent was personally friendly to the absentee.

The following is the entry in volume 77, p. 302, of the Registers of the Probate Court of the County of Suffolk,

"Powell, John, Esq. Agent Bond.

"December 18th 1778. Shrimpton Hutchinson of Boston in the County of Suffolk Admitted by the Judge, Agent of the Estate of John Powell late a Resident in the Town of Boston in the County aforesaid. Jeremiah Powell and William Powell both of Boston in the County aforesaid became bound with the said Shrimpton for the faithful discharge of his trust.

"Att. Wm. Cooper, Regr."

In volume 78, p. 104, the Inventory is given, dated May 28, 1779—valuing the estate at £902.1.2 thus:

Realty	£666.13.4
Personalty	235.7.10
Total	£902.1.2

An account is filed volume 78, p. 167, of rent, repairs, etc., of the real estate.

In the meantime, confiscatory legislation had been passed.

On April 30, 1779, was passed "An Act to confiscate the Estates of certain Notorious conspirators against the Government and Liberties of the Inhabitants of the late Province now State of Massachusetts Bay," being chapter 48 of that Session. It confiscated the property of certain named persons, including former Governors, Lieutenant Governor, Treasurer, Secretary, Chief Justice, Councillors, Attorney General, Solicitor General, etc: it does not however mention John Powell. But on the same day, was passed Chapter 74, "An Act for Confiscating the Estates of certain Persons commonly called Absentees"; it enacted that all inhabitants of any of the States who since April 19, 1775 (the day of the Lexington-Concord Battle) (a) had levied war against the Colonies, or (b) adhered to the King, or (c) removed without consent of the Legislature or Executive from any Colony to any place under the control of the King—and also all who before April 19, 1775, and after General Gage's arrival at Boston (May 13, 1774) withdrew to Boston for protection by Gage and who had either died or not returned and taken an oath of allegiance (if required), should be considered aliens and to have renounced all civil and political relation to all the United States. Their property of all kinds, lands goods, credits, etc., was escheated except such as accrued after April 19, 1775, or the time of the offence. The Attorney General or his appointee was directed to file a complaint to the Justices of an Inferior Court of Common Pleas setting out the offence charged and a description of the estate to be escheated. Notice being left at the Mansion House on the property or some public place, the Court should if any one appeared to defend try the issues, if not postpone the case and issue a proclamation for any person to claim the estate. All issues were to be tried by a jury and an appeal was allowed to the Superior Court of Judicature "as in all other real actions". The Act further provided that all debts "due before the time of the offence committed to any subject of the United States" from any of such persons should be repayable out of the estate.

William Powell had lent his brother John, One thousand pounds to enable him to leave the Colony, and therefore was a creditor: he had taken the Colonial side and was a subject (*horresco referens*) of the United States; his brother had a house and barn in Boston which was under lease but had not been sold to pay debts John not having left any except that to his brother William, or if any, they had been paid out of the personal estate: and William wanted the house and barn. Accordingly William Powell in 1780 petitioned the Legislature in respect of this property; and February 14, 1781, the following proceedings were had in the Legislature (Chapter 109, January Session).

“RESOLVE OF THE PETITION OF WILLIAM POWELL

“On the petition of William Powell

“RESOLVED, The honourable Judge of Probate for the county of Suffolk be, and he is hereby authorized and impowered to appoint three sufficient freeholders of the town of Boston, to appraise the estate of John Powell, formerly of Boston, an absentee, consisting of one house and barn, situated in Boston aforesaid, and to take bonds of William Powell, of Boston, merchant, to the amount of one thousand pounds as a security to refund such part of what said house and barn may be appraised as may be the just proportion of the claims of any other creditors that may appear in the course of one year from the above date.

“And it is further RESOLVED, That when the said William Powell shall have complied with the above resolve, that the agent for the estate of John Powell, formerly of Boston, an absentee, shall deliver into the hands of said William the house and barn mentioned in his petition, when the present lease of the same shall expire, any law or resolve to the contrary notwithstanding.”

Before William Powell could obtain the property an appraisement of its value had to be made: we find that February 16, 1781, appraisers were duly appointed to “appraise the estate of John Powell formerly of Boston, an Absentee consisting of one House and Barn situated at Boston”, and February 21 1781, they returned the value of “one thousand pounds S. Money Silver”.—Records, Volume 80, p. 86. William then obtained the property remaining liable to pay a proportionate part of any claim against John presented within one year—the Act of 1777 having provided for payment *pro rata*.

So matters stood till after the Peace of 1783. In the Treaty of Paris by Article V, it was agreed that Congress should recommend to the various States to provide for the restitution of confiscated estates to “real British subjects” and to reconsider “all . . . Laws regarding the premises so as to the said Laws . . . perfectly consistent not only with justice and equity but with that spirit of conciliation which on the return of the blessings of Peace should universally prevail.” By Article VI, it was agreed that there should be no future confiscation or prosecutions.

Massachusetts, July 2, 1783, by chapter 6 of the May Session, enacted that all persons in custody under the Act of 1778 above referred to, should be immediately sent to the King’s dominions with the penalty of death if they should return—hardly to be characterized as conciliatory.

Powell, April 24, 1784, received from his father described as “late of Boston in the State of Massachusetts in North America now of Edward Street in the Parish of Marylebone in the County of Middlesex, Esquire” a Power of Attorney with specific power to sell and

alienate lands in Massachusetts; he is described as "my son William Dummer Powell, late of Montreal in the Province of Quebec, Barrister-at-Law, now of Edward Street aforesaid but soon intending for America". Suffolk Deeds, Vol. 143, p. 227.

Before this time, the Massachusetts Legislature had acted in the matter of escheated estates. On March 24, 1784, was passed an Act of great importance to Powell, Chapter 69 (January Session, c. 46). This repealed the Acts of 1778 and 1783 already mentioned: but forbade those named in special confiscation Act, chapter 73 of 1779, (which did not include John Powell) and any who had gone off to and taken protection of the government, fleet or Army of Great Britain or had borne arms, etc., to return to the State—if any should do so, he was to be apprehended, committed to gaol and sent off. Other absentees were to be permitted to reside in the State only if they obtained a licence from the Governor which licence should have no force after the end of the ensuing session of the Legislature. If the licensee did not obtain an Act of Naturalization or have his licence approved by the General Court he was to be treated as though he had no licence.

This Act also contained provisions purporting to carry out Article VI of the Treaty of Paris. Lands which had not been confiscated by the Statute or by judgment at law—not pledged to the Government for money borrowed or sold by agents for the payment of debts or liable to pay an annual charge for the support of a poor person—were to be delivered up to their former owners: but if any of these owners was mentioned in the Act of 1778, he must sell within three years.

It would appear that all of John Powell's land had not been actually confiscated, and that the Power of Attorney given to his son was for the purpose of enabling him to realize on the remaining lands.

We find among the Suffolk Deeds, volume 144, p. 77, July 23, 1784, a deed indexed as referring to "Boston, School St. and Governor's Alley—said Alley—Long Whf, 2 pc. or 2 shares." This deed is made July 20, 1784, by "William Dummer Powell Junior of Montreal in the Province of Canada now residing in Boston" as "Agent and Attorney to John Powell of Ludlow in the County of Shropshire in the Kingdom of Great Britain, Esquire" and it conveys to William Powell for an expressed consideration of £1000 the two tenements in School St., Boston, "formerly the Estate of the Honble. William Dummer deceased and two other tenements situate in Governor's Alley formerly called Governor Dummer's Stables" and one share in Long Wharf "formerly part of the estate of said William Dummer, deceased" and half of another share.

It seems not unlikely that some if not all of the above was John Powell's distributive share of the estate of his uncle William Dummer who is known to have died unmarried. There was a mortgage for £135 made by Christopher Lehr to John Powell and William Powell, (Suffolk Deeds, Volume 103, p. 126). This was, November 2, 1790, assigned and released by William for himself and as Attorney for John (Suffolk Deeds, Volume 168, p. 216).

It would seem that while John Powell may have lost some personal property, his lands were saved; he was consequently much more fortunate than many of the Loyalists.

APPENDIX C

MRS. POWELL'S MONEY TROUBLES

Anne Powell, the wife of William Dummer Powell, was the niece of Elizabeth Inman, the wife of Ralph Inman of Cambridge, Massachusetts.

When Powell and his wife were in Massachusetts after his return from presenting to Sydney the Petition of 1783, Mrs. Inman made her will, May 14, 1785 and died a few days thereafter: the will was admitted to Probate, May 28, 1785 in Suffolk County and is recorded in Volume 84, pp. 307, 312 as No. 18445, in the Suffolk Probate Register. The executors were "John Innes Clark of Providence in the State of Rhode Island and Providence Plantations . . . Edward Hutchinson Robbins of Milton . . . and John Murray late of Providence now of Virginia . . ." The first and the last were nephews of the testatrix.

She had an ante-nuptial agreement with her husband—she was before her marriage to Ralph Inman, the widow of James Smith in his lifetime of Milton, Merchant—the agreement is dated, September 24, 1771, and, reciting: "Whereas a Marriage by God's permission is intended shortly to be made and solemnized between the said Ralph Inman and Elizabeth Smith, and the said Elizabeth being seized in her own absolute right of a very considerable estate both real and personal, the greatest part whereof was given and bequeathed to her by her late husband, the said James Smith deceased, in and by his last will and testament", it gives the intending wife the right to dispose of all of her own property by will, &c.—Volume 84, p. 303—the will was made in accordance with this ante-nuptial agreement.

Anne Powell was provided for in two items of the will: "Item my Will is that Mrs. Anne Powell the wife of William Dummer Powell be paid and receive from my estate hereafter described, the lawful Interest of two Thousand Pounds Sterling which interest is to be paid to her annually for and during her natural life, and for her own personal use and disposal, and that after her decease the said principal Sum of two Thousand pounds Sterling be paid and distributed to and among her present and future children in equal portions; that is to say among those who survive her decease (unless they leave issue, which issue shall represent their deceased parent) provision for said two Thousand pounds Sterling and Interest is to be made and secured by my House and Land or Messuage and its App'res, situate at the corner of Queen or Court Street in said Boston, now in the occupation of Mr. John Carnes.

"Also all that Brick Dwelling House, and sugar House and Land with all their outbuildings and app'res now under the improvement of Mr. John Read, the same House and land are situate in said Boston and is bounded in front on a Street or Lane leading from the Meeting House in Brattle Street (late Doctr. Cooper's) to the Market, and is contiguous to the said Meeting House, which two Messuages and sugar House so charged as security; and from which the said Sum is to be raised and not otherwise, My Executors may sell and dispose of in fee Simple or otherwise and invest the proceeds in such funds or securities

as they think will most effectually secure the payment of said two Thousand Pounds Sterling and Interest as aforesaid.

"Item, I give and devise to John Innes Clark of Providence in the State of Rhode Island, Esquire, and to John Murray late of Providence now in Virginia, Merchant, my two Nephews, the said Messuage and its app'res at the corner of Queen Street and the said House and Sugar House near said Meeting House and their app'res, incumbered with the payment of said Two Thousand Pounds and Interest provided for Mrs. Powell and Children in manner and form aforesaid: To hold the same to said Clark and Murray their Heirs and Assigns in equal portions encumbered as aforesaid. And when the premises are exonerated therefrom the same or the residue thereof shall be and remain to the use of said Clark and Murray their heirs and assigns, in equal portions."

Full power was given to the executors to sell and dispose of any part of the estate.

