

William Osgoode, Chief Justice

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When William Osgoode came to Upper Canada in June 1792 as its first Chief Justice,¹ he found civil and criminal courts already in operation. More than three years before, in 1788, Lord Dorchester, Governor of Quebec, had divided that portion of the province to become Upper Canada into four districts, in each of which he set up a Court of Common Pleas with unlimited civil, but no criminal jurisdiction. The criminal courts were of two kinds: the Court of Quarter, or General, Sessions of the Peace and the higher Courts of Oyer and Terminer and General Gaol Delivery, held at irregular intervals. The Court of Quarter Sessions, one for each district, was presided over by the justices of the peace of the district and met at stated intervals.²

Although permitted to try criminal actions, in practice the

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¹For details of William Osgoode's life before his arrival in Upper Canada, the interested reader might turn to the Dictionary of National Biography, to Joseph Foster's *Alumni Oxonienses, 1500-1886* (Oxford, 1887-92), and to the two manuscript volumes of correspondence of Osgoode and his friends in the Library of Osgoode Hall, Toronto (H. S. Osler Collection, 2 vols.). Born in March 1754, he was the son of William Osgood, gentleman, of St. Martin's parish, London, and of his wife Martha. Nothing seems known of Osgoode's early years until his matriculation at the age of fifteen years at Christ Church College, Oxford, from which he was graduated B.A. in 1772, and M.A. in 1777. He entered Lincoln's Inn in 1773, and was called to the bar on November 11th, 1779. In practice he confined himself largely to equity drafting in Chancery. In 1779, he published a small quarto opposing Blackstone's views of the laws of descent. When Christian's edition of Blackstone's Commentaries appeared, Osgoode resumed his argument in another anonymous volume published in London in 1797. His arguments won a brief *succès d'estime*, but apparently were without other effect.

Osgoode's warrant was issued on December 31st, 1791. In it he is addressed as "Wm. Osgoode, Esqr. Chief Justice of the Province of Upper Canada . . . with full powers and authority to hold the Supreme Courts of Judicature at such Places and at such Times as the same may be and ought to be held within Our said Province". For his services he was to have and enjoy "all and singular the Rights, Profits, Privileges & Emoluments to the said Place belonging". (Public Record Office, Colonial Office records, 324/45, pp. 306, 307, Grants and Warrants, 1783-1797, London)

²W. R. Riddell, *Upper Canada Sketches* (Toronto, 1922) p. 108.

quarter sessions sent capital cases to the higher court, especially convoked for that purpose. Since the list of crimes for which capital punishment could be imposed was much lengthier than some years later, the function performed by the higher court was of first importance. Unlike the courts of quarter sessions, which were permanent, these higher courts terminated with each sitting until summoned again. At convenient times, otherwise annually, a commission for convening the Court of Oyer and Terminer and General Gaol Delivery was issued for each district.³ A judge, if one was available, was usually named in the commission, with two or more supernumeraries to lend an aspect of weight and dignity to the bench. If they were known as men of probity and sense, they might be consulted by the presiding judge; otherwise their function was largely decorative. This, then, was the legal machinery with which the new chief justice had to work and which, with the advent of Lieutenant Governor Simcoe, came indirectly under his control.

Osgoode, whose practice in England had been chiefly in Chancery,⁴ presided over the criminal assizes for the first time at Kingston, U.C., on August 23rd and 24th, when, as the attorney general, John White, records in his diary,⁵ “. . . the meeting of the Court [on] the 23 when the Chief [Justice] gave a most excellent charge”. Characteristically, White teases curiosity by telling nothing more, except to add that the two soldiers, brought up on a charge of murdering an Indian, were acquitted next day, as was a civilian accused of sheep-stealing,⁶ a fairly common complaint at the time for which juries were loath to convict because of the death penalty attached. For offences now regarded as venial the law often prescribed the harshest punishment.

From Kingston, Simcoe in July moved to Niagara, or, as he preferred to call it, Newark, which he had selected as the capital of the province. Before sailing, he had issued a proclamation on the advice of his executive councillors dividing the province of Upper Canada into sixteen constituencies. From each he nominated

³ *Ibid.*, p. 109.

