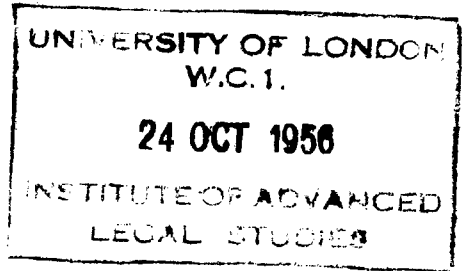


49,1897



In the Privy Council.

No. 3 of 1897.

44798

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA Appellant,

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO Respondent.

JOINT APPENDIX.

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[References to Public Documents, Authorities, and Information bearing on the discussion of the Queen's Counsel Case.]

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In the Privy Council.

No. 3 of 1897.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE ATTORNEY-GENERAL FOR THE DOMINION
OF CANADA *Appellant,*

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE
OF ONTARIO *Respondent.*

APPENDIX TO THE QUEEN'S COUNSEL CASE.

PATENT TO SIR FRANCIS BACON, 1604.

Rymer's Fœdera, Vol. xvi., Fol. 596, Hagæ Edition.

“ De Concessione ad Vitam pro Francisco Bacon.

Rex omnibus ad quos.

Salutem :

Sciatis quod nos :

Tam in consideratione boni fidelis et acceptabilis Servitii; per Dilectum
Servientem nostrum Franciscum Bacon militem præstiti et impensi, quam
pro diversis aliis Causis et Considerationibus ad hoc nos specialiter
10 moventibus.

De Gratia nostra speciali, ac ex certâ Scientiâ et mero Motu nostris,
constituimus ordinavimus et appunctuavimus, ac, per Præsentes, pro Nobis
Hæredibus et Successoribus nostris, constituimus ordinamus et appunctuamus
præfatum *Franciscum Bacon* Consiliarium nostrum ad Legem, sive unum de
Consilio nostro erudito in Lege.

Dedimus etiam et concessimus et pro Nobis Hæredibus et Successoribus
nostris, damus et concedimus, per Præsentes, præfato Francisco Locum et
Præsidentiam in Curiis nostris vel alibi et Præaudientiam, necnon omnia et
singula Proficua Advantagia, Emolumenta Jura Præeminentia confidentias, seu
20 alia quæcumque quæ ad unum Consiliarium nostrum ad Legem, ut Consiliario

Copy Patent
to Sir Francis
Bacon as
King's
Counsel,
being the
first such
patent which
is known,
1604.

Copy Patent
to Sir Francis
Bacon as
King's
Counsel,
being the
first such
patent which
is known,
1604

—continued.

hujusmodi, et minimè ratione alicujus specialis officii, spectant aut pertinent, aut spectare aut pertinere consueverunt aut de jure debent.

Volumus etiam et concedimus, pro Nobis Hæredibus et Successoribus nostris, quòd præfatus Franciscus Bacon habeat plenam et sufficientem Potestatem et Auctoritatem ad omnia et singula præstanda exequenda et perimplenda, quæ quivis alius de Consilio nostro erudito in Lege ut unus de Consilio nostro prædicto, et minimè ratione specialis alicujus officii possit exequi et perimplere.

Habenda et tenenda gaudenda percipienda et exercenda Potestatem auctoritatem Proficua, ac omnia et singula præconcessa sive expressa præfato Francisco quamdiu ipse se bene gesserit in executione et exercitio Muneris Authoritatis et Potestatis Prædictarum, in tam amplis modo et forma quàm aliquis alius de Consilio nostro erudito in Lege, vel ipse Franciscus, ratione Verbi Regii Elizabethæ nuper antecessoris nostri, vel ratione Warranti nostri sub Signatura nostra Regia, habuit tenuit gavisus est vel executus est nichilominus nolumus quòd hæc Concessio nostra deroget alicui officii antehac, per Nos aut Antecessores nostros dato vel concessio.

Et ulterius, de uberiori Gratia nostra, pro exercitio Servitii Prædicti, dedimus et concessimus, ac per Præsentes, pro Nobis Hæredibus et Successoribus nostris, damus et concedimus præfato Francisco Bacon Vadium et Feodum Quadraginta Librarum bonæ et legalis monetæ Angliæ per annum, solvendum annuatim eidem Francisco Bacon ad Festa Sancti Michaelis Archangeli et Paschæ per æquales Portiones, de Thesauro nostro Hæredum et successorum nostrorum, per Manus Thesaurarii et Camerariorum ibidem pro tempore existentium, primâ solutione inde incipiendâ ad Festum Festorum Prædictorum proximo post Datam Præsentium.