In September, 1785, Mrs. Powell being still in Massachusetts, her husband having gone to Montreal, she received from Robbins one of the Executors £60 sterling, the half of one-year's annuity; and she received nothing further until her sister came to Detroit to visit her there and brought 100 guineas. We have seen that she went to the house of her brother, John Murray at Alexandria, Virginia, later in the same year on her way to England. She was there promised a settlement of the arrears—her brother went to Boston to enquire and returned with the news that the houses set apart to secure Mrs. Powell's annuity would not yield the amount required unless they were substantially repaired. He told her that Clark and he had decided that unless she relinquished one-fourth of the annuity, they would not pay for the repairs and the houses would go to ruin. Mrs. Powell urged an immediate sale being certain that the property would realize more than £2000—this her brother refused and added that for his part he would have called for a greater reduction in the annuity but that Clark would not consent. In one of her documents she says:

"On April 10, 1794, the three executors deeded to John Carnes of Boston by deed, recorded, Volume 178, page 77, the property situated on Court Street, Corn hill and a passageway (John Murray is here described as of New York). The deed recited the power of sale under the will and a consideration of Two Thousand Pounds, 'lawful money', and it is with warranties.

"On January 2, 1795, the three executors deeded to Stephen Fales and Jonathan Murray of Boston, merchants, by deed recorded in Volume 179, Page 173, the property on Brattle Street and in Brattle Square, described as 'all that piece of land Brick and Dwelling House and Sugar House thereon standing with all the buildings and improvements situate in Brattle Square in Boston,' adjoining the Meeting House, etc. This deed recites the power under the will to sell and invest the proceeds effectually to 'secure the payment of Interest of Two Thousand Pounds Sterling to Mrs. Anne Powell and the said Principal sum of Two Thousand Pounds Sterling to her children upon her decease.' Clark and Murray covenant that the fee simple of the estate is in them, 'subject only to the conveyance of said Robbins with them as executor for the purpose of exonerating the encumbrances aforesaid created by said Will on the estate hereby conveyed and that the same is now free from all incumbrances of every kind' this deed also is with warranties."

Powell and his wife learned of this sale for the first time in the Summer of 1795 after their return from England and removal to Niagara: next year, she visited her brother in New York and asked for the full amount of her annuity as the reduction had been submitted to only that the houses might be put in repair. Compliance was refused by Murray in terms of violent resentment. Mrs. Powell says: "After great irritation, the case was to be submitted to Arbitration, my Brother permitted to name the Umpire; this was given up from his declining any other question to be discussed than the legality of the Bond which had not been questioned; this put an end to all further proceedings, and I returned home;—in 1807 a painful event called for my Husband's presence in Europe—before his departure he called on Mr. Cadwallader Colden for his opinion respecting the contest with my Aunt's Executors: that Gentleman's opinion of the ultimate decision of a Court of Chancery must be favorable to my claim; but that the situation of the two Countries was of such a nature, as to render intercourse doubtful, and at any rate the Trustees would have the power to remove the Cause from Court to Court to an interminable period; however a Bill in Chancery was filed and various subsequent events both political and domestic; in 1818, I was at New York where I met Mr. Clark; and called upon him to perform this act of justice; he assured me that he had given up all interference in this affair, it being entirely in my Brother's hands; application to him (J. B. Murray) was unavailing and would have interrupted that affectionate intercourse with my sister and family which had been a source of pleasure to both parties; in 1828, previous to my embarking for England, I again urged him to perform this act of Justice; his refusal was couched in such terms that but for the pain it would have given to his family I should have left his House, never to renew my visit; on our return from England in 1827, some offensive language on the part of Hamilton Murray induced Mr. Powell to take the opinion and retain Counsel; and nothing has occurred to shake my conviction that the sale of the property secured for the payment of the whole annuity, no longer justified its reduction for the sole purpose of keeping it in repair."

In the end Mrs. Powell had to submit to a very serious reduction in the amount which her aunt intended her to receive.

APPENDIX D

COMPLETION OF THE EPISODE OF JEREMIAH POWELL

In the meantime the unfortunate Jeremiah remained a prisoner in the fortress at Cartagena to which place he was taken on the way to Omoa. Many letters passed between him and his father and his uncle George Murray, the latter of whom kept him well supplied with money and also informed him as to the progress of the efforts for his release. Murray was also in correspondence with his sister, Mrs. Powell, to whom he transmitted her son's letters.

The young man had planned an escape, when, at length, October 29, 1807, the news arrived that he was to be set free. He had been treated well for a convict, having been allowed to walk around the city wearing a small iron ring around one of his legs, the money supplied him standing him in good stead.

We have the following memorandum in Jeremiah's handwriting:
"Memorandum.

"The Brig Wolf brought the order to Cartagena under cover directed to me in my Father's handwriting on the 22nd in the afternoon—the same evening I was removed to the gaol; my F's letter of the 16th July was given to me—on the same night at 3 o'clock I saw the Govr & Mr. Jones in H. E. closet who told me that the order was insufficient for my discharge in as much as the only apparent proof of its authenticity was the certificate of Dr. Manl de la Torré, a man of whom he knew nothing, & of whose office (Chargé d' Affaires of Prisonners in London) he had never heard. H. E. assured me that he was morally satisfied that I was pardoned tho' he could not give me up, that during the probable time of my detention which could not be more than a month I should be treated with consideration & indulgence, and be set at liberty the moment that the original order signed by the Span Secy (Dn P Cavallos) should appear or advices be received from Curacao authorizing such a step—On the next day it was again doubtful with H. E. whether the paper warranted my discharge & he postponed the giving a final answer till sat'y aft'n the 24 when with the advice of the Fiscal and the Assessor he returned to the British Offr. the certified order which he brought & on the back of it H. E.'S refusal (dated 23d) with which the vessel directly put to sea—at the same time I received this translation of the Royal Decree."

The sloop in which he finally came to New York had been fitted out at the expense of his uncle George W. Murray. He arrived in New York early in the year and he came home to his father's house in February, 1808, his father having gone to Niagara to meet him. Mr. Justice Powell himself had got home only late in October, 1807. The subsequent story of the young man is tragic.

During the time the Judge was in England on his way home from Spain, he used his influence with Sir James Cockburn who was to go out to Curacao as Governor, and he also solicited the good offices of Major Robertson, an old friend, to procure for his son an Office in that Island. A letter from the latter from London, No. 33 Michael's Place, Brompton, October 5, 1808, assured him that Jeremiah would without

doubt be appointed "Interpreter to the Courts, a situation worth £2,000 sterling per annum at least, and may be done for £200 or less by Deputy." The letter proceeds:

"From what has already passed you may rely on this. The fact is that Sr James has already consented to appoint my Father, Capt. of the Fort & Mr Sutherland Vendue Master but on the express condition of their coming to the Island; as he has laid it down as a Rule never to be departed from that he will not given any situation of Importance to any Person who is not present himself to discharge the Duties thereof—these are his own words—Sr. James is li e many more in one particular—he has a numerous family of needy Dependents—I therefore did not hesitate in combining his Interest with my wishes—My Father is to allow one half should it be £2000 or upwards and one third if under £2000, to a brother of his, Capt. Francis Cockburn of the 66th Regt. Mr. S. to be on the same terms with Alexr. Cockburn, Esqr, another brother, of the Corps diplomatique, formerly Consul General at Hamburgh—to these conditions I am pledged, and perhaps something similar may be the case in the Interest of your Son.

"This I conclude neither you or he would object to, particularly as I consider any appointment or situation in the Island as a Secondary Consideration when compared with his commercial views—the same with Mr Sutherland—I have referred to Messrs. Murray at New York as a correspondent—perhaps it may end in a commercial connection between Mr. S. and your Son—they will certainly have all the Support which the Governor can give them—Sr James has the power of granting licenses for vessels trading with St. Domingo. This may prove really advantageous to your Son—I hope that we shall find him there on our arrival—an article in Sr. James' Instructions directs that he is to notify his arrival by a flag of Truce to the Spanish Governor General at the Carracas expressing his wish that every possible friendly Inter-course may take place which their relative Situations will admit of. &c. I am to be the Bearer of this Communication.

"From my former knowledge of the Gov. Genl. while at Barbadoes some Benefit may result in Consequence thereof. Even now Mr Windham has given assurance to Sr James that He will not be long absent—the Prince & all the Sidmouth party are to be decidedly with the late Ministers—All the Marchioness of Bath (Lady Pultney's) members are also with the Opposition. Sr James seems determined that I shall return with him—be this as it may, both your son and myself will I hope secure at all Events a friend in him at Head Quarters. . . ."

This letter was shown to Jeremiah shortly after his arrival in York: and, as soon as his health was fairly restored, he became restless of the inaction; and March 8, 1808, set off again in pursuit of fortune. A letter from Mrs. Powell to her brother George Murray in New York dated March 8 1808, tells the story thus:

"He left us an hour ago on his way to Kingston and N Yk. You will be surprised at the suddenness of his determination but will I trust approve; he will show you the ground on which he acts and I think had his father as he at first intended copied Major's Robertson's Letters and forwarded it to you, the happiness I have experienced in embracing this son of my solicitude had been delayed until he had secured the situation to which he has been appointed at Curacao . . . he considers the commercial advantages such an Introduction may afford as of the first importance the appointment though high sounding in point of emolument but secondary"

"No one sees more plainly than my self the baneful effects of the most inhuman treatment ever suffered from people who consider themselves superior to the Barbarians the Hollowness of his cheeks and Eyes and the Cough which in the morning has made me start and of which he is not sensible are to me sure symptoms of material injury Your unwearied friendship and Affection secured his liberation—parental success had been insufficient but for your timely aid, for who could suppose the obstacles thrown in the way by rapacity and cruelty?"

He seems to have intended to sail by way of New York but changed his mind, as his father had warned him to take no risks. He therefore went to Halifax arriving late in May; there he met the notorious Aaron Burr. Letters of introduction from his father procured him the notice of Sir George Prevost, the Governor, the Bishop, Dr. Inglis, and the best people generally. A letter from the Bishop to Mr. Justice Powell shows that the son made warm and admiring friends in Halifax during his short stay in the City. He had gone to Halifax that he might be taken on board a British man-of-war and in that way pursue his voyage to the West Indies in safety. In July the "Latonia" of 38 guns (Captain Wood) left Halifax for Barbadoes, and Jeremiah secured a passage in that ship: from Barbadoes he proceeded to Curacoa; there he found that the place which he had expected had been filled owing to his long delay in arriving at the Island. The warning that he must be present on the Island to be appointed had been specific enough, but his caution in travelling in a perfectly safe method had resulted in very great delay, and he had to suffer the penalty.

He found that his house in Hayti had been rifled by Dessalines a few hours after he had made his escape; all his efforts to obtain assistance from his former associates proved vain, and his uncle had spent nearly \$3,000 in alleviating his condition when a captive and in attempting to procure his escape from the South American prison. He could see no prospect of opening business in Curacoa or Venezuela; and he determined to sail for England.

Miranda had escaped and had made his way to England where he was again taken into favour by the British Government. The pension of himself and his secretary was renewed, and he was living in good repute in Society. Mr. Justice Powell in July wrote to his brother-in-law Captain Robert Browne of Norwich, husband of Mrs Powell's sister: and Browne went to see Miranda (it may be of interest to note that a letter from York, Upper Canada, sent January 19 arrived at Norwich, England, May 30, and another sent from York July 28 arrived at Norwich, September 18). The result of the interview appears in a letter from Browne to Powell dated October 5, 1808, which reads in part as follows:

"I am happy to acquaint you I have been more fortunate in respect to yours of the 28th July which was received 18th Sept. to Mrs B[rowne] I lost no time in finding up Mr Miranda, whom I waited upon, and made myself known to him, was received with great politeness, and made acquainted with all his misfortunes and disappointments to the capture of your son, of whom he speaks in the highest terms, but had never heard of him till he saw me. The whole of his property on board with a kind of will (which on those occasions is generally made) was given to a Mr Kirkman (Kirkland) a friend of Jerry's on his going on board the schooner Bacchus, and by what I understand from Miranda his property was to be delivered to his friend

at New York. Mr. Kirkman is in America or in some one of the West Indies; our friend George I have no doubt will be able to get some information of him. Finding the ground I was on with the General was pretty firm, I took my leave requesting him to allow his Secretary (who was present) to give me what information he could on the subject and I would call again; this I did three days after and found (which I always thought) Miranda was sanctioned by this Government. He told me of two gentlemen who were with him that were provided with places in the West Indies to the amount of £700 per annum on his application, and spoke in the most friendly manner. I then opened my battery and pointed to him in the strongest colours my poor abilities would allow the distress he had been thro' with that of his family, and asked if a word from him to the Secretary of State might not be of service to Jerry in his present situation. The eagerness with which he replied convinced me of his real friendship for your son. I shall see my Lord Castlereagh next week; I will do all in my power for Mr. Powell and have no doubt but that he will be recompensed for his losses, and if I can by any means in my power otherwise befriend him I shall be happy, you will kind enough to inform him of this when you write, with my kind regards."