⁴ Riddell, in his *Life of John Graves Simcoe* (1926), p. 376, says: “He [Osgoode] did not go on Circuit and apparently did not take Common Law briefs at all, confining himself mainly to Equity drafting”. Yet Osgoode, writing to Dundas from Lincoln’s Inn, August 11th, 1791, says, “On my return from Circuit this morning I found a note from Colonel Simcoe . . .”. Public Record Office, Colonial Office records, 42/21, Series Q., London.

⁵ It was largely on Osgoode’s recommendation that John White was appointed Attorney General of Upper Canada. See Osgoode to Evan Nepean, London, August 13th, 1791, P.R.O., C.O. 42/21, Series Q.

⁶ John White diary: entry for Saturday, August 25th, 1792. A type-written copy of this diary is in the Toronto Public Reference Library.

a representative who was to offer himself for election to the Legislative Assembly. Upon his recovery from a brief illness, Osgoode, with White, followed the Lieutenant Governor to Niagara, where they were joined early in September by the rest of the official family. Osgoode was no sailor. On his return to Niagara from a visit to York (Toronto), he wrote ruefully to William Dummer Powell: "The Misery I suffer when on the Lakes does not induce me to undertake more Voyages than are absolutely necessary—I cannot therefore promise myself the pleasure of seeing You this Fall".⁷

The duties of Osgoode varied, and were not always judicial. As chief justice he presided over the high courts and supervised their functions. He was speaker of the Legislative Council, chairman of the Executive Council, chairman of the Land Board; he ordered the printing of the Acts and Simcoe's speeches; and, as if these responsibilities were not enough, he directed the issue of paper to Louis Roy, government printer.⁸ Once at least the attorney general mentions him as employed most of one Sunday morning engrossing an Indian deed. Possibly one of the most agreeable of obligations he was called upon to perform was that of host to judges and jury during the sittings of court. Osgoode's annual salary as chief justice was £1,000, with the customary perquisites, including £100 as legislative councillor.

Niagara then had a small population of about 500 persons;⁹ two years later, in 1794, the number had increased to about 750, including officers and men of the Queen's Rangers. In his *Travels in Canada, 1795*, Rochefoucault mentions that the place had about one hundred houses, "mostly very fine structures. The house of Colonel [John] Smith, lieutenant colonel in the fifth regiment, is much distinguished from the rest in point of size and elegance. It consists of joiner's work, but is constructed and embellished, and painted in the best style: the yard, garden and court are surrounded with railings, made and painted as elegantly as they could be in England."¹⁰ Absence of suitable dwellings may be accounted for

⁷ Newark, September 9th, 1793: William Dummer Powell papers, 1735-1847, Toronto Public Reference Library. Osgoode to William Dummer Powell: "I should be very happy to hear from You and to learn that Mrs P and Yourself are recovered from the Fatigues of Your Journey and that your Spirits are rather more afloat than when You wrote last—I frequently experience unpleasant Moments but thank God they are of no long Continuance—May You enjoy the same benefit".

⁸ See W. Colgate, Louis Roy, First Printer in Upper Canada, Ontario Historical Society, Ontario History, vol. xliii (1951), No. 3, pp. 137-140.

⁹ D. B. Read, Newark in 1792, Transactions of the Canadian Institute, 1889-90, vol. 1, pp. 72-76.

¹⁰ La Rochefoucault-Liancourt's Travels in Canada in 1795. Thirteenth Report of the Bureau of Archives for the Province of Ontario, by Alexander Fraser (1916), p. 49.

largely by the scarcity of skilled labour; carpenters' wages are quoted as amounting to sixteen shillings a day. Unable to find shelter elsewhere, John White found it in a marquee erected by the Lieutenant Governor "on very dry and well drained ground"; Osgoode went to the Governor's house as his guest until he could find a place of his own. On this head, Mrs. Simcoe remarks in her diary, December 12th, 1792: "Mr Justice Osgoode is now in his own house which is so near that he always came in an evening to make up our party [at whist]. Till within this fortnight he resided in our house, not having been able to meet with any that suited him, and Coll. Simcoe finds him a very agreeable companion." The estimated population of Upper Canada at this time was between ten and twelve thousand, consisting mainly of United Empire Loyalists or their descendants, living chiefly at Cornwall, Kingston, Niagara and Detroit. Apart from Detroit, all the localities mentioned were mainly English speaking.¹¹ As may be inferred from its name, Detroit was inhabited for the most part by French-speaking settlers. In a letter to Simcoe, May 23rd, 1793, Osgoode tersely describes the situation at Niagara: "And as for the delights either of Climate, Society or any of the Comforts of life . . . the catalogue is not very copious".¹²