Habendum et tenendum gaudendum et percipiendum Vadium et Feodum prædictum, durante Vitâ naturali prædicti Francisci, Bacon.

In Cujus Rei, etc.

Teste Rege apud Harfeild vicesimo quinto. Die Augusti, A° 1604, A.R. 2.

Per Breve de Privato Sigillo."

30

QUEBEC, 1763.

EXTRACT FROM COMMISSION OF CAPTAIN-GENERAL AND GOVERNOR-IN-CHIEF OF THE PROVINCE OF QUEBEC.

21 November, 1763.

To James Murray—

(" Maseres' Commissions," page 93—at page 97.)

* * * * *

" and we do hereby grant unto you full power and authority to constitute and
" appoint judges, and (in cases requisite) Commissioners of Oyer and Terminer,
" justices of the peace, and other necessary officers and ministers, in our said
" province, for the better administration of justice, and putting the laws in
" execution; and to administer, or cause to be administered, unto them such oath
" or oaths as are usually given for the due execution and performance of offices
" and places, and for clearing the truth in judicial causes."

Extracts
from Com-
missions of
Captains-
General and
Governors-
in-Chief, and
Lieutenant-
Governors of
British
Provinces,
1763 to
1864.
Quebec.

QUEBEC.
 COMMISSION OF LIEUTENANT-GOVERNOR FROM "MASERES' COMMISSIONS"
 (PAGE 122).

GEORGE, R.

George the Third, by the Grace of God, King of Great Britain, France, and Ireland, Defender of the Faith, and so forth: To our trusty and well-beloved Guy Carleton, Esq.

Greeting:—

We, reposing especial trust and confidence in your loyalty, integrity, and ability, do, by these presents, constitute and appoint you to be our Lieutenant-Governor of our Province of Quebec, in America; to have, hold, exercise, and enjoy the said place and office during our pleasure, with all rights, privileges, profits, perquisites, and advantages to the same belonging or appertaining.

And further, in case of the death, or during the absence, of our Captain-General and Governor-in-Chief of our said Province of Quebec, now, and for the time being, we do hereby authorise and require you to exercise and perform all and singular the powers and directions contained in our commission to our Captain-General and Governor-in-Chief, according to such instructions as he has already received from us, and such further orders and instructions as he, or you, shall hereafter receive from us.

And we do hereby command all and singular our officers, ministers and loving subjects in our said Province, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at our Court at St. James's, the seventh of April, 1766, in the sixth year of our reign.

By His Majesty's command,

(Signed)

U. S. CONWAY.

Guy Carleton, Esq., Lieutenant-Governor of Quebec.

Entered as follows:

Entered at the Treasury,

(Signed) THOS. TOMKYN.

Entered in the office of the Lords Commissioners for Trade and Plantations.

(Signed) S. BRADBURY.

UPPER CANADA, 1828.

COMMISSION TO SIR J. COLBORNE, AUGUST 23RD, 1828, AS LIEUTENANT-GOVERNOR
 OF UPPER CANADA.

George the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.

To our trustworthy and well-beloved Sir John Colborne, Knight Commander of the most Honourable Military Order of the Bath, Major-General of our Forces,

Greeting:—

We, reposing especial trust and confidence in your loyalty, integrity, and ability, do, by these presents, constitute and appoint you to be our Lieutenant-

Extracts
 from Com-
 missions of
 Captains-
 General and
 Governors-
 in-Chief, and
 Lieutenant-
 Governors of
 British
 Provinces,
 1763 to
 1864
 —continued.
 Quebec.

Upper
 Canada.

Extracts
from Com-
missions of
Captains-
General and
Governors-
in-Chief, and
Lieutenant-
Governors of
British
Provinces,
1763 to
1864
— continued.

Governor of our Province of Upper Canada in America, in the room of Major-General Sir Peregrine Maitland.

To have, hold, exercise and enjoy the said place and office during our pleasure, with all rights, privileges, profits, perquisites and advantages to the same belonging or appertaining.

And further, in case of the death, or during the absence, of our Captain-General and Governor-in-Chief of our said Province of Upper Canada now and for the time being, we do hereby authorise and require you to exercise and perform all and singular, the powers and directions contained in our commission to our Captain-General and our Governor-in-Chief, according to such instructions 10 as he hath already received from us, and such further orders and instructions as he or you shall hereafter receive from us.

And we do hereby command all and singular, our officers, ministers, and loving subjects in our said Province, to take due notice hereof, and to give their ready obedience accordingly.

Given at our Court at Windsor, the 23rd day of August, 1828, in the ninth year of our reign.

By His Majesty's command,

(Signed) G. MURRAY.