The contents of this letter could not possibly have been communicated to Jeremiah; but it is obvious that his determination to sail for England was not ill-advised, and that he had every reason to expect that he would receive some consideration at the hands of Miranda, and also that Miranda's influence would be of advantage to him. He seems to have believed that he could advance his father's interests as the following letter will show (a similar letter was written to his mother at the same time):

"Curacoa, 28 Novr., 1808.

"My Dear Father,

"I wrote you on the 15th inst announcing my intention of going to England. I sail in a few days and my time is very much occupied. This is to be expected, in failure of all my expectations from Government that I shall be able to make some desirable arrangements at home for my return. In time of war we must not trust very full explanations to letters. Connected with my own views at the Capital I intend to make an effort for yourself; and if successful there, and you should not approve of the change on hearing it, I pledge myself that everything shall be so completely taken on my own shoulders with Ministers that you need feel no delicacy in refusing to ratify any of my engagements that relate to yourself. The late appointment of Mr S. (i. e. Mr. Scott as Chief Justice of Upper Canada) has disgusted me coming on the back of a great many unaccountable events. It cannot be gratifying to you. And, as I think the Admiralty will be induced to establish a Court here, I propose, if I am not mistaken in the fact, to offer your name for the Office of Vice Admiralty Judge and Surrogate. The salary I think is £1200 to £1500 Stg. P. An; the climate is delightful and Curacoa must become a scene of business and interest more inviting than Upper Canada in its best days. There is already a sort of Job Court here which I intend to overset as soon as I get to England this will not be difficult and there are so many applicants for Canada that the change will be eagerly embraced for the sake of ready patronage. The Admiralty Establishment for their Judges, you know, is very

much superior to any other Colonial system. If I succeed and you agree you will find this country pleasant, healthy and not so expensive as Canada. My Mother can pass a year with my sisters in England, and I hope it will be a decisive step towards more desirable arrangements in every quarter. I think John's Commissions are with leave to appoint deputies for his two places at Niagara at Least, which after Clarke's death are worth £300 Stg. I know that he does not dislike the West Indies, and If I succeed so as to enable me to reject official appointments for myself I can perhaps arrange with him. That he may never feel any disappointment however through me it would be better I think not to hint to him that I have any idea of the kind. I have suffered enough myself from delusive prospects, and disappointed hopes. If in conceiving a project of this kind I am officious or impertinent I know my dear Father you will receive my motives as a justification; and I assure you that if your concurrence should be at all improper or unadvisable, the seeming inconsistency shall not be allowed to affect you in any way. I will assure all. Latterly Sir J. C. has been very attentive to me. If we succeed in getting the Spaniards to admit strangers to reside in Caraccas I intend to secure Grant an Introduction, perhaps an invitation to that place, and advise him to fix his family there. Here there is no occupation for Esculapian skill. I hope my last or this will be in time to let me hear from you in London. As all I propose is only in prospect you will of course admit it to have no more serious effect on yr other plans as yet."

"Mr S" whose appointment has disgusted the son was Thomas Scott who was appointed Chief Justice of Upper Canada, August 6, 1806. "John" was John Powell and the Judge's oldest son. "Grant" was the third son a medical man at the time at Ballston Springs, Saratoga, New York State.

Jeremiah sailed from Curacoa for London a few days later by the ship *Alexander*. Neither ship nor passenger was ever heard of again; it is supposed that the ship foundered and all on board perished.

The letters of Mrs. Powell to her brother George at this time form a stirring human document. As early as July, 1809, fears are expressed that all is not well with the wanderer; hope of ever hearing of him again is gradually lost tho' the writer attempts to buoy herself up with the suggestion that the ship might have been captured by a Privateer. Her own experience thirty years before had taught her the possibility of such an occurrence and that it was not necessarily fatal or even very harmful. Her sister "mentions an instance of a Vessel many months given up as lost when a letter from its Capt. gave the information of his having been taken by a Privateer, the Ship burnt and the crew carried into the L'Orient . . ." But month after month passes by and the heart broken-mother becomes more and more hopeless; even in January, 1810, however she had not yet entirely abandoned hope. "I am told that the time for accounts from the Isle of France is not yet elapsed." This is the last hope and from this time the dearly loved son is given up as lost.

The fate of Miranda was even more tragic. Again invading Venezuela he met with considerable success. He became Dictator in his native land, but at length surrendering to the Spaniards he passed the rest of his life in wretched captivity in the prison at Cadiz, and died in chains and misery, 1816. The best account of his life is given by Dr Robertson *Trans. Am. Hist. Soc.* 1907.

One circumstance connected with the imprisonment of Powell may

be noticed for its romantic interest. During his captivity at Cartagena—for he never got as far as Omoa—he carved a set of chessmen. He brought them with him to New York, and during his stay there on his way home, he presented them to his fiancée, Miss Eliza Bard, daughter of Dr Samuel Bard, a prominent physician who organized a medical college afterwards the Medical Faculty of King's College (Columbia University). Some of his poetry to the young lady—no worse and no better than the average of such effusions—is still preserved. She afterwards married President McVickar, and the chessmen were at her death in 1840, given to the mother of the lost one. They are still in existence as a memorial of an extraordinary incident.

Of the unfortunate captives, some died in prison, a few escaped, and more died in attempting to escape. Powell was released, as we have seen in 1807; in May, 1808, two others, Ingersoll and Moore, were released at the instance of the British Government as being British subjects, though it is quite certain that Ingersoll was an American citizen, and it is reasonably certain that his case was taken up by Britain at the request of his own Government. In 1810, most of the others were released at the instance of a merchant of Cartagena.

The story of Jeremiah Powell has attracted some attention and has been told in a more or less fragmentary way several times. The writers have not taken the trouble to consult the original letters and other papers still in existence, and have been led into error in some important particulars. I subjoin here two of the accounts to be found in well-known books.

In *The Story of the Filibusters* by James Jeffrey Roche (London, 1891) the following account is given:

"Of the prisoners taken ten were hanged; some fifty were condemned to terms of imprisonment varying from eight to ten years. Among the later was Major Jeremiah Powell, whose father visited Spain in a vain effort to procure his release. Returning, in despair, by way of London, he bethought him of a novel expedient. It was that of getting a letter of introduction to the Spanish monarch from the great Dr Jenner. Armed with this he returned to Madrid and presented himself before the Court. The student of Spanish, and notably Spanish-American history, will find few instances of generous or tender instinct in its bloody annals. Let it be written, as a bright line on the dark page of Spanish cruelty, that the appeal of humanity's benefactor was not made in vain. Major Powell was at once set free. The conquest of deadly pestilence was hardly a greater victory than that won over the heart of a merciless despot. Two half-pay officers of the British army, and ex-Colonel of the United States service, a chevalier of the Austrian Empire, and several adventurous young men of good families in the United States, formed the circle from which Miranda chose his officers. Among the latter was a youth named Smith, grandson of President Adams. It was rumored that he was among the prisoners taken at Caracas. The Spanish Minister at Washington, the Marquis de Casa Yrujo, fancying that he saw a good chance of serving his Government, and, at the same time, getting credit for an humane act, wrote to a friend of young Smith's father at New York, offering to interest himself on behalf of the prisoner, who otherwise would probably be condemned to die with his companions. Respect for the exalted character of Mr. Adams, he said, prompted this step, but he must nevertheless stipulate that Colonel Smith should impart to him full and complete information about the plans of Miranda, and a list of the Spanish

subjects who were concerned in them. The father, yet ignorant of the fact that his son was not among the unfortunate prisoners, at once replied thanking the noble Marquis for the interest he had shewn, but adding with dignity and fortitude worthy of a Roman: "Do me the favour, my friend, to inform the Marquis, that were I in my son's place I would not comply with his proposals to save my life; and I will not cast so great an indignity on that son, my family and myself as to shelter him under the shield of disgrace."

The account given in the same book of Miranda is as follows:

"Among the ardent friends of liberty who rallied around the flag of the Directory was Don Fransico Miranda a native of Venezuela, of which province his grandfather had been Governor. He was well educated, and owned a large private fortune. On account of his revolutionary sentiments he was forced to fly his native country and the military service of Spain, in which he had gained the rank of Colonel. The bulk of his property was made forfeit. With what he could save from the wreck he fled to the United States in 1783. He afterwards visited several European countries. The French revolution found him in Russia, whence he at once set out to offer his sword to the Directory. He held a command under Dumourier in the Holland command of 1783, in which he won a brave name but no serviceable laurels. The campaign was a failure. Dumourier deserted the cause, and Miranda was arrested and tried for treason. Although undoubtedly innocent, his political intrigues had aroused against him powerful enemies who procured his banishment from France. He removed to England a country whose ministry he interested in his life-long scheme for the revolution of his native land. New York was chosen as the point of departure. With bills of exchange on London he bought the ship *Leander*, with a formidable armament. On the 2nd February, 1805, the first filibustering expedition from the United States, consisting of about two hundred men, "some of them gentlemen and persons of good standing in society, though mostly of crooked fortunes," set sail for Venezuela on a crusade of liberty. When eleven days at sea they were brought to by H. M. S. *Cleopatre*, and nineteen of the adventurers were impressed, in the ungracious fashion of the British navy of the period. The *Leander* was detained, notwithstanding her American clearance, until General Miranda produced some private papers, at sight of which the British Captain not only allowed her to proceed unmolested but also gave her a "protection paper", forbidding all other English cruisers to detain or search her. Apart from the *Leander's* questionable mission, this remarkable permit to travel on the high seas throws a striking light upon the construction of international law at the beginning of the nineteenth century.

"Miranda received material aid and comfort from Admiral Cochrane, commanding the British squadron on the West India station, but although his force was swelled by two small vessels, it was, from its first advent on the Spanish Main, a wretched failure. Differences among the invaders aggravated by the wayward temper of the leader, together with a total apathy or active hostility on the part of the very Venezuelans whom the filibusters had come so far to deliver, brought all their fond hopes to nought. Such of the adventurers as were not captured by the Spaniards surrendered to an English frigate and were carried to the West Indies, whence they made the best of their way home."

"What sympathy, if any, was given to the undertaking by the admin-

istration of President Jefferson, it is hard to determine. Miranda always claimed to have been in the confidence of the American Government, as he undoubtedly was in that of Great Britain. It is certain that the people of the United States already looked with brotherly feelings upon the misgoverned peoples of Spanish America. Some of the leaders were tried before the United States Courts upon their return, but, defended with burning eloquence by Thomas Addis Emmett, himself an exiled patriot, they were promptly acquitted.

"Failing in his attempt to free Venezuela from without Miranda returned to the country in December, 1810, and was favourably received by the semi independent colonial government. Obtaining a seat in the republican congress he soon rose to the vice presidency of that body, and organised a more formidable scheme of revolution. On the 5th of July, 1811, he signed the act of independence, and was appointed commander-in-chief of the forces. On his staff was Simon Bolivar, who was destined to play a more fortunate part than that of his chief in the destinie of South America. For a time Miranda was successful in the field, but reverses were soon followed by treachery, and when, in pursuance of the authority of Congress, he signed the treaty of Victoria, restoring Venezuela to Spanish rule, on July 25th 1812, he was denounced as a traitor by his fellow revolutionists who with little consistency, delivered him up to the enemy in whose interest they pretended he had acted. His after fate sufficiently establishes his innocence of treason to the revolutionary cause. The Spaniards sent him a prisoner to Cadiz where he lingered for four years, dying in a dungeon, with a chain around his neck.