So much for the amenities of Niagara. There the first legislature was summoned to assemble on September 17th, 1792. To Osgoode, as speaker of the legislative council, was entrusted, with other measures, the drafting of a projected Marriage Bill. Osgoode had charge of the legislation in the council; John White for the assembly. The so-called Marriage Bill, dealt with by the new parliament, began as a motion by Richard Cartwright, Jr., and Robert Hamilton of the executive council, for leave to bring in a bill to legalize what, for lack of a proper officiating clergyman of the Church of England, were considered irregular marriages or no marriages at all. Such marriages were not only regarded as invalid, but the children born of them were deemed, *stricto jure*, illegitimate and consequently not entitled to inherit property. The bill, which proved contentious in debate, received a first reading. Meanwhile, apprehensive of the effect its provisions might have upon the rights and privileges of the Church of England, Simcoe, with Osgoode assenting, persuaded Cartwright to withdraw his bill upon a promise to lay the whole matter before the Home Office. After the house rose, a draft of the bill, prepared by Osgoode, was submitted to

¹¹ D. B. Read, *loc. cit.*

¹² Simcoe-Osgoode Correspondence. See Osgoode's letter to William Dummer Powell, September 9th, 1793, *loc. cit.*

the law officers of the Crown in London, with an elaborate report by Cartwright stating reasons in detail for ensuring the validity of past and future marriages as proposed by the bill. In the following year the bill, having been passed by both houses, became law.¹³

Although mitigating, if not removing, the worst effects of an irregular if pardonable practice, the Act fell short of giving full satisfaction since it omitted to provide for the marriage of dissenters by their own ministers.¹⁴ The rigidity of Simcoe's religious views prevented further action at the time. Subsequently, the various denominations were granted a fuller and fairer recognition by more progressive legislation.

In a despatch from Navy Hall to the Secretary of State for Home Affairs, the Right Honourable Henry Dundas, Simcoe summarized the negotiations between himself and Cartwright, saying, "The favorite Bill in the Legislative Council is the Bill to make valid the irregular marriages already contracted in the Province: two of the members are in that predicament—a hasty and ill-digested Bill was brought forward by a leading character who is personally concerned and it was only on our express promise that a Draft of the Bill should be prepared for the opinion of Government and sent home this winter that he was induced to withdraw his measure". The "leading character" was of course Cartwright; and, as Simcoe might very well have added, Cartwright was not alone. The supporters were numerous. He concludes: "This is a circumstance which requires the serious and immediate consideration of Government. The people seem very desirous of availing themselves of regular sanctions though they have but little opportunity." Regular sanctions to Simcoe meant those that had the blessing of the Established Church; the dissenting bodies had no place in his view. These he looked upon with suspicion and distrust as disseminators of radical ideas and possible fomenters of strife and rebellion against government.

Besides drafting the Marriage Bill, Osgoode introduced the bill adopting the law of England in Upper Canada in matters affecting

¹³ Osgoode to Simcoe, Newark, U.C., November 14th, 1793, Simcoe-Osgoode Correspondence, Ontario Archives, Toronto. See also Simcoe to Dundas, York, U.C., September 16th, 1793, Public Archives of Canada, Series Q, 279, II, p. 335.

¹⁴ Under the terms of the Act all marriages theretofore contracted between persons not being under canonical disqualification, publicly contracted before any magistrate or commanding officer of a military post or adjutant or surgeon or any other person in any public office or employment, became valid. For the future, until there should be five persons of the Church of England in any district, a justice of the peace could perform the ceremony using the ritual of the Church of England. 33 Geo. III, 1793, c. 5 (U.C.).

property and civil rights, as well as the bill directing all issues of fact to be tried by jury. In 1763, English law by royal proclamation was introduced into Quebec.¹⁵ In 1774, the Quebec Act, which enlarged the boundaries of the province to include all the area of the future province of Upper Canada, confirmed the former French Canadian law, the *Coutume de Paris*, to govern decision in suits involving property and civil rights. Since the Canada Act of 1791 left the law as it was, unchanged, the French Canadian civil law ruled in the new province of Upper Canada, as it continued to do in the lower province.