Major-General Sir John Colborne,

to be Lieutenant-Governor of the Province of Upper Canada.

20

Lower
Canada.

LOWER CANADA, 1835.

EXTRACT FROM COMMISSION OF CAPTAIN-GENERAL AND GOVERNOR-IN-CHIEF IN AND OVER THE PROVINCE OF UPPER AND LOWER CANADA.

To Archibald Earl of Gosford, 13th June, 1835.

* * * * *

And we do hereby authorise and empower you to constitute and appoint Judges, and in cases requisite, Commissioners of Oyer and Terminer, Justices of the Peace and other necessary officers and ministers in our said Provinces of Lower and Upper Canada, for the better administration of justice, and putting 30 the laws in execution and to administer or cause to be administered unto them such oath or oaths as are usually taken for the due execution and performance of offices and places, and for clearing the truth in judicial causes.

Canada.

THE LATE PROVINCE OF CANADA, 1861.

EXTRACT—COMMISSION APPOINTING VISCOUNT MONCK, CAPTAIN-GENERAL AND GOVERNOR-IN-CHIEF IN AND OVER THE PROVINCE OF CANADA.—2 NOVEMBER, 1861.

“ And we do further authorise and empower you to constitute and appoint
“ Judges and in cases requisite Commissioners of Oyer and Terminer, Justices of
“ the Peace and other necessary officers and Ministers of our said Province of Canada
“ for the better administration of justice and putting the laws into execution.” 40

Printed in full—Appendix Journals of Assembly of Nova Scotia, 1862, No. 34.

BRITISH COLUMBIA, 1864.

EXTRACT—COMMISSION APPOINTING FREDERICK SEYMOUR, ESQ., GOVERNOR OF
BRITISH COLUMBIA.—11 JANUARY, 1864.

“And we do hereby authorise and empower you to constitute and appoint
Judges and in cases requisite, Commissioners of Oyer and Terminer, Justices
of the Peace and other necessary officers and Ministers in our said Colony, and
to administer or cause to be administered unto them such oath or oaths as are
usually given for the due execution and performance of offices and places, and
for the clearing of truth in judicial matters.”

Extracts
from Com-
missions of
Captains-
General and
Governors-
in-Chief, and
Lieutenant-
Governors of
British
Provinces,
1763 to
1864
—continued.

10 NOVA SCOTIA, 1769.

EXTRACT—COMMISSION TO WALTER PATERSON, ESQUIRE, AS CAPTAIN-GENERAL
AND GOVERNOR-IN-CHIEF OF NOVA SCOTIA.—4TH AUGUST, 1769.

“And we do hereby grant unto you full power and authority to constitute
and appoint Judges and in cases requisite, Commissioners of Oyer and Terminer,
Justices of the Peace, Sheriffs, and other necessary Officers and Ministers in Our
said Island, for the better administration of Justice, and putting the laws into
execution, and to administer or cause to be administered unto them, such oath
or oaths as are usually given for the due execution and performance of offices
and places, and for the clearing of truth in judicial causes.” Dom. Sess. Papers,
20 1883, vol. xvi., No. 70, page 2.

British
Columbia.
Nova Scotia.

NEW BRUNSWICK, 1784.

EXTRACT—COMMISSION TO GOVERNOR THOMAS CARLETON, 1784, AS CAPTAIN-
GENERAL AND GOVERNOR-IN-CHIEF OF NEW BRUNSWICK.—16TH AUGUST, 24TH
OF GEO. III.

The text of this Commission is printed at length in the Dominion Sessional
Papers, 1883, vol. xvi., No. 70, page 47.

“And we do hereby authorise and empower you to constitute and appoint
Judges, and in cases requisite, Commissioners of Oyer and Terminer, Justices of
the Peace and other necessary Officers and Ministers in Our said Province, for the
30 better administration of Justice and putting the laws in execution, and to
administer or cause to be administered unto them such oath or oaths as are
usually given for the due execution and performance of offices and places, and for
the clearing of truth in judicial causes.”

New Bruns-
wick.

PROVINCE OF NEW YORK, 1754.

MASERES' COLLECTION OF COMMISSIONS,

with the view of showing the resemblance of the Civil Constitutions given to the
two Provinces of Quebec and New York by His Majesty's Commissions and
Instructions to his Governors of them.

40 COPY OF A COMMISSION TO SIR DANVERS OSBORN, CAPTAIN-GENERAL AND
GOVERNOR-IN-CHIEF IN AND OVER THE PROVINCE OF NEW YORK, 1754, IS INCLUDED.

Extract, page 244:

“And we do hereby authorise and empower you to constitute and appoint

New York.