"Of all his deeds fame had preserved but one enduring memento, his name, carved, with those of other great soldiers of the Directory on the Arc de Triomphe in Paris."

The following is an extract from *Foreign Reminiscences by Henry Richard, Lord Holland*, 2nd edition, 1851. Speaking of Godoy, "Prince of Peace", he says (pp. 135, 136, 137) :

"Our interviews were mere interchanges of civility. But a transaction of no importance to the public, but of great importance to the parties concerned, took place between us, and he not only behaved with great courtesy to me, but shewed both humanity and magnanimity. A young English gentleman of the name of Powell had, before the war between England and Spain, engaged either with General Miranda, or some other South American adventurer, in an expedition to liberate the Spanish colonies. He was taken. By law his life was forfeited, but he was condemned by sentence nearly equivalent to perpetual imprisonment in the unwholesome fortress of Omoa. His father, Chief Justice of Canada, on hearing the said tidings, hastened to England. Unfortunately, hostilities had commenced under circumstances calculated to exasperate the Government and people of Spain. The Chief Justice was, however, determined to try the efficacy of a personal application to alleviate the sufferings of his son, by a change of prison, since he despaired of obtaining his release. Having procured passports, he proceeded to Spain, furnished with a letter of introduction to the Prince of Peace from me, to whom he applied as recently arrived from thence, and not involved in the angry feelings or discussions which had led to the rupture between the two countries. The Prince received him at Aranjuez, and immediately on reading the letter, and hearing the story, bade the anxious father remain till he has seen the King, and left the room for that purpose without ceremony or delay. He soon returned

with an order, not for the change of prison, but for the immediate liberation of the young man. Nor was he satisfied with this act of humanity, but added with a smile of benevolence, that a parent who had come so far to render a service to his child would probably like to be the bearer of good intelligence himself, and accordingly he furnished him with a passport and permission to sail in a Spanish frigate then preparing to leave Cadiz for the West Indies."

In *The Life of the Rev. Joseph Blanco White, Written by Himself*, London, 1845, in vol. II at pp. 195-196 is found a letter from Lord Holland to Blanco White dated London, March 4th, 1836, in which almost the same language is used, the only difference being verbal.

These are verbal errors in the transcript in *The Magazine of American History*, July, 1880, p. 38.

APPENDIX E

A LEGAL EPISODE: MONK V. POWELL

When Powell began the practice of law in Montreal in 1779, he formed a connection with James (afterwards Sir James) Monk, who was practising in Quebec—each became the agent of the other in his City in what Powell calls “a sort of partnership” and each enjoyed on occasion the hospitality of the other—they had been friends or at least acquaintances before.

This continued till 1789 when Powell was appointed First Judge of the Court of Common Pleas for the District of Hesse; the accounts were taken¹; and Powell was found to be indebted to Monk in the sum of £413-5-2, for which sum he gave his note payable with interest on demand, dated April 3, 1789. Powell had been incapacitated from paying (at least in part) by his purchase of a small but beautiful estate on the Mountain of Montreal, which is described in the legal proceedings² as “a lot or piece of land situate on the Cote Hill Saint Antoine, in the Parish of St. Mary, in the District of Montreal, containing three arpents in front by 12 or 13 arpents in depth, more or less, but being only two arpents broad in the rear, bounded in the front by Gilbert LeDuc and behind by James Walker, Esq., on one side heretofore by Joachim now represented by Jean Baptiste Billion, and on the other side by Gervais Decaris.”

The amount paid for this estate was nearly £325 or 7,800 livres; and Powell had expended in improvements more than the value of the land;³ a house, barn, stable and other buildings, fencing, road-making, planting of fruit trees and forest trees, etc.

While the note was payable on demand, the understanding was that Powell should pay it, principal and interest, in three semi-annual payments, equal or approximately so. It was expected he would receive a sum of £350 from the Treasury almost immediately, but that he would need this money for transportation to Detroit, expenses, etc. Accordingly it was arranged that Monk should continue to be Powell's agent in Quebec, receive his salary warrants and apply part of the proceeds upon the notes.

Upon Powell's return to Montreal from Quebec he found that a lawsuit to which he was a party had gone against him, and he arranged with a friend to become his security upon an appeal to be taken from the adverse judgment, agreeing to make him his agent, instead of Monk. Upon this being communicated to Monk, he offered himself to become security upon condition that he should remain Powell's agent and also receive security upon the Montreal property with which he was well acquainted. To this Powell assented; he entered into a Notarial Act before Mr. Papineau a Montreal Notary Public mortgaging his villa property to pay the debt. The document was sent to Monk in Quebec and he kept both it and the note; he told Powell that now he had security, he need not hurry to pay the debt.

On November 1, 1789, a salary warrant for Powell's salary—£250 sterling was handed over to Monk; that—at the old rate of exchange—

was equal to £277-15-6 Provincial currency. He from this paid to Robert Lester a draft of Powell's for £100 currency drawn in favour of Forsyth & McGill, the well known traders, and applied the remainder £177.15.6 on the note.⁴

As soon as Powell discovered that the payment had been credited on the note and not on the Notarial Act, he refused to pay any more till the note should be cancelled and the former payment be credited upon the "bond and mortgage."

Monk having been dismissed, April 3, 1789, from his position of Attorney General, went suddenly to England and left Powell's agency in other hands; Powell selected his own agent and gave instructions not to pay any more on Monk's debt.

Why, if he was acting in good faith, he did not pay the balance is not explained; if he was right, there was no reason why he should not have paid according to his agreement and demanded his release.

Considerable correspondence took place between the parties, and finally Powell gave Monk a power of attorney to sell the villa property and apply the proceeds on the debt. Monk was not living in Montreal, and gave Powell clearly to understand (by letter from Montreal, dated September 4, 1793) that the lands were not by far worth the amount of the debt unpaid.

Monk brought action upon the Notarial Act for the full amount with interest; process was served at the last known place of residence in Montreal of the defendant. This was allowed as sufficient by the Court of King's Bench at Montreal, and Judgment was entered November 27, 1794 for the full amount—£413-5-2—and interest from April 1, 1789, and costs £5.17.6 without taking into consideration the payment made in November, 1789. That this was improper is clear; even on Monk's own showing, he had received £177.15.6. He claimed an open account against Powell of £88.18.9. This left a balance of £88.16.10 which in any case should have been credited upon the account.

Powell says over and over again, that this judgment was obtained when Monk was Chief Justice of the Court; but this is not the case as he did not become a Judge of the Court till December 11, 1794, when he was appointed Chief Justice.

The Court at Montreal in view of the want of personal service directed that no execution should issue upon this judgment until the plaintiff should file in the Court sufficient security that the defendant should be paid any damages resulting to him from the service of the writ otherwise than on his person or at his place of abode.

The Bond of a wealthy citizen of Montreal for the purpose was procured and filed; but the responsibility on this bond was limited to one year.

The time for appealing to the Provincial Court of Appeal in Lower Canada had expired before Powell became aware of the judgment rendered against him; and as the amount was less than £500 sterling, he could not appeal to the King in His Privy Council.⁵

He had no notice of the action or judgment till he received notice of action, judgment, and the sale about to be mentioned, all at the same time.

The Bond required by the Court having been filed, the next step was the issue of a writ of execution against the goods and lands of Powell, December 27, 1794. This being placed in the hands of Edward William Gray, Sheriff of the District of Montreal, he issued his warrant (still extant) to his "Deputies, Bailiffs or Huissiers" to cause to be

made the sums named for principal, interest and costs out of the goods and lands of Powell in that district.

The Mountain property, which its owner describes as "a most desirable villa on the mountain not three miles from Montreal" was advertised for sale under execution. Monk requested^s the Sheriff not to put it up for sale until Mr. Davidson his attorney (whom he had requested to attend the sale) should be present, or some person authorized by him to follow Monk's instructions at the time of sale; and the property was sold to Monk for £150 Currency. "A vile price" says Powell "one fourth of the money known by" Monk "to have been paid by" Powell for the estate, on which he had expended more than the first cost in erecting buildings and planting or as he says elsewhere "one third of the price paid for it and less than one-fifth of the money expended on it by the debtor."

A deed (which Monk insisted should be on parchment) was made to him of the property; and the following official statement was returned by the Sheriff:

In the Court of King's Bench
District of Montreal.

James Monk Esquire
vs.

William Dummer Powell Esquire.

Dated 27th December, 1795.

For Debt.....413.5.2.
Costs and Writ..... 6.2.6.

1795 £419.7.8.

May 16th Sold and adjudged a lot of Land at the Cote
Saint Antoine, belonging to the Defendant, to the
Plaintiff, for..... £150.

Sheriff's fees and disbursements

Drawing the advertisement for the sale of the
premises and necessary copies thereof.....

0.11.8.

Commission on £150 at 2½ o/o
per cent.

3.15.0.

Paid the Printer

1.17.6.

Paid the Bailiff for publishing the
sale at the Church door and crying
the premises.....

10.0.0

Paid the Bailiff for going to the
Cote St Antoine and taking a de-
scription of the premises.....

7.0.0

7.1.2

Levied £142.18.10

Ed. Wm. Gray Sheriff.
1st June 1795.

Although Powell who had now become puisne Justice of the Court of King's Bench, Upper Canada, shortly after the sale had full notice of all these proceedings, he does not seem to have taken any steps to set the judgment or sale aside, or to have his payment of November, 1789, credited upon the judgment; nor did Monk, for many years, take any proceedings against him to realize the balance of his claim.

Powell became Chief Justice of Upper Canada in 1816.⁸ In 1822 John Beverley Robinson the Attorney General, afterwards Chief Justice, went to England. Even before this trip the relations, theretofore of the most friendly nature between the Chief Justice and himself, had become strained, and during his absence in England matters grew worse between the two former friends for reasons not necessary to be here gone into. On the Attorney General's return, the Chief Justice was shocked by the receipt of a note from him that he had been instructed by Monk, whom he had met in England, to recover the balance of the judgment. Robinson said he had accepted the commission only upon the condition that he might propose to Powell to settle the matter amicably by arbitration. When Robinson proposed an arbitration, Powell readily assented upon condition that the judgment should be waived.

The Attorney General drew up and witnessed a Bond of Submission to arbitrators of his own choice and waiving the Montreal judgment. The arbitrators took the burden of the arbitration upon them, a day was set for proceeding with the reference, the parties were practically heard, when Mr. Monk, nephew and agent of Sir James Monk, said he did not mean to submit to the arbitrators the case stripped of the judgment. The arbitrators, therefore, refused to proceed; Robinson resumed the Bonds of Submission, and returned them to the signatories instead of the obligees, which properly and regularly he should have done.

The Attorney General, no doubt actuated by a sense of his high official position and his peculiar relation to the Court, and perhaps by his feeling of obligation to the Chief Justice for former kindnesses, did not himself take proceedings against Powell. He placed the matter in the hands of the Solicitor-General, Henry John Boulton, who immediately (1825) brought an action in the Court of King's Bench for Upper Canada.⁹ All proper courtesy was observed in the initiation of the suit. Mr. Boulton wrote the Chief Justice asking to what member of the profession he should send the declaration in order to the defence: Powell selected Jonas Jones, afterwards a Judge of the King's Bench.

The Declaration contained six counts: (1) on the Montreal Judgment, (2) on the Notorial Act or Bond (3) on the promissory note and (4), (5) and (6) for the several amounts for which the note had been given thirty seven years before. No mention was made of the payment of November, 1789.....

The pleas were drawn by Jonas Jones and Robert Baldwin who was afterwards so well known in political life. They are very voluminous but can be reduced into small compass. To the count on the Montreal judgment, the defendant pleaded that an execution was issued by Monk upon that judgment, and the Sheriff of Montreal sold of his property sufficient to pay judgment, debt, interest, and costs. This of course was not true, as the defendant knew. To the same count he further pleaded that he had paid the judgment, interest and costs; this also he knew to be untrue; to the count on the Notorial Act he pleaded that he had paid it, which was not true; and that it was not his deed, which was only technically true since he admits in his MSS more than

once that the document had the same effect as a deed executed and delivered by himself. To the counts on the note and the account, he pleads that the debt had not accrued within six years and denies that he owes the money. He also puts everything in issue, so that the plaintiff would require to prove his case in full.