But English minds habituated to English law found the paradox perplexing and annoying, so that before long Osgoode, at the instigation of Simcoe, assisted by the attorney general and supported by the executive council, prepared for submission to the legislative council a bill making English law the law of Upper Canada.¹⁶ The legislative council approved the measure and it passed the assembly without dissent. Indeed, so eager and unanimous was the assembly in its acceptance of the bill that only the intervention of Simcoe prevented its passing the three readings in one day. This, the first Act of the legislature of Upper Canada, enacted that "in all matters of controversy relating to property and civil rights, resort shall be made to the laws of England as the rule for the decision of the same". Since English criminal law, proclaimed in Quebec in 1763, was not affected by the Quebec Act of 1774, it automatically came into force in Upper Canada without further enactment. As a natural corollary of the change in the civil law, an Act was passed introducing trial by jury of all issues of fact; juries had been allowed in few trials under the existing law.

According to John White, the first session of the assembly passed without much friction: "During this interval [September 17th to October 1st], very little has happened out of the usual way but what has happened in the House of Assembly where indeed there has been unusual ignorance and stupidity".¹⁷ Harsh words, but they may have been justified. On October 15th both houses prorogued.

For the further relief of litigants, Osgoode had in mind the opening of a supreme court, staffed by professionally trained men, where issues of major importance could be tried. For several

¹⁵ A. Short and A. G. Doughty, eds., *Documents Relating to the Constitutional History of Canada* (1918) pp. 163-68.

¹⁶ Osgoode to Simcoe, Quebec, September 23rd, 1794. E 22, Ontario Archives.

¹⁷ John White diary, Monday, October 1st, 1792.

reasons it had been found impracticable during the last session to advance the contemplated legislation, as Osgoode wrote to his colleague, William Dummer Powell.¹⁸ Its discussion was thus left over until the next meeting of the legislative council. In the meantime the Chief Justice, in his letter to Powell, took occasion to state briefly but clearly his belief that the erection of a supreme court was "not only advisable but desirable", since, as he very reasonably concludes, "It cannot be expected that Gentlemen who have not a professional Education should be competent to hold Pleas of Real Property or to direct a jury on many of the points that may now come before them . . . and as the Government has provided for the Institution I think the province should not be deprived of it". Chief Justice Osgoode was not to remain in Upper Canada long enough to see the establishment of a supreme court. His insistence upon a proper legal training as a prerequisite to practice in the courts, however, was to continue part of his professional code in Lower Canada.¹⁹

In the interval between sessions Osgoode busied himself with the issuance of Indian land grants²⁰ and with matters affecting the courts and administration of the executive council, of which he

¹⁸ Osgoode to W. D. Powell, Newark, U.C., September 9th, 1793. William Dummer Powell papers, 1735-1847, *loc. cit.*

In this letter Osgoode mentions that he himself did not apply for the office of chief justice: "I recollect it was from Mr S. that I first heard there was such a Person as Mr Powell in existence, and this was some time after I had accepted the place I hold as I did not ask for it—I could have no Competitor, & it was confirmed to me before I knew . . . the Pretensions of any one in the Establishment." It is quite possible, though by no means certain, that Joseph Jekyll, M.P., or Sir William Grant, Master of the Rolls, both friends of Osgoode, used their influence to have him appointed to head the judiciary of Upper Canada; as Grant did later when the appointment of a successor to Chief Justice Smith of Lower Canada was in the balance. This time, however, Osgoode made early application for the nomination to both Pitt and Dundas. His appointment came in due course. See Transcript C.O.R., Gov. Lord Dorchester 1794—Lower Canada, Vol. 69, Pt. II, p. 203, P.A.C. See also letter from Osgoode C.J. to William Pitt, Newark, U.C., February 20th, 1794. P.R.O., Chatham Papers (G. D. 8), Bundle 164.