Extracts
from Com-
missions of
Captains-
General and
Governors-
in-Chief, and
Lieutenant-
Governors of
British
Provinces,
1763 to
1864

“Judges and in cases requisite, Commissioners of Oyer and Terminer, Justices of the Peace and other necessary Officers and Ministers in our said province for the better administration of justice and putting the laws into execution and to administer or cause to be administered unto them such oath or oaths as are usually given for the due execution and performance of offices and places and for the clearing of truth in judicial causes.”

COLONY PRECEDENTS BY ANTHONY STOKES, HIS MAJESTY'S CHIEF JUSTICE OF GEORGIA, PUBLISHED IN 1783.

—continued.

At page 149, gives a modern form of a Governor's Commission—extract at page 158: 10

“And we do hereby authorise and empower you to constitute and appoint Judges and, in cases requisite, Commissioners of Oyer and Terminer, Justices of the Peace, and other necessary Officers and Ministers in our said province, for the better administration of justice and putting the laws in execution; and to administer or cause to be administered unto them such oath or oaths as are usually given for the due execution and performance of offices and places and for the clearing of truth in judicial causes.”

Appoint-
ments of
King's
Counsel and
Queen's
Counsel for
Lower
Canada,
1809 to
1839.

LIST OF KING'S AND QUEEN'S COUNSEL APPOINTED IN LOWER CANADA,
1809 TO 1839.

Canada Parliamentary Papers, 1843, Appendix AA, being extract from a Return of Appointments in Lower Canada, from the division of the Province of Quebec in 1791, into the two Provinces of Upper and Lower Canada, to the Union.

1809, 20 June	—E. Bowen.	
1811, 3 Sept.	—D. Ross.	
1812, 1 June	—A. Caron.	
1816, 9 Jan.	—C. R. Ogden.	
1821, 9 Oct.	—J. T. Taschereau.	
1824, 15 July	—P. Vezina.	
1825, 9 Oct.	—J. R. Vallieres de St. Real.	30
1827, 25 July	—S. Sewell.	
1828, 6 Sept.	—A. W. Cochrane.	
1829, 15 July	—J. Bedard.	
1830, 11 Dec.	—P. Vezina.	
1830, 11 Dec.	—S. Sewell.	
1830, 11 Dec.	—A. W. Cochrane.	
1830, 11 Dec.	—D. Ross.	
1831, 24 Feb.	—J. Bedard.	
1831, 5 April	—M. O'Sullivan.	
1831, 8 Dec.	—P. Panet.	40
1832, 6 Nov.	—D. Mondelet.	
1833, 8 Feb.	—E. Peck.	

1835, 11 March—A. D. Bostwick.
 1835, 19 June —A. C. Grant.
 1835, 19 June —A. Buchanan.
 1835, 22 June —J. F. J. Duval.
 1836, 24 Sept. —H. Black.
 1838, 4 Jan. —C. D. Day.
 1838, 13 Jan. —P. D. Dumalin.
 1838, 1 March—H. Driscoll.
 1838, 31 March—J. Boston.
 1838, 20 Dec. —H. Black.
 1838, 20 Dec. —P. Vezani.
 1838, 20 Dec. —A. W. Cochrane.
 1838, 20 Dec. —D. Mondelet.
 1838, 20 Dec. —A. Buchanan.
 1839, 14 May —A. R. Hamel.

Appoint-
 ments of
 King's
 Counsel and
 Queen's
 Counsel for
 Lower
 Canada,
 1809 to
 1839

— continued.

10

No. 53.

COPY OF A DESPATCH FROM SIR F. B. HEAD, BART., K.C.B., TO LORD GLENELG.
 From the Book of Despatches, Sir F. B. Head, extract page 416.

Government House,
 Toronto, 10th September, 1837.

20

* * * * *
 “ On my dissolving the Parliament, And appealing to the People of Upper
 “ Canada for Redress, they Completely overturned the Republican Party in
 “ general, and Mr. Bidwell in particular.

“ In vain he attempted to retain his Station, but he was driven by the
 “ People, not only from the Speakership, but from the House of Assembly itself;
 “ in fact he lost his Election.

30 “ My Lord, the whole of the above Facts are known to your Lordship; and
 “ yet in the very same Despatch in which I learned that the Promotion of His
 “ Majesty's Attorney and Solicitor-General has, after a whole life of Loyalty and
 “ Devotion to our Sovereign been arrested from a Newspaper Statement of an
 “ erroneous opinion said to have been uttered in the Heat of a religious Debate,
 “ I am informed that, in opposition to my Recommendation to the Contrary, it is
 “ the Wish of His Majesty's Government, that Mr. Bidwell should be raised to
 “ the Bench.