There was then no incongruity in pleading (as Powell did) 1. I never owed you; 2, I paid you, and 3, anyway, the debt is outlawed.

I find in the Records of the Court of King's Bench (Term Book, No. 9) the following entries: Michaelmas Term, 6 Geo. IV November 15th 1825, (Praes. Campbell, C. J. and Sherwood J.) "Sir James Monk v. Honourable Wm. Dummer Powell. Motion for a Commission to examine Witnesses in this cause resident in Lower Canada, on the part of the plaintiff. Motion made by the Attorney-General for plaintiff. Granted."

It will be seen that though the Solicitor-General was the Attorney for the plaintiff, the Attorney-General J. B. Robinson, acted also as Counsel. S. P. Jarvis who was appointed Commissioner under the Commission issued for the defendant, November 15, was his son in law; he married Mary Boyles Powell. The Commissions just referred to were of course to procure evidence of the transactions in Montreal; the interrogatories and cross interrogatories are still extant.

The case came down for trial at the sittings after Hilary Term, 1826, and various documents and exhibits were given in evidence by each party. As several legal questions arose, it was agreed with a view to having the case properly decided to take a verdict for the plaintiff subject to the opinion of the Court on the points reserved. Here the defendant, though a former Chief Justice and a judge for thirty six years, and also his very able counsel the celebrated Robert Baldwin, made a mistake in practice. Whether the astute counsel for the plaintiff understood and intended the full effect of this arrangement and out generalled his antagonists, cannot of course be ascertained; but the result as we shall see, was of serious consequence to the defendant.

The next entry in the Term Book is: Easter Term, 7 George IV April 21 1826, same judges present. "Wm. D. Powell ats James Monk Motion for Rule on Plaintiff to elect the Count on which he will enter his verdict" Motion by Robert Baldwin Esquire for defendant. Not Granted." The object of this motion is obvious to a lawyer learned in the old practice; it was to hold the plaintiff down to one course of action.

The verdict was entered generally on all the six counts; if the plaintiff could be compelled to accept the verdict on one count only, any objection fatal to that count would be fatal to the action. For example, suppose the plaintiff should elect to take his verdict on the first count, if the defendant could show in the proceedings that the judgment in the Montreal Court was void as having been improperly obtained (as on the facts he well might) the defendant would have a verdict and the plaintiff lose his money. If he took his verdict on the promissory note, the Statute of Limitations would bar him, etc., etc.,

But the Court refused the order as the defendant should have insisted on that at the trial, and not have consented to a general verdict upon the whole declaration. In those technical days, one was not allowed to blow hot and cold.

Then the following appears in the Term Book; April 21st "Wm D. Powell ats James Monk. Motion for a Consilium to argue the points reserved at the Trial in the Cause, on Friday next, with leave to move

for a new trial after the judgment on the same." Moved by Robert Baldwin, Esq. for Defendant but "Not Granted."

In those days points of law were reserved by the trial judge for the determination of the Full Court; that is, instead of deciding all questions of law himself and leaving the unsuccessful party to appeal to the Full Court, the trial judge sent the points at once to the Full Court to decide. But before the Full Court would hear such points argued, counsel for the party must apply to the Court for a consilium, concilium or 'dies concilii' (as it was called indifferently), that is, a day to be fixed for the Court to hear the argument, "a day in Court". What Mr. Baldwin wanted was to be allowed to argue the points of law reserved; and, if unsuccessful, then be allowed to move for a new trial. The only objection was that this was asked in the absence of the other side; the practice was wrong for, speaking generally, no indulgence can be given to one party unless the other party is present. But the desired end could be accomplished in a different way, that is by taking out an order that the other side should show cause, give some reason why the desired indulgence should not be granted. This was done forthwith and on the same day. "The Honble W. D. Powell ats. Honble James Monk. Motion for a rule to show cause why the verdict rendered for the plaintiff in this cause at the last sittings should not be set aside and a non-suit entered upon the points reserved at the trial, with leave to move afterwards for a new trial should the opinion of the Court be with the plaintiff on those points; on the ground of the verdict being contrary to evidence." Motion made by Robert Baldwin, Esquire, for defendant. Granted.

Easter Term, 7 George IV April 28, 1826 same judges present: "Honble Wm D Powell ats Hon'ble Sir James Monk. Argued and stand for judgment. "April 29 stands for judgment"

Trinity Term, 7 George IV June 28, 1826 "Honble Sir James Monk v Honble W. D. Powell. Rule discharged."

Powell in his "Story of a Refugee" says this was decided against the Chief Justice by the Puisne Judges; but his recollection is plainly at fault—not the only instance in his later papers. Certainly all the points of law reserved, were decided against the defendant; but, as will be seen by subsequent entries, he was still at liberty to move to set aside the verdict. This was a hopeless task; he had himself agreed to the verdict.

Michaelmas Term, VII George IV, November 14, 1826, (Praes Campbell C. J., Boulton and Sherwood JJ) "Honble Wm Powell ats Sir James Monk. Motion, pursuant to leave for a rule to show cause why the verdict rendered for the plaintiff in this cause should not be set aside and a new trial granted on the ground that the former verdict was contrary to law and evidence and excessive. Robt. Baldwin Esq. for the defendant. Refused."

Judgment was entered for £740.10.9 and £40.12.9 costs on November 30, 1826, as the first day of Michaelmas Term, November 6, 1826. It will be seen that the whole sum of £413.5.2, with interest at 6 per cent since 1789 would largely exceed the amount of the judgment.

Monk's account as signed by him and rendered by his nephew and agent G. H. Monk, as of May 16, 1824 showed £844.9.9. due. This was made up by debiting Powell with £88.18.8 in addition to the £100 draft, then calculating interest on the balance down to the sheriff's sale, crediting the net proceeds on the account as it then stood and then computing interest at 6 o/o on the balance down to the date of the

account. In the computation of the net proceeds of the sheriff's sale, not only were there paid out of the £150 the sheriff's fees £71.2, and the costs £5.17.6 and £0.5.0 but also *Cens et Rentes* £2.10.0 and *Lods et Ventes* £27.1.8, paid to the Seigneur, as was unavoidable. If the judgment in the Montreal Court was valid, no complaint could be made against this computation except as regards the £88.18.8 claimed against Powell as payable out of his salary warrant. The Plaintiff did not insist upon this, and the Judgment in the Upper Canada Court was taken for a sum allowing the defendant credit for his payment in November 1787, without deduction except for the £100 draft.

In view of the subsequent proceedings it may be well to note that there seems to have been at attempt at the trial to draw up a special verdict (the draft is still in existence) but this failed—disastrously for Powell, as it turned out. It would also appear that even at this late stage, an attempt was made to refer the whole matter to arbitration; but that also failed.

It is plain that Powell had no fair ground for complaint in morals (except at the worst on account of the few pounds of costs he had to pay) for he owed the money and should have paid it. But if he could get rid of the judgment, he could avoid the payment of the debt by means of the Statute of Limitations; and to this end, he bent all his efforts.

He first appealed to the Court of Appeals for Upper Canada. This from 1794 to 1849, consisted of the Lieutenant Governor of the Province or the Chief Justice with two or more of the Executive Council. The Lieutenant Governor at that time was Sir Peregrine Maitland with whom Powell had had a most serious misunderstanding not long before, who had humiliated him in his position of Speaker of the Legislative Council and who had at least for a time done all in his power to prevent his receiving a pension on retiring from the Chief Justiceship. The Chief Justice was Campbell, who was believed and with some reason, to be wholly under the influence of the Attorney General. But Powell tried the experiment.

He by this time had become fully alive to the mistake he had made at the trial. As will be seen from the subsequent proceedings, the existing Court of Appeals and the Judicial Committee could, under the existing rules of practice, in cases in which there was a verdict for the plaintiff subject to the opinion of the Court on points reserved, look only at the formal record, and could take no cognizance of evidence, exhibits, etc., at the trial, but not made part of the record. What the defendant should have done was to have had the jury render a special verdict finding all the facts, and leaving the law thereon to the Courts. This is a distinction wholly unfamiliar and almost unintelligible to a modern lawyer in England or Ontario, but at that time form was of some consequence. The further back we go in the history of law the more technical we find the practice; the more modern law is, the more simple, non-technical and common sense.

"Strange all this difference should be
Twixt Tweedledum and Tweedledee."

Powell and his Counsel made every effort to get rid of the fatal consequences of their slip in practice. On March 1, 1827, application was made to the Court of Appeals of the Province for a Writ of Appeal upon the judgment; and the Court was asked to require the Court of King's Bench to send with the Record "all the original papers and pro-

ceedings found in the Records or Registers of the Court." This was an attempt to bring before the Court of Appeals all the papers showing the irregularity and invalidity of the Montreal Judgment. But the Court of Appeals—Chief Justice Campbell presiding—refused any special order of this kind. The defendant then took his writ in the usual form for the "record and proceedings" in the action, with the items touching the same. This was disregarded by the Court of King's Bench and in January, 1830,⁹ Powell again applied to the Court of Appeals to order the Court of King's Bench "to certify without delay to the said Court of Appeals all evidence and documents remaining in their custody upon which judgment was rendered." This was a new attempt to go outside the record and introduce the facts. The Court of Appeals refused—John Beverley Robinson having become Chief Justice—, and a Writ in the usual form was issued.

The Court of King's Bench then (before August 17, 1836,) certified the pleadings, the jury process, the entry for trial at *nisi prius*, the return of the Postea, and the judgment—that is to say, all the formal proceedings of Record; Powell at once filed his reasons of appeal.

Sir James Monk died, November 20, 1831, and Simon Washburn, a well known Toronto practitioner, took out letters of administration and became plaintiff. In December, 1831,¹⁰ another application was made by Powell to amend the return by adding the original papers and documents filed at the trial and still in possession of the Court of King's Bench. This renewed attempt to get over form and bring the facts before the Court of Appeal failed, and again Powell had to rely upon his points reserved.

The Court of Appeals having before it only the skeleton of the case, could do nothing else than dismiss the appeal, which it did. Then Powell appealed to the King in Council; but he died, and his son (Dr) Grant Powell and others, his executors, continued the appeal.

Washburn now objected that the appeal was not properly before the Judicial Committee; but this contention was overruled, February 14, 1838. The appeal came on to be heard, December 14, 1838, before Lord Brougham, Baron Parke⁹ (afterwards Lord Wensleydale), Mr. Justice Bosanquet, Sir Hebert Jenner and the Right Hon. Dr Lushington. The Committee decided¹¹ that the Upper Canada Court of Appeal was a Court of Error only, and not a Court of Appeal, that it could deal only with the record as sent up from the inferior court and that the appellants could not go outside the four corners of the record so certified by the Court of King's Bench. Accordingly, the appeal was dismissed.

I must not omit to notice an attempt by Washburn to realize on the Upper Canadian judgment notwithstanding the pendency of the appeal to the King in Council; Washburn, having obtained letters of administration with will annexed, he, November 19, 1831, issued a *sci. fa.* to revive the judgment in the King's Bench in his own name as administrator. Robert Baldwin, for Powell, in Michaelmas Term, 2 Wm. 4, obtained a rule in the King's Bench calling upon the new plaintiff to show cause why all proceedings on this *sci. fa.* should not be stayed until the decision of His Majesty in His Privy Council.

In Easter Term, 2 Wm. 4, the rule was argued by Washburn and Baldwin before the Court, composed of the Chief Justice (John B. Robinson) and Sherwood and Macaulay J.J.; the Chief Justice giving no opinion, as he had been concerned in the case when at the Bar. The plaintiff's argument was as follows: The judgment for £740.11.9 debt, and £44.19.10 costs, was entered on November 30, 1826, as of the 1st

day of Michaelmas Term, November 6, 1826, when Monk was still living. The Writ of Appeals to the Court of Appeals was allowed by that Court, March 13, 1827, but the appeal to the King in Council was not allowed till February 7, 1832, when Monk was dead; and so that appeal was void and the case stood as though there had been no appeal allowed to the Privy Council; "If the defendant wishes to appeal from this judgment now, let him commence his proceedings in appeal *de novo*; but as this appeal can ultimately have no effect on the judgment, it would be useless to stay the proceedings on *scire facias*."