¹⁹ See Osgoode's letter to Dorchester: Quebec, May 12th, 1795 (E 25), Ontario Archives. Also Osgoode to Simcoe: Quebec, May 23rd, 1795, Ontario Archives. Pertinent to the subject, in a letter to, presumably, Simcoe, though no salutation appears, Osgoode writes from Quebec, July 8th, 1796: "A gentleman has been appointed within this Week past to a seat on the K B at Montreal; he must go on Circuits altho he cannot utter a word of French. This appointment would never have taken place had he not possessed the Office of Judge of the Admiralty—which he was compelled to resign in favour of the Atty Genl. There is not a practitioner at the Quebec Bar who would know how to undertake the Business. . . . There is a good opening for any Young man of Talent at the Bar here—but he ought to understand French . . .". Osgoode himself had a working knowledge of French, acquired by residence in France, and could speak and write the language with some proficiency.

²⁰ John White diary: January 13th, 1793.

was head. Until the close of his term as chief justice he did not exercise any civil jurisdiction in the province. His appointment was for the courts of oyer and terminer and general gaol delivery. Except at the court of Mecklenberg district, held at Kingston on August 23rd and 24th, 1792, he did not sit again until the parliamentary session of 1793. Altogether, the Chief Justice sat in the courts of oyer and terminer on four occasions. He presided on August 8th, 1793, for the district of Mecklenberg; on August 14th, for the Eastern district of New Johnstown; and, in July 1794, for the Eastern district at Cornwall; also, as stated, on August 23rd and 24th, 1792, at Kingston.²¹

Among the measures debated in the second parliamentary session of 1793 were the proposed changes in the courts, for the probate of wills, and the bill for the governing of the marriage ceremony within the province. Quite as important as these proposals was the introduction of a bill²² "to prevent the further introduction of Slaves and to limit the Term of Contracts for Servitude within this Province".²³ The bill, *inter alia*, confirmed the owners of slaves in their property rights. It further provided that children born of a negro mother were to remain in bondage until the age of twenty-five years, when they were to be given their freedom; that their birth was to be recorded, and for any neglect of this provision a penalty was imposed; that proof of age was to rest with the owner of the slave; that grandchildren of slaves, born in servitude, were to be entitled to the rights and privileges of free-born subjects; and that owners of released slaves were to be required to furnish sufficient security to the church or township wardens that slaves so released should not become a charge upon the parish or township.

This humane measure probably had no more zealous supporters than Simcoe and Osgoode; especially Simcoe who, as a former member of the House of Commons, had spoken against slavery, though in common with many Englishmen of his time and since he found far less difficulty in perceiving the evil at a distance than the evils nearer home. To the merciless servitude and awful poverty of his fellow-countrymen wrought by the Enclosure Act and the

²¹ W. R. Riddell, *Upper Canada Sketches*, p. 115.

²² 33 Geo. III, 1793, c. 7.

²³ Despite the unremitting efforts of Wilberforce and other English abolitionists, slavery was not entirely abolished within the British dominions until 1833. Denmark, by royal edict, was first to suppress the traffic in slaves. This was in 1792, but the royal decree did not become effective until ten years later, in 1802. See the *Encyclopedia Britannica*, on modern slavery, vol. 20, pp. 778-86 (Chicago, 1943).

oncoming Industrial Revolution he was curiously blind; but credit must be given him for such social conscience as he evinced. If many of the slaves in Canada continued slaves, the bill was to make certain that their number would not increase and that the practice of slavery in Upper Canada would be permitted gradually to die. The suggestion for the bill most likely came from Simcoe, the drafted form from White, with probably some assistance from the Chief Justice.

The anti-slavery bill was moved in the legislative assembly by the Attorney General, where it was passed without dissent. In the legislative council, it was approved with minor changes, concurred in by the assembly and, with the royal assent, became law. Opposition to the Act was voiced by some slave-holders (officials and owners of lands), who because of the prevalent scarcity of white labour felt called upon to protect what they had.²⁴ Economically, they were in the same position as the planters of the Southern States, who, had they been deprived of slave labour, could scarcely have existed at all. John White, who later lost his seat over the issue, records in his diary (June 25th, 1793) his view of the attitude of the house toward the bill: "Debated the Slave Bill hardly. Met much opposition but little argument." To him as attorney general had been assigned the task of piloting the bill through the house.

Osgoode's tenure of office in Upper Canada, unexpectedly brief, was fast running out. The death of William Smith, Chief Justice of Lower Canada, in December 1793 necessitated the appointment of a successor. Osgoode lost no time in pressing his claim to preferment upon Dundas and Pitt. In the summer of 1794, word reached him of his appointment to succeed Smith. He did not leave immediately, having promised Simcoe to remain for a time in Upper Canada to assist him in drafting the Judicature Bill.