40 “ In my former Despatch on this subject I submitted to your Lordship,
 “ that ‘publicly to raise Mr. Bidwell to the Bench would deprive me of the
 “ Respect and Confidence of the People of this Province, the Welfare and
 “ Honour of which,’ I added, ‘depended on His Majesty never promoting a
 “ disloyal Man.’

“ To these Principles and Opinions I respectfully and unalterably adhere,
 “ and nothing is therefore left for me but to declare to your Lordship with the
 “ deepest Regret, that so long as I remain Lieutenant-Governor of this Province
 “ I will never raise Mr. Bidwell to the Bench; and I think it proper to confess
 “ to your Lordship, that I have at this moment Two Appointments to make of

10th Sept.
 Extra Des-
 patch.
 Sir F. B.
 Head to
 Colonial
 Secretary.
 Announce-
 ment of
 intention to
 appoint
 Queen's
 Counsel for
 Upper
 Canada,
 1837.

“ King’s Counsel, neither of which can I conscientiously bestow upon that Gentleman, who has not as your Lordship seems to conceive, ‘at least for the present withdrawn himself from political Strife,’ but who in a moral Conflict has been forcibly driven from the Field.

“ Seeing that I have prevented him from becoming President of the Republican State of Upper Canada, he might now, no doubt, be happy to become a Judge under the Monarchy.”

QUEEN’S COUNSEL APPOINTMENTS FOR UPPER CANADA.

Appointment of Queen’s Counsel for Upper Canada, 1838.	A.D. 1838.—21 January,	Allan N. Macnab. John S. Cartwright. Henry Sherwood.	} By Lieutenant-Governor Sir 10 F. B. Head.
Ditto : Queen’s Counsel after Union Act, 1840. 1841 and 1842.	1841.—28 August, 1842.—13 September, ” 15 ” ” 16 ”	George Morse Boswell. John Prince. William H. Draper. Henry John Boulton. Robert Baldwin, to take precedence next after the Solicitor-Gener- al for the time being.	} By Governor-General Baron Sydenham.
	1842.—21 September, 26 September,	Henry Sherwood, patent of precedence. James Edward Small.	} By Governor-General Sir 20 Charles Bagot.

Parlia-
mentary
Return of
appointments
of Queen’s
Counsel,
1843.

1843.—6 OCTOBER, PARLIAMENTARY RETURN OF MEMBERS OF THE LEGISLATIVE ASSEMBLY WHO HAVE RECEIVED APPOINTMENTS OF QUEEN’S COUNSEL.

CANADA SESSIONAL PAPERS 1843.—APPENDIX P.

Extract from Statement of all Members of the Legislative Assembly who have Received Appointments as Queen’s Counsel, (6th Oct. 1843.)

Alwyn, T. C.	23 Sept., 1842.	Q.C.
Baldwin, Robert.	16 Sept., 1842.	Q.C.
Boswell, G. M.	28 Aug., 1841.	Q.C.
Boulton, H. J.	15 Sept., 1842.	Q.C.
Cartwright, John S.	22 Jan., 1838.	Q.C.
Lafontaine, L. H.	16 Sept., 1842.	Q.C.
Macnab, Sir Allan.	21 Jan., 1838.	Q.C.
Prince, John.	28 Aug., 1841.	Q.C.
Small, J. E.	26 Sept., 1842.	Q.C.
Sherwood, Henry.	23 July, 1842.	Q.C.
Ogden, C. R.	10 Feb., 1841.	Q.C.
Quesnel, F. A.	5 April, 1841.	Q.C.
Draper, W. H.	13 Sept., 1842.	Q.C.

REVOCATION OF COMMISSIONS TO QUEEN'S COUNSEL.

1849.—10 December.	John Rose.	} By Governor-General Earl of Elgin.
	Francis G. Johnson.	
1850.—13 April.	John Prince.	

Revocation by Lord Elgin of Commissions to Queen's Counsel, 1849 and 1850.

CANADA LAW JOURNAL, VOL. 17, PAGE 74, (15TH FEBRUARY, 1881).

RIGHT OF QUEEN'S COUNSEL TO DEFEND PRISONERS.

Article, Canada Law Journal, vol. 17, page 74, 15th Feb., 1881, respecting the right of Queen's Counsel to defend prisoners, 1881.