Baldwin in his reply relied solely upon the Statute 24 Geo. III, cap. 2 and retorted "If the administrator (defendant in appeal) rely upon the death of the defendant as destroying the appeal, he may plead it in abatement or suggest it in the Court of His Majesty in Privy Council."

The Judges agreed in their opinion, and made the rule absolute, staying proceedings. This I find in an old MSS. Report in Court of Appeal Library at Osgoods Hall pp. 589, 599.

So true is it that "An argument that would have prevailed in Plowden's time, and perhaps would have raised a difficulty to be got rid of in Lord Ellenborough's, now would be answered only with a smile" as says Oliver Wendell Holmes, Justice of the Supreme Court of the United States.

The contention of the defendant in the Privy Council as well as in the Court of Appeals was that the Court of Appeals was really a Court of Appeal and not a Court of Error. The distinction is hardly ever made at the present day, and never in any civilized and advanced jurisprudence. In a Court of Appeal the whole case is examined, fact and law, and in effect tried a second time; while in a Court of Error only matters of law are examined, and the judgment is reversed only if any errors of law have been committed. Nowadays of course or Appellate Courts are Courts of both Appeal and Error.

Powell in the Privy Council and Court of Appeal based his contention on the Royal Ordinance of the Province of Quebec of 1784 and 1786, which he contended were in force by virtue of sec. 34 of the Imperial Act, 31 Geo. III, cap. 31 and the Upper Canada Act of 1792, 32 Geo. III, cap. 1. The Court of Appeals, presided over by Chief Justice Robinson decided against him, holding that the old Royal Ordinances were not in force. Powell failed to carry a Bill introduced by him in the Legislative Council to declare them in force; the Chief Justice introduced a bill to repeal them, but this bill was not proceeded with in the House of Assembly, as being unnecessary.

The conduct of Chief Justice Robinson in sitting in a case in which he had been of counsel for one of the parties would not now be followed. His conduct throughout is complained of most bitterly by Powell, whose MSS are full of such complaints. e. g: in a series of questions in the handwriting of Powell addressed to Robinson, appears the following:

"Quere. Do you know that a return of such writ of appeal was made not satisfactory to the appellant and that the cause of such dissatisfaction has been argued before the Court of Appeals twice the last after an interval of three years by yourself as Vice-President of the Court of Appeals, wherein your opinion confirms that of Mr. Justice McAuley that the appellant is not entitled to demand as part of the return from the Court below of all matters and things touching the said judgment appealed from as are found recorded in the said Court."

And in a bitterly worded memorandum "On the 13th December 1831, Mr Robinson, the Chief Justice of Upper Canada, brought to a successful issue his intrigue to punish me for being his friend. I had so pertinaciously resisted all discretion as to exert my interest with my friend Sir R. Sheaffe as to adopt him for acting Attorney General in this Province of Upper Canada, in preference to the strong recommendations of his valued friends at Quebec—he, Mr John Beverley Robinson not being then of age or at liberty from his clerkship, etc., etc.,

The judgment in this case was not paid by Powell's representatives till the end of the year, 1848.

NOTES TO APPENDIX E

¹Powell sometimes speaks of the transaction as a loan from Monk to himself, but this is an error in terminology.

²Advertisement for sale of land under Writ of Execution in James Monk v. William Dummer Powell, Montreal, 8th January, 1795, signed by "Edwd. W. Gray Sheriff."

³The "house, barn and other holdings" are also mentioned in the above advertisement.

⁴The old rate of exchange was £1—\$4.44-4/9; i. e. the dollar = 4/6-£9 sterling==£10 currency. Even yet this is the nominal par, and when £1=\$4.8667 (the intrinsic value) sterling exchange is said to be at 9½%—1.09½% of \$4.44-4/9 is \$4.8667.

⁵See Instructions to Sir Guy Carleton, January 3rd 1775, sec. 15.

⁶Letter Montreal, May 2, 1795, "Jas Monk to Ed. W. Gray Esq Sheriff, etc". Can. Arch.

⁷"Case in the Court of Appeals, Upper Canada, in Powell, Appellant v Monk Respondent."

⁸The Report in 2 *Moore Privy Council Rep*, p. 199, gives the date as 1826 but this is an error.

⁹I find the following memoranda in the handwriting of Mr. Justice Macaulay in his notebook:

"In the Court of King's Bench,

"Tuesday 5th Jany. 1830.

"Solr. Genl submits that a write in ye case of

Monk	}	has not been returned by ye Judges to whom addressed or
v.		
Powell	}	any of them.

"The Writ requires ye Record and Proceedings afsd (i. e. ye Record & Proceedings between ye Parties) with all things touching re same to our Court of our Govr in Council. Retble 2d April. 1827 Barnes 201. Tidd 1216-7; 1 Sid 258 1 Sal. 92 2 Str. 1063-4; Hard 344; S. C. Yel. 34.16 Mad. 43; Bayley 315-6; 1 Wils. 35; 2 Sal. 145; 2 Str 1063-4; 1 Kel. 658-686; Cro. El. 84; 2 Saw 101.

Monk.	}	Must not the Writ & Transcript of Rule be taken off ye
v.		
Powell.		
	}	file of ye Court of Appeal by order of that Court before

"Is not the personal delivery of the Writ & Transcript by the Chief Justice Sufficient Return. Might not Mr. Sherwood add the Caption & Return at ye head of the Rule in the name of all ye Justices named in the Writ.

"Saturday 9th January 1830.

Monk	}	The Court cannot act upon ye writ while it remains on the files of ye Court of Error—or of Appeal."
v		
Powell.		

¹⁰Powell in his "Story of a Refugee" complains "The utmost assiduity of Counsel could not procure a judgment for or against from 1824 to 1831." This is a mistake, as the Records show; the delay was his own and that of his own Counsel; and no application was made to the Court of Appeals till 1827.

¹¹See the full report in 2 *Moore's Cases before the Privy Council*, pp. 199. sqq.

APPENDIX F

WOOD V. POWELL

In 1823, the Provincial Act of 4 Geo. IV. c. 4., provided for the appointment of Commissioners to investigate the claims made by the inhabitants of the Province for loss and damage by the plundering of their dwellings and other buildings, and by the devastation of their lands during the war of 1812-15.

The Secretary of State directed Sir Peregrine Maitland, the Lieutenant Governor of Upper Canada, to have such a Commission appointed prior to the payment of any compensation to the claimants.

The Act, approved March 10, 1823, gave authority to the Lieutenant Governor by commission under the Great Seal of the Province, to appoint five persons three of whom should be a quorum, "to enquire into the losses respectively sustained by His Majesty's subjects during the late war with the United States of America, whether arising from the Act of the King's enemies, or of His Majesty's generals or troops, or of the Indians serving with them". Sec. 2 of the Act required the Commissioners before entering upon the execution of their office, to take an oath in the form prescribed "before any one of His Majesty's Justices of the Court of King's Bench, which he is authorized and required to administer....."

Powell being an Executive Councillor, Sir Peregrine Maitland some time later, sent his private secretary, Major Hillier, to him with a list of the proposed Commissioners: Joseph Wells, Colly Foster, John B. Robinson, Peter Robinson, and William Allan. The Chief Justice said he could offer no objection to any of the persons proposed.

At the instance of the Reverend Dr. Strachan, who had been three years before appointed by Sir Peregrine a Legislative Councillor but was not as yet Bishop of Toronto or Archdeacon of York, the name of Alexander Wood¹ was inserted in the place of that of John B. Robinson without the knowledge or approval of Powell; the Commission issued May 14, 1823. The Chief Justice seeing the official notice in the Gazette, sent for Major Hillier and asked him if Wood's name had been in the list of those suggested to him for Commissioners. Hillier replying in the negative, Powell desired him to bear in mind that he had not advised or consented to the appointment of Wood. The next day Hillier again called upon Powell and asked him if there was any objection to Wood as a Commissioner; and Powell said there was such objection as he could not have withheld if he had been consulted about Wood. Hillier asked for particulars and was shown two letters, one from Wood to Powell, July 6, 1810, the other Powell's reply on the following day. In the former, Wood asks the advice of the Judge "circumstanced and mortified" as he was though his "conscience neither charged" him "with vice or malice" and all that he had done was "to save from the greatest hardship that can be inflicted, to deprive a man of his liberty who had done nothing that ought to restrain him". The answer is stern—referring to the odious and incredible report "concerning Wood's conduct in his capacity of Magistrate" Powell goes on to say: "your admission left no longer room to hope that it was the invention of slander—your

conduct in the cases alluded to, is such a contrast to your usual exemplary prudence and discretion, that finding no motive to it in the history of the human mind, I could not but attribute it to some disease, some temporary alienation of judgment. . . . Your perseverance in offering to your friends and in deceiving yourself with such excuses is to me the strongest evidence of an unsound judgment. The gratification of mere curiosity—however idle, absurd, or preposterous—is itself but the object of ridicule only, but when such gratification has been procured by an abuse of authority when good manners and the feelings of individuals have been wounded by the Magistrate whose duty it is to protect them, I fear not only pecuniary damages are reclaimable in a civil prosecution, but that exemplary punishment must follow the conviction on a criminal information.”—there is much more in the like strain. Not unnaturally, the Secretary asked for an explanation and Powell gave it:—

Wood being on the Commission of the Peace, had been charged by common rumour in 1810 with acting in an revoltingly indecent way: he was said to have sent for respectable men and telling them that complaint had been made against them for assault upon women, and that the women claimed to have wounded them, insisted that they should bare themselves for his personal inspection. Whether this charge was true, we need not inquire; certainly original documents are in existence signed by persons who claimed to have been subjected to this treatment and who give particulars. It is equally certain the Attorney General Macdonell dubbed him “Inspector General for Private Affairs”, and that this nickname was constantly used for years.

Powell was stopped in the street, July 5, 1810, by the Solicitor General Boulton to hear the complaint of one of those complaining and took down the amazing story in writing; in the evening, Wood called upon him, admitted nearly everything that was charged, and was advised that if he could not produce the women who claimed to have been assaulted, he had better not remain in York. Wood left shortly after for Europe; but he returned and lived in York for several years in good repute, associating with the best people in the Capital.

Nothing more was heard of the matter till June 2, 1823; Col. Wells, Col. Foster, Col. Allan and Wood that day waited on the Chief Justice with blank forms of oath and certificate of their being sworn into office as Commissioners, and a letter from Major Hillier stating their appointment. Powell was naturally astonished in view of what had taken place between Hillier and himself and asked to see the Commission. He then desired the visitors to be seated, and took Mr Wood into an adjoining room. He explained to Wood his objections to his being on the Commission, so that he might if so inclined decline to be sworn in for the present. . . . he says he did so because he was under the impression that the Lieutenant Governor would not allow Wood to be a Commissioner and it would be less humiliating for him not to be sworn in in the first instance than to be superseded after he was in office. Wood declined the suggestion, and the two returned to the other room where the three Commissioners were waiting.

The Chief Justice craved their indulgence while he should write a note to Major Hillier, stating the presence of Wood, and asking his attendance. Wood left the house with the servant who was sent with the letter: the other three were sworn in and received their certificates and went away leaving behind the blank certificate for Wood. Wood returned with Hillier, and then it is claimed he declined to be sworn

in before the Chief Justice—from his subsequent conduct this seems likely.

He retained James Buchanan Macaulay, a young man of great ability who had been called to the Bar the preceding year, but who had already come into considerable practice (he became a few years later a Puisne Justice of the King's Bench, and afterwards Chief Justice of the Common Pleas, dying in 1859, Sir James Macaulay).