By the terms of the Judicature Act of 1794²⁵ the existing courts

²⁴ Mrs. Hannah Jarvis, wife of the Provincial Secretary, writing from Niagara on September 23rd, 1793, says: "He [Simcoe] has by a piece of Chicanery freed all the negroes; by this move he has rendered himself unpopular with those of his suite, particularly the Attorney General, member for Kingston, who will never come again as a representative" (Jarvis-Peters Papers, Public Archives of Canada). He never did.

²⁵ The terms of the Act provided that the chief justice of the province, together with two puisne judges, "shall reside in the said court which shall be holden . . . where the lieutenant governor shall usually reside and until such place be fixed" the court was to be held at the last place of meeting of the legislature council and assembly. Four annual sessions or terms were appointed, to be known as Hilary, Easter, Trinity and Michaelmas. It was further enacted that the records of the late courts of common pleas were to be deposited in the new Court of King's Bench, that actions pending in the late courts of common pleas were to be transmitted to the Court of King's Bench, and that all ordinances, constituting

of common pleas were abolished and in their stead a new court was erected known as "his Majesty's Court of King's Bench for the Province of Upper Canada", with all the powers, both in civil and criminal suits, of the Courts of King's Bench, Common Pleas and (in matters of revenue) Exchequer in England. A procedure, very like, but not identical with the English Court of King's Bench was prescribed. This Act was approved by the Lieutenant Governor on July 7th, 1794. His work done, Osgoode sailed on July 13th from Niagara for Quebec to take over his new duties. Osgoode, it may be added, never presided in the Court of King's Bench in Upper Canada, which sat for the first time on October 6th, 1794, under William Dummer Powell.²⁶

The journey to Lower Canada was interrupted at Cornwall to enable the Chief Justice and the Attorney General to take the Court of Oyer and Terminer and General Gaol Delivery for the Eastern district, and there, with White prosecuting, Osgoode tried a case of murder and one of perjury on July 20th and 21st. Since he held a commission of *nisi prius*, he sat also as a civil tribunal. Osgoode arrived at Quebec on the twenty-seventh of July, and on the next day he was handed his patent as Chief Justice of Lower Canada. In December of the same year he was commissioned to the King's Bench. He had been nominated a member of the executive council early in June, but he did not take his seat until the nineteenth of September. On the seventeenth of December Osgoode became president of the legislative council.

Simcoe felt his loss keenly and urged the Home Office to replace him with another English barrister.²⁷ Upon receiving official word of Osgoode's appointment to succeed Smith, Lord Dorchester, the governor general, wrote to Lieutenant Governor Simcoe, "As the situation of the Province is exceedingly critical, and I may say, seditious, Mr Osgoode's presence is of importance, and therefore I hope to see him here as soon as possible".²⁸

the former courts of common pleas, were to be repealed. A table of fees was set for the attorney general in the increased proportion of one third. Fees receivable by the clerk of the King's Bench were also set, as were those of the marshall, crier and sheriff. Provision was also made for the appointment of commissions under the seal of the court for the examination of witnesses without the province, and of persons aged, infirm or going to depart the province. 34 Geo. III, 1794, c. 2 (U. C.)

²⁶ Ontario Archives: Court Records, King's Bench series; Term Book from October 6th, 1794, to July 9th, 1806.

²⁷ Simcoe to John King, Navy Hall, Upper Canada, January 20th, 1794: "I shall feel a most irreparable loss in Mr Chief Justice Osgoode. I hope to God he will be replaced by an *English lawyer*." Simcoe Papers, Ontario Historical Society, 1924, vol. ii, p. 281. Writing from Whitehall, May 11th, 1794, to Dorchester, Dundas says: "By the appointment of Osgoode the Province is secured from abuses". Q. 67, p. 71, P.A.C.

²⁸ Simcoe Papers, *op. cit.*, p. 251.