Though the legal atmosphere has been much disturbed of late by the questions whether the Dominion or a Provincial Government has the right to appoint a Queen's Counsel, and whether such appointment confers a "title of honour," and so comes from the Crown as *fons honoris*, or means only an "office," or a general retainer from the Crown, which entitles the barrister holding a patent as "One of Her Majesty's Counsel learned in the law," to pre-audience in Court, owing to "the dignity of his client," nothing has as yet been said respecting the peculiar duty of a Queen's Counsel—long known and still recognised in England—not to appear against the Crown in any civil or criminal cause, unless by special license.

In Gude's Crown Practice (v. 2, p. 599) a form of petition for this license is given. It sets forth that the petitioners are prosecuted at the suit of the Crown, and then proceeds "That _____ one of your Majesty's Counsel learned in the law would be very useful for your petitioners in defending them therein. Your petitioners therefore humbly beg your Majesty would be graciously pleased to grant your Royal dispensation to the said _____, to be of counsel for your petitioners in their defence."

The form of license is given at p. 390 of the same work, and after reciting the petition, reads: "We being graciously pleased to condescend to this request, do accordingly, by these presents, dispense with the said _____, and grant him our Royal license to be of counsel," etc. A note to the form states: "The certificate from the Secretary of State's office is considered sufficient for counsel to authorise him to receive the brief, without having the license itself."

The relations of Queen's counsel to the Crown may be better understood when it is stated that the two principal members of that select body are Her Majesty's Attorney and Solicitor-General; and if either of these counsel, who are more especially Her Majesty's law officers, can, without license, take briefs against the Crown, *a fortiori*, may those holding the subordinate rank and office of Her Majesty's Counsel, take briefs and be engaged in causes against the Crown.

The first barrister appointed by the Crown to be a Queen's Counsel was Lord Bacon, in 1590. His appointment was that of Counsel Extraordinary to the Queen; but no fee was then attached to the office. Soon after the accession of James I., he was constituted by Letters Patent, "King's Counsel," having been previously knighted.

The next appointment of King's Counsel was in 1668, when Sir Francis

Article,
Canada Law
Journal,
vol. 17, page
74, 15th
Feb., 1881,
respecting
the right of
Queen's
Counsel to
defend
prisoners,
1881
—continued.

North received a silk gown. It is said that, being desirous of making himself known at Court as an anti-Parliamentarian lawyer, he volunteered to argue for the Crown before the House of Lords the great Parliamentary case of the *King v. Sir John Elliott, Denzill Hollis, and others*, (3, St. Tr. 294), and his argument so pleased the Duke of York (afterwards James II.) that he induced the King to appoint him one of His Majesty's Counsel.

From early days a fee or retainer of £40 a year was attached to the office. Some writers say that Lord Bacon was the first to receive this fee; while others say that Sir Francis North received £40 as his fee in the case referred to, and that thenceforward it became the annual fee or retainer of a King's or Queen's Counsel. And after 6th Anne, c. 7, s. 24, (1708) the appointment was held to confer an "office of profit," which disqualified a member of the House of Commons from sitting in Parliament without re-election (a).

It seems to have been the rule as early as Sir Francis North's time, that a King's Counsel could not appear in any civil or criminal cause against the Crown. In the civil case of *Smith v. Wheeler*, 1 Mod. 38, (1669) the reporter states:—

"In this case Serjeant Maynard was about to argue that the residue of the term was not forfeited to the King."

"Kelynge, C.J. Brother Maynard, you would do well to be advised, whether, or no, you being of the King's Counsel, ought to argue against the King."

"Maynard answered, that the King's Counsel would have but little to do, if they should be excluded in such cases; and that Serjeant Crew argued Haviland's case, in which there was the like question."

"Twisden, J. In *Stone and Newman's case*, Cro. Car. 427, I know the King's Counsel did argue against estates coming to the Crown; but if my lord thinks it not proper, my brother Maynard may give his argument to some gentleman of the bar to deliver for him." And thereupon Serjeant Maynard handed his brief to Mr. Jones, who argued the case the following term. 30

The next authority in order of date is Sir William Blackstone. In the 3rd vol. of his Commentaries, p. 30, he says: "The King's Counsel answer, in some measure, to the advocates of the revenue, *Advocati fisci*, among the Romans. For they must not be employed in any cause against the Crown, without special license, in which restriction they agree with the advocates of the fisc."

Mr. Christian, in his edition of Blackstone, adds: "Hence none of the King's Counsel can publicly plead in Court for a prisoner, or a defendant in a criminal prosecution, without a license, which is never refused."