Macaulay applied to the Court of King's Bench for a Writ of Mandamus to compel Powell to administer the oath. A mandamus has never been awarded against a Superior Court; but there is no reason why such a writ should not issue against one charged with an official duty, even though he happens to be a Superior Court Judge, the duty to be performed being obligatory and not merely discretionary.

The following appears in the Term Books at Osgoode Hall: The Trinity Term 4 George IV, on Monday July 14, 1823, (Praes. Powell C. J., and Boulton J) "In the matter of Alex Wood and The Honble. William D. Powell C. J.—Motion for a Mandamus Nisi directed to the said Wm. D. Powell, commanding him to administer to the said Alexander Wood the oath of office as a Commissioner for the investigation of Claims of Loss. Granted J. B. Macaulay." Powell at once communicated to Macaulay his readiness to swear Wood in; but Wood by letter, July 16, said: "the circumstances attending your former refusal having wounded my reputation so deeply as to lead to a second Commission in which I understand my name is to be omitted, there can be no object in accepting the oath at this period. The object of the mandamus was to call upon you to record publicly and explicitly the reason for your first refusal, that I might vindicate my character should you assail it; but as you have intimated that you never did refuse, it is in your power of course to return that you were always ready and willing, which return, should it be made, I am prepared to meet and answer." If one object of the Mandamus was as stated in this letter, the letter itself defeated the object, as it left it open to Powell to act as he did—that is, return his willingness and attach the letter to his return.

It is very probable that the proceedings in Mandamus were taken to harass Powell, as nothing prevented Wood from applying to another Judge to be sworn in; he did in fact apply to Mr. Justice Boulton almost immediately and was sworn in, *quantum valeat*, by that Judge. But he had another string to his bow: In addition to the application for a Mandamus, he brought an action² on the case for damages. The following I find in the Term Book, No. 8 at Osgoode Hall:

"Trinity Term, 4 George IV Wednesday 16th July, 1823

Alex'r Wood	}	Motion for six weeks time to plead W. W. Baldwin. Granted Issued"
The Honble. W. D. Powell		

It will be seen that the Chief Justice went outside the lawyers who may not unfairly be called the "Government set"—showing to anyone acquainted with the history, legal or otherwise, of the time, what indeed is all too obvious from other facts that he was no longer *persona grata* with the "powers that be."

The Rule for time to plead was not entirely uncalled for—the action was a simple one of trespass on the Case, and the declaration needed but to set out the Act of Parliament, the appointment of the Plaintiff

as Commissioner, his application to the defendant to be sworn, the Defendant's position as a Justice of the King's Bench, his refusal and damage resulting. The declaration did allege malice and intent to bring the plaintiff into great scandal and disgrace; but these were mere matters of aggravation to increase the damages—he claimed \$20,000. The defence was not so easy to frame, and we find not only Dr. Baldwin and his client in correspondence and conference but also Mr. Sherwood consulted and his opinion asked. This was Levius Peters Sherwood who became a Justice of the King's Bench in Michaelmas Term, 1825, on Powell's resignation as Chief in that year. He was succeeded by Mr Justice Campbell and Sherwood took Campbell's place on the Bench. The "Pleas" would alarm a modern lawyer by their length and wealth of technicality and repetition; but, boiled down, the defence was two-fold: 1. a general denial, 2. setting out the facts of the application to the defendant as Executive Councillor for advice as to the appointment of Commissioners and his advice, the subsequent application to him for his reasons for objecting to Wood, and his answer (setting out the whole nauseous story), and what took place when the Commissioners called upon him. It was recognized that this second plea was rather to damage than a valid defence.

The case came on for trial at York, October 15, 1823. The day before the trial was to be proceeded with, Dr. Strachan wrote the Chief Justice urging a settlement, and offering his services as mediator. He replied: "Sensible of no injury to Mr. Wood in any part of my conduct, public or private, I shall be ever ready to make all reparation in my power except by a compromise before conviction. The industry with which the public mind has been poisoned by false and malignant calumnies on my principles and conduct, cannot have failed to operate the desired prejudgment of any jury to whom it may be submitted, and renders it impossible for me to shrink from the enquiry which I regret on account of the respectable part of the community which unite with you in deprecating the progress of this suit". A suggestion met in this spirit naturally came to naught; and the action proceeded.

The presiding Judge was Mr. Justice Campbell, but Mr. Justice Boulton was also upon the Bench—he was consulted and he advised on all points that arose at the trial: Macaulay held the plaintiff's brief, and Dr. Baldwin that of the defendant.

Colonels Wells and Allan were called and gave a very fair and impartial account of the facts at the time of the alleged refusal, the Commission was produced and the letter we have spoken of; also the Writ of Mandamus and the return of defendant thereto, the new Commission which superseded that which contained the plaintiff's name and which did not contain his name. The remuneration the Commissioners received who sat by virtue of the latter Commission was also proved.

For the defence, Major Hillier was called; he gave an account of the conversations between himself and the Chief Justice, and said the Chief Justice did not exhibit any animosity toward the plaintiff. No evidence was given of any express demand by the plaintiff to be sworn or of any express refusal by the defendant; but the refusal of the plaintiff to be sworn when he returned with Major Hillier, was proved.

The trial judge held that demand and refusal should be inferred from the circumstances and from the letter by the plaintiff to the defendant of July 16 not answered. The jury found for the plaintiff

for £120,³ being the amount the other Commissioners received for their services as such.

Powell in his "Story of a Refugee" says that the "action was founded on a charge of the basest calumny—that of declining to perform an act of duty—without just cause and from personal malice. It was the refusal from such motives to obey a Mandamus of the Court of King's Bench, to swear into office the plaintiff appointed to it by lawful Commission." This, as we have seen, is not the fact, the action was begun before the Mandamus was applied for.

Complaint is made by Powell that the Court did not require proof of the demand by Wood to be sworn in and the refusal of Powell to swear him in, but, "commanded the jury to presume the demand and refusal.... It was one of the few cases where the Law required direct and positive evidence of the facts, and admits no presumption." But the law does not require that the word "refuse" should be used or any equivalent to it. It is enough to show that the person to whom the writ is directed withholds compliance, and distinctly determines not to do what is required. The question is, "has the party done what the Court distinctly sees to be equivalent to a refusal?" *R. v. Brecknock Canal Co.*, 3 A. & E., 222.

The error, if there was an error, was in directing the jury to find demand and refusal instead of leaving it to the jury to find these or not, according as they viewed the evidence.

Powell did not pursue the usual course of moving for a new trial, or for judgment *non obstante veredicto*. Baldwin had at the trial moved for a nonsuit on the ground that the evidence did not show demand and refusal; and this the defendant himself desired to make a ground of objection.

But both puisne Judges had been on the Bench when the ruling was made at the trial, and while the ruling was in form that of Mr. Justice Campbell only, the defendant knew that his Brother Boulton agreed in the opinion. It seemed to be hopeless to expect the King's Bench to reverse the decision of the only two judges who could sit to hear the appeal, if an appeal should be taken. Accordingly, the defendant decided on a Bill of Exceptions⁴—a most unusual course. The Bill was drawn up at the close of the trial, and tendered to Mr. Justice Campbell for his seal; he asked time to read it at his leisure as he was then exhausted by the eight-hour trial of the case. He subsequently returned the Bill declining to seal it. If the facts alleged in a Bill were true, the Judge should have sealed it under the provisions of the Statute of Westminster the Second, 13 Edw. I. c. 31, and, upon refusal, the party tendering the Bill might obtain a compulsory writ from Chancery against him commanding him to seal it. Powell upon the refusal lodged a petition to Sir Peregrine Maitland as "Lieutenant Governor of the Province of Upper Canada and Chancellor therein", and praying "Your Excellency will address the said William Campbell as Justice of Assize as aforesaid, commanding him forthwith to put his seal to such Bill of Exceptions." His Excellency referred the matter to the Attorney General, John Beverley Robinson. That able lawyer desired first to see the Bill of Exceptions tendered, before giving an opinion. "The application being unprecedented here and of extremely rare occurrence in England, I am unwilling to hazard an opinion hastily; but when I learn the nature of the Bill of Exceptions tendered, I shall give the matter immediate consideration." This was notified to Powell, the Bill as proposed was handed in, and the following day Hillier wrote him that it was

not for the purpose of preparing the Writ prayed for that the papers were handed to the Attorney General, but "that His Excellency might be satisfied (if he should be advised that he can in any case legally issue the required writ) that the case in question is one in which such a writ ought to be awarded as His Excellency is advised that there are some cases in which a Bill of Exceptions will not lie." The letter went on to say that, if desired, His Excellency would sit as Chancellor in the Council Chamber on Thursday, November 13: but adds significantly: "the question which has been made of his jurisdiction as Chancellor being at present, as you are aware, under the consideration of His Majesty's Law Officers in England he has necessarily forborne until a decision is received, to make those arrangements which would have afforded a more known and regular access for the purposes of justice; and His Excellency hoped that in the meantime, it might have been found possible to avoid a resort to a jurisdiction, the existence of which has been called in question." Powell at once answered saying that he did not know that any doubt existed as to the power to issue the writ, otherwise he would not have solicited it. He knew that the proceeding was novel, but thought it was a matter of course. After saying that the "writ was to be prepared by the officer (the Attorney General) which induced me to inform you of the probable application by anticipation"—not the only suggestion against the good faith of the Attorney General—he continues, "I cannot for a moment continue any application for the exercise of a questionable jurisdiction." It is plain he had no hope of success and made a virtue of necessity.

The verdict was for less than five hundred pounds, so that he could not appeal to the King in Council.

The plaintiff, Wood, offered later to discharge the judgment if the costs were paid to his Attorney who had then become a Justice of the King's Bench; but this offer Powell "rejected as a tacit admission of the justice which it would be dishonourable to acknowledge." He shows no gratitude to Wood for his offer which certainly does not seem ungenerous, but complains that the judgment "hangs over him and his posterity as a charge on his real property."

In 1833 Powell wrote the following letter to Wood:

"Toronto, 5th July, 1833

"Sir:

"When you obtained a judgment against me by the concurrence of my brother judges on a charge of refusing to administer an oath to you from base and unworthy motives, I was Chief Justice of this Province, and esteemed the judgment so iniquitous that I declined to cancel it at the expense of paying the costs to your Attorney, the present Judge Macaulay.

"I did not appeal because the amount of the judgment would not carry it to the King in Council, and for nearly ten years, have expected execution to consummate the injustice.

"It hangs a cloud on my real property, to no part of which can I give a title whilst that judgment remains unsatisfied on the Record. This delay of that entry on the Record is becoming an additional injury as the value of my real estate (is) now at its summit and probably really diminishing.

"If therefore such entry on the record as will free my land from the judgment (be not made), I shall be constrained to petition the Legislature for that purpose at its first meeting."

"We find among his MSS a draft bill to meet the case. It provided that "hereafter any judgment of the Superior Court from which no appeal has been made within twelve months from the date of the entry of the judgment and for which no writ of execution shall have been sued out within fifteen months of the said entry, shall be no longer binding upon the movable or real estate of the judgment (Debtor), but shall be esteemed to have (been) satisfied." This Bill does not seem to have been brought up on the Legislature; certainly it was not passed.

At this time and till after Powell's death, it was considered by many that a judgment bound the land even without a writ of execution, and it required express decisions of the Court of King's Bench to establish the doctrine that not the judgment but the writ of execution bound the land, and that not until its delivery to the sheriff. Doe dem. McIntosh v. McDonell, (1835), 4 U. C. R., O. S., 195. Powell seems to have been of opinion to the contrary.

NOTES TO APPENDIX F

¹Alexander Wood was a well known personage in York at the time. His brother came from Aberdeen very early in the history of Upper Canada; he went into partnership with William Allan in York and later carried on business on his own account. He died, leaving considerable property which Alexander came to York to attend to. Alexander was a close friend of Dr John Strachan who had himself come from Aberdeen; some of the correspondence between them is still in existence. He seems to have become a close friend of the Powell family also; during Mr Justice Powell's absence in Europe seeking the release of his son Jeremiah from a Spanish-American prison, Mrs Powell applied to Wood for money for the support of herself and family.