Coming down to latter times, we find that in the case of *Regina v. Jones*, 9 40 C. & P. 404, Mr. Cresswell, Q.C., was instructed to argue the case for the prisoner on a point reserved for the consideration of the fifteen judges. The reporter states: "The case was to have been argued before the Judges in Easter Term, 1840; but it being stated by C. Cresswell, who was instructed to argue for the defendant, that he had not obtained a license from Her Majesty, under the royal sign manual, to argue against the Crown, and that he had only received a certificate from the Secretary of State's office, the judge directed

“the case to stand over till Trinity Term, that Her Majesty’s license might be obtained.”

The reporter adds in a footnote that, “The Attorney and Solicitor-General, a Queen’s Serjeant, or a Queen’s Counsel, cannot appear in a case against the Crown (even if the Crown be a nominal party only) without a license under Her Majesty’s sign manual. To obtain the license a petition is presented to Her Majesty. This petition is left at the Secretary of State’s office, and a sum of £1 10s. paid, on which a certificate is given; and the license is then prepared, to which Her Majesty’s sign manual is obtained. Serjeants and counsel who have patents of precedency, may appear in cases against the Crown without any such license.”

Article,
Canada Law
Journal,
vol. 17, page
74, 15th
Feb., 1881,
respecting
the right of
Queen’s
Counsel to
defend
prisoners,
1881

—continued.

Serjeant Woolrych, in his *Lives of Eminent Serjeants* (p. xviii.) explains the origin of these latter appointments. “The King’s Counsel were gratified with a salary of £40 per annum. The rank thus salaried was held to be an office under the Crown. Hence, when a Member of Parliament became King’s Counsel he vacated his seat. This was, in more senses than one, a manifest inconvenience. A new election is ill-relished by the member; and if he were of the party of the Government, the loss of a supporter was hazarded. A remedy suggested itself. By investing the fresh ‘silk gown’ with a ‘patent of precedency,’ the person on whom it was conferred received no salary, and consequently was not an officer of the Crown, and thus retained his seat. And he had this further advantage. He was to take precedence next after the King’s Counsel last made, and his leadership at the Bar was thus secured to him. He had also the right to be called within the Bar.”

In the case of *Regina v. Bartlett*, 2 C. & K., 321, at the Hereford Assizes in 1846, Mr. Whateley, Q.C., before the case was called, stated that a brief had been delivered to him for the defendant in the case of a criminal information, at the suit of a private prosecutor, and that a letter had been sent to the Secretary of State for the Home Department, to ask that a license might be granted to him, as a Queen’s Counsel, to allow him to plead against the Crown, but to this letter no answer had, as yet, been received. He stated that he felt a difficulty in the matter, as he had been informed that on the Norfolk circuit a Queen’s Counsel had conducted the defence of a misdemeanour after an application had been made to the Secretary of State for a license, and before an answer was received, it being considered that after such an application a license was always granted as a matter of course if the case was not a Government prosecution.

That Lord Chief Justice (Sir Thomas Wilde, afterwards Lord Chancellor Truro) said, “I think there must be license, or at least a letter from the Secretary of State.”

The reporter adds, “As neither a license nor a letter from the Secretary of State arrived before the trial of the case, Mr. Whateley returned his brief.”

In Cox’s *English Government* (1863) the writer says (p. 375), “Queen’s Counsel or Her Majesty’s Counsel learned in the law, are barristers who by an honorary appointment as servants of the Crown obtain certain rights of precedence at the Bar. They have a nominal salary as servants of the Crown, and must not be employed in any cause against its interest without special license from the Crown, which is, however, never refused.”

Article,
Canada Law
Journal,
vol. 17, page
74, 15th
Feb., 1881,
respecting
the right of
Queen's
Counsel to
defend
prisoners,
1881
—continued.

Without citing further authorities we may add the following from the Transactions of the Judicial Society (vol. 2, p. 483): "Queen's Counsel have practically no duties whatever, corresponding to their title; for the most part, they have never to advise or act for the Crown; and they undertake no responsibilities by virtue of their appointments, beyond the negative duty of not appearing against the Crown, unless licensed so to do."

The result of these authorities would seem to be that, if Queen's Counsel in this country are "officers of the Crown," and occupy a position analogous to that of Queen's Counsel in England, they cannot appear in civil or criminal causes against the Crown without a license. But if their position is analogous to that of barristers with patents of precedency there, then they are not restricted in the cases they may be retained to defend, and may without such license appear in cases against the Crown.

The question is one for those holding the "office" of Queen's Counsel to consider and settle; or failing their doing so, then it may be raised by some daring "junior" in a criminal trial in one of our Courts, and the status of Queen's Counsel again discussed, together with the further question: whether a Patent of Precedence, instead of a Patent as Queen's Counsel, would be more appropriate recognition of professional rank in this country.

T. H. 20

(Foot-note "(a)");

(a) In ordering a writ for a new election it was called "the office of one of His Majesty's Counsel learned in the law." The constituencies vacated by the appointment were:

Berealston	(1715)	18	Com. Jour.	334
Higham Ferrers	(1726)	20	"	722
Newport	(1730)	21	"	587
Dorchester	(1735)	22	"	563
Stamford	(1737)	23	"	22
Dorchester	(1742)	24	"	333
Cirencester	(1745)	25	"	35
Bath	(1751)	26	"	299
Knaresborough	(1765)	30	"	441
Calne	(1815)	70	"	73
Newport	(1816)	71	"	164
Plympton Earle	(1824)	79	"	501

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BEREALSTON (1715) 18 COM. JOUR. 334.

Martis, 10 mo die Jannario; Anno. 2., Georgin Regis, 1715. 18 Com. Jour. p. 334.

"Ordered, that Mr. Speaker do issue his warrant to the Clerk of the Crown 40
"to make out a new writ for the electing a Burgess to serve in this present
"Parliament for the Borough of Berealston, in the County of Devon, in the

“room of Lawrence Carter, Esquire, who, since his election for the said
 “Borough, hath accepted the office of One of His Majesty’s Counsel Learned in
 “the Law.”

Article,
 Canada Law
 Journal,
 vol 17, page
 74, 15th
 Feb., 1881,
 respecting
 the right of
 Queen’s
 Counsel to
 defend
 prisoners,
 1881
 — continued.

JOVIS, 20 DIE FEBMARI; HIGHAM FERRERS, ANNO. 13 ,, GEORGIN REGIS, 1726
 20 COM. JOUR. p. 732.

“Ordered that Mr. Speaker do issue his warrant to the Clerk of the Crown,
 “to make out a new writ for the electing a Burgess to serve in this present
 “Parliament for the Borough of Higham Ferrers, in the County of Northampton,
 “in the room of the Honourable John Finch, Esquire, who since his election for
 10 “the said borough, hath accepted the office of one of His Majesty’s Counsel
 “learned in the law.”

Legislation with respect to taking the Opinion of the Courts on Constitutional
 and other questions by a direct reference without any action between the
 parties.

IMPERIAL STATUTE.

Imperial Statute providing for references by Her Majesty to the Judicial
 Committee of the Privy Council of Appeals, “and any such other matters what-
 “soever as His Majesty shall think fit.” 3 & 4, Will. IV., c. 41, s. 4.

Legislation
 with respect
 to taking the
 opinion of the
 Courts on
 constitutional
 and other
 questions by
 a direct
 reference
 without any
 action
 between the
 parties.
 Imperial,
 Dominion
 and Pro-
 vincial
 Statutes, also
 Acts of
 States of
 America.

DOMINION STATUTES.

20 R. S. C. c. 135, sec. 37. The Supreme Court Act: *A. G. Canada v.*
A. G. Ontario, 19 App. 31.
 47 Vict. c. 32, sub-sec. 2 of sec. 26; The Liquor License Act, 1883.
 48-49 Vict. c. 73, sec. 1; respecting the Liquor License Act, 1883. Dom.
 Sess. Papers, 1885, vol. 18 85A, 4 Cartwr, 342.
 51 Vict. c. 29, §§ 19-20; The Railway Act.

ONTARIO.

R. S. O. c. 44 § 52 (2) the Judicature Act and § 55.
 53 Vict. c. 13, for decision of Constitutional and other Provincial questions.

MASSACHUSETTS.

30 Constitution of 1780—part II., chap. 3, article 3, public statutes of Mass.
 1882-1887, page 32.
 Poore’s Federal and State Constitutions, part I., pages 968-969.

Imperial,
 Dominion
 and Pro-
 vincial
 Statutes,
 also Acts of
 States of
 America
 —continued.

NEW HAMPSHIRE.

Constitution of 1792—part II., sec. 74; Poore's Federal and State
 Constitutions—part II., page 1305.

MAINE.

Constitution of 1820, article VI., sec. 3, Poore's Federal and State
 Constitutions—part I., page 796.

RHODE ISLAND.

Constitution of 1842, article X., sec. 3, Revised Statutes of R. I. page 30.

FLORIDA.

Constitution of 1868, article VI. Poore's Federal and State Constitutions 10
 —part I., page 352.

In the Privy Council.

No. 3 of 1897.

*On Appeal from the Court of Appeal
for Ontario.*

BETWEEN

THE ATTORNEY-GENERAL FOR
THE DOMINION OF CANADA *Appellant,*

AND

THE ATTORNEY-GENERAL FOR
THE PROVINCE OF ONTARIO *Respondent.*

JOINT APPENDIX.