He became, in 1812, Secretary of the Loyal and Patriotic Society. Not long after the lawsuit, Wood v. Powell, he returned to Scotland, where at Stonehaven not far from Aberdeen, he had a family estate; he was never married. Alexander and Wood Streets in Toronto are named after him.

The curiosity which Powell reprehends was, no doubt, an indication of a mental lesion not amounting to actual insanity and not very uncommon. Dr Thom, surgeon of the 41st Regiment writing to Wood from Fort George in 1806, advises him to pursue a certain mode of treatment which was the approved treatment at the time for mental disorders. Further particulars may be seen in Dr Scadding's *Toronto of Old*, p. 187 and in Robertson's *Landmarks of Toronto*, I, 177-9, and II, 1007-1020.

The circumstance that he was of high standing is given bluntly as a reason for not prosecuting him: such an occurrence was by no means rare at that time.

²The Action was not begun by Capias; Judges like Attornies were privileged from arrest and were sued by Bill (usually called a Bill of Privilege); as they were supposed to be always personally present in Court there was no need of process to compel their appearance.

³It may interest members of the legal profession to know that the costs taxed to the plaintiff which the defendant was order to pay, were £39.10.0 (\$158.00); the costs of his own attorney, Dr W. W. Baldwin were £17.10.2 (\$70.04) and counsel fees amounting to £25. (\$100).

⁴A "Bill of Exceptions" is "in the nature of an appeal examinable not in the Court out of which the record issues for the trial at *nisi prius* but in the next immediate Superior Court upon a writ of error after judgment given in the Court below". Blackstone, *Comm.* III, 372.

The Bill of Exceptions in this case would have come on for decision in the Court of Appeal, not in the Court of King's Bench.

The curious may find all the learning as to this obsolete proceeding in the pages of Todd and Buller; Tidd's *Practice*, p. 913, Buller's *Nisi prius*, 316, 317., Maddox' *Chancery*, I, 15, 16, also discusses the matter.

I confess that Powell received hard measure in this matter. It is impossible to find anything wrong in his *quasi* refusal to swear Wood in on Commission.

APPENDIX G

TRANSLATIONS

Du Calvet's *Appel à la Justice de l'État*, pp. 166, 167 (p. 170 *suprà*)
"In 1781, the number of those refusing to perform corvée service was greatly increased in the District of Montreal, taking their stand on the rights of nature and reason; and the Justices of the Peace declared themselves the defenders and fathers of the poor oppressed farmers: and upon the facts being proved they refused to convict the refusers for infractions which reason and justice justified them in. Upon news of this humane decision, the surgeon-judge, the imperious Mr. Mabane flew post-haste from Quebec to Montreal: he at once called the Justices of the Peace together, he ordered them in the King's name to enforce the existing laws in all their rigor: upon that authority which commands respect but is in that case so unworthily prostituted, an unavoidable disobedience to police orders is punished as a wilful and public crime. Those refusing are condemned to pay a fine of £5 sterling: and those unable through poverty to pay are cooped up in prison." And he exclaims: "Just Heaven! could beasts of burden who rebelled against too heavy a yoke which is laid upon them, be more severely chastised? Poor Canadians, bridled, muzzled, shackled and beaten thus pitilessly under the withers!" He is confident: "These forced services are the ruin of the Colony by their unwise imposition" and "it was thus that these rascally conquerors with a high hand made themselves masters of the houses of merchant and farmer—the wives, the daughters, the sisters joined the procession among the crowd of those, the spoils of victory."

Petition (p. 177, *suprà*)

"The very humble Address of all Estates and other Catholic inhabitants in the Province of Quebec in Canada—

TO THE KING

Sire:—

The happy occurrence which through the paternal care of Your Majesty just spread throughout Your whole Empire gives us the hope, in a very consoling way, of continuing to enjoy the happiness we now have of being British subjects.

Permit us in that capacity which is always dear to us, to approach Your Throne and there lay at the feet of Your Sacred Person, our very respectful representations—

In the fourteenth year of Your Majesty's reign, You were graciously pleased by an Act of Your Parliament to recognize us fully as subjects of Your Majesty and to authorize in this Province the worship of our religion and our system of laws.

Since that time, Most Gracious Sovereign, accidents and unforeseen obstacles have for a time suspended the happy effects of Your Royal

bounty to us. The several reasons which we have to lay before Your Majesty, seem to us based upon justice and right: and we humbly submit them to Your Excellency.

The unequivocal proofs of a constant fidelity and an inviolable attachment to the interests of Your Majesty which we have given even in the stormiest times inspire us with the humble confidence to hope that Your Most Gracious Majesty—always anxious to procure peoples submissive to Your Empire—would be very favorable to us and admit us without any discrimination under whatever form of government it may please you to establish in this Province to the precious participation in the favors, the rights, the privileges and the prerogatives which in all other parts of the globe, all the faithful subjects of Your Majesty enjoy.

And your faithful Canadian people filled with the liveliest gratitude will ever pray for the preservation of Your Majesty and the prosperity of Your Dominions.

Copy

Adhémar

Jn Delisle

Copy enclosed in a letter to Lord North No. 16.

"Memorandum to make felt the necessity in which the Province of Quebec is found to have ecclesiastical subjects.

"When in the year 1760, this Province was subjected to the British Empire, the free exercise of the Roman Catholic religion which was the only one there professed, was reserved to the good pleasure of the King, and later confirmed by the Treaty of Paris, 1763.

"Under the Royal protection of His Majesty, the inhabitants of this Province enjoyed that liberty without interference or molestation but without any assurance for the future until 1774, when it pleased His Most Gracious Majesty, for the complete security and tranquillity of the inhabitants of the said Province to declare in Parliament and through His assent, that the subjects of His Majesty, professing the religion of the Church of Rome in the said Province of Quebec should have kept and enjoy the free exercise of the religion of the Church of Rome.

"Our religion, the religion of our fathers has, then, been authorized by the benevolence and signal bounty of His Majesty with the advice and consent and under the sanction of that respected body which represents the Nation in which we find ourselves remitted and incorporated Justice and equity have dictated that disposition, ardently desired by the whole of a numerous people now amounting to more than 130,000 souls "An attachment sincere and determined, to the Most August Person of His Majesty, His Royal Family and His Government, is the only return which this faithful and recognizant people can make for such a gift: therefore we have the satisfaction to see that that recognizance based upon and assisted by the true principles of that religion which is retained for us, has disconcerted the attempts and the temptations of the enemies of His Majesty to discontent the inhabitants of this Province against the Government of His Majesty and of Great Britain. All the European subjects or allies of His Majesty who have appeared in this Province during the unhappy troubles which so long menaced our Province bear conclusive witness to the fidelity and loyalty of the Roman Catholic clergy: Menaces, violence, imprisonment—

nothing could slacken the zeal of any of them: in the cities and in the country, all their members constantly and openly inculcated the essential maxim of obedience and fidelity to the King by ways the most efficacious, those of religion, that sacred tie which binds the Roman Catholic peoples to their sovereign. Their zeal was not without result: and since the liberty accorded to Roman Catholics to profess and practise their religion has there happily sown the seeds of a sincere attachment and an approved loyalty, they hope with humble confidence that there will in like manner be accorded to them the essential and necessary means to procure for them the help which they expect from their religion and it is in that regard for reasons which could not then enter into the considerations of the Government, that no sufficient provision has been made.

"In reality, religion cannot be exercised without the aid of Bishops and Priests who are its Ministers.

"From its establishment until the Conquest, our Colony was unable by itself to supply itself with a competent number of priests to serve the different Parishes and to furnish men for the Seminaries, Colleges, Hospitals and Communities. The Houses of the Jesuits and Récollets provided persons come from Europe and a number of European priests scattered in the Seminaries and the country places formed two-thirds of the clergy when this Province was added to the British Empire: That revolution has been for this Province the happy epoch which under the influence of the Government of Great Britain has placed in movement, the sources of its growth and prosperity, agriculture and industry once encouraged the population has considerably increased. Quantities of land which had not been cleared have become fertile fields and form fine establishments. A new College has been opened in Montreal for the instruction of the youth who formerly could not without difficulty and at great expense obtain a suitable education, that City being situate leagues from the Capital which alone had a College. Beyond contradiction, we owe all these advantages to the tranquillity and the encouragement procured for us by the Conquest. But at the same period, the priests, ministers of religion and the professors necessary for education, ceased to come to us from Europe, in the time elapsed till the present, the professors of the Colleges and the greater part of the priests then living have died the small number yet remaining are aged and infirm, and daily experience proves to us that all the pains taken by the worthy Prelate placed with the good pleasure of His Majesty over the spiritual government of our Church cannot draw from our Province as many ecclesiastics as the various needs demand: at the present time, more than seventy-five Parishes are without Curés, without taking into consideration several districts recently established which are in a condition to form new ones: the Congregations and Seminaries are on the eve of failing entirely in those to conduct them: the Indians, Algonquins, Nipissings, Six Nations, Iroquois, Hurons and Abenakis, all Roman Catholics and who in the recent troubles have all shown so much zeal for the Government are about to find themselves destitute of missionaries: already several villages have no education of the youth, that object so important which always deserves the attention of every government is limited and neglected in this Province only from want of teachers and professors of every kind, who could cultivate that noble emulation which makes shine the talents and the arts necessary equally for the advantage of the individual, the well-being of society and the support of the state—so that for all these objects, the Province finds

itself in pressing need for assistance from without. In fine it results from the rapid and marked increase of establishments which are formed and are daily forming by Roman Catholics, that a single Bishop can no longer cover all the details of his ministry in respect of the many people who are committed to his care. The pastoral visits to the various Parishes and Indian missions which Bishops can not too often repeat for the consolation of the people, the strengthening of good order and the correction of the abuses that may creep in from time to time have become and are becoming more and more impossible for a single individual. That is why the Roman Catholics in the said Province of Quebec convinced that liberty of religion implies also the liberty of the means to draw from it the aids they expect from it and full of confidence in the benevolence and Royal protection of His Majesty of which they have already experienced signal results, hope that they will be granted by the good pleasure of His Majesty and of his Government:—

“1st. That in view of the considerable extent of the Province and the great number of Roman Catholics, there established a Bishop should be given to the District of Montreal in order that all persons may equally receive the aids which one alone cannot procure at once.

2nd. That since the Province cannot itself furnish the necessary number of Priests and Professors, it may be permitted to bring in such Professors or Priests speaking the language of the country as they may need.

“3rd. That those so desiring may come into the Province to perform such functions as they deem advisable.

[N. B. The text of the 2nd and 3rd prayer is probably corrupt.]

“4th. And inasmuch as it is of great importance that the foreigners who may be called into the Province should equally enjoy the confidence of the Government and of the people, and since the Priests resident in this Province who have been educated in the houses of St. Sulpice and Les Missions Étrangères have given undeniable proofs that the principles of these Houses are of a steadfast purity in respect of religion and of an entire loyalty towards the legitimate sovereign of whatever nationality, it is apparent that the pupils of these schools who wish to come to this Province would be the most proper to fill the two objects and would merit in that regard the preference—unless, at least, it should appear otherwise to His Majesty.

“These just and moderate requests are so truly bound to the liberty of religion that the Roman Catholics cannot but expect with humble confidence that they will be accorded by His Most Gracious Majesty: And that distinguished favor joined to the signal protection with which His Majesty has always favored this Province will produce the most perfect harmony, affection, fidelity and loyalty toward His Majesty and His Government from which will result the happiness and security of this Province to the mutual advantage of its Colonists and of Great Britain.”

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The following contractions are employed :

Atty-Gen.	Attorney-General
C. J.	Chief Justice
C. P.	Common Pleas
Ct.	Court
K. B.	Court of King's Bench
L-G.	Lieutenant Governor
Leg. Assy.	Legislative Assembly
Leg. Col.	Legislative Council
Leg. Colr.	Legislative Councillor
P.	William Dummer Powell
U. C.	Upper Canada
U. E. L.	United Empire Loyalist

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