Even before he had met Osgoode, Simcoe put on record a flattering estimate of his character and abilities, when, in a memorandum to Dundas, he refers to him in somewhat exalted language: "The administration of public justice has been nobly provided for in the selection of a Gentleman to fill its Principal office of such respectable personal and professional character as may ensure the equal & just execution of its responsible duties".²⁹ Again, in a letter to Dundas from London on August 12th, 1791, he writes: "In regard to the legal Appointments, the placing of so respectable a man as Mr Osgoode at the Head of the law Department leaves me nothing to desire on that subject". And so, throughout Osgoode's tenure of office, Simcoe continued to honour him highly and to trust his judgment implicitly. By no means easy to please, Simcoe maintained and insisted upon lofty standards of public and private conduct, and then as always demanded much of men.

It is to Osgoode, among other things, that Upper Canada owes "the very well drawn Judicature Act of 1794, the foundation of the common law practice", until superseded by Oliver Mowat's Judicature Act of 1881.³⁰

Further evidence of Simcoe's high regard for Osgoode's legal acumen, as well as for his integrity, appears in a confidential despatch to Dundas from York, Upper Canada, September 20th, 1793: "In regard to the last Sessions, the Chief Justice has furnished me with the Observations on the proceedings of the House; I follow his opinion of the necessity of Mr Shaw's being in the Council: & He dreads the ascendancy which the provision Contract, independent of the Government of this Province, may throw into the hands of Messrs Hamilton & Cartwright".³¹ On the subject of such patronage, doubtful in ethics and potentially inimical to free government, the Chief Justice, in a secret and confidential memorandum, expresses himself more fully and pointedly:³²

Should any man from Jealousy or resentment be desirous of cherishing an Opposition to the King's Lieutenant Governor in Upper Canada he will be anxious that the Management of the Flour Contract shd be in the hands of those Gentlemen who distinguished themselves so much in the Course of the last Session.

The importance of this Engine is not sufficiently attended to — Grain is the sole produce of the Country and a Market the only Benefit required. Give me the Control of that Market and I will ensure the Re-

²⁹ Simcoe to Dundas: London, June 2nd, 1791, Q.278, p. 201, P.A.C.

³⁰ Riddell, *Life of John Graves Simcoe*, p. 376.

³¹ Simcoe to Dundas, York, U.C., Sept. 20th, 1793, Simcoe Papers, vol. ii, pp. 55-56.

³² Simcoe-Osgoode Correspondence, Ontario Archives.

sult of every Proposition to be made in a House where every man is a Farmer—The proceeding is not fair—You might as Reasonably expect the Business of the Country to be Carried through by Ministers, with the whole patronage of Government in the hands of the Opposition.

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Simcoe's opinion of the relations which ought to subsist between the two provinces is made manifest in his memorandum to Dundas, consisting of twenty-four articles of suggestion and complaint. He writes (item 12): "Nothing can be more prudent than the King being the Arbiter of all differences between the two Provinces, and the Government of them should be such as to preclude the possibility of such happenings [that is, incidents disturbing to inter-provincial relations]. The Wisdom of Chief Justice Osgoode in the Legislative Council has checked such a disposition in some instances."³³

In this, as on other occasions, Osgoode is shown as strict in the performance of his judicial duties. During his stay in Upper Canada, he was the only member of the executive committee to attend every one of the sixty-five meetings held from July 9th, 1792, until his departure for Lower Canada two years later. The date of the last meeting at which he was present was July 9th, 1794. Of the sixty-three meetings of the legislative council, from 1792 to 1794, Osgoode as speaker of the council was present at all of them. From the records it is clear that he attended more meetings of the council than any other member. Peter Russell, next in point of regularity, is mentioned as having taken part in the deliberations of council on more than thirty-three days.³⁴ Apart from attendance, or rather because of it, the council in its discussions profited greatly from Osgoode's legal skill and knowledge, of which, in its formative stage, the province stood much in need.

Here it may be noted that a statute of the province of Lower Canada, passed in November 1793, created two courts of King's Bench for the province: one at Quebec and the other at Montreal.³⁵ Osgoode's appointment as Chief Justice was to the Court of King's Bench of the district of Quebec.

The most important criminal action to confront Osgoode in Quebec, a *cause célèbre*, was the trial and conviction of David McLane on a charge of high treason. Associated with the Chief Justice on this occasion were the Honourable James Monk, Chief

³³ Simcoe to Dundas, York, U.C., Feb. 28th, 1794, Simcoe Papers, *loc. cit.*, pp. 168-69.

³⁴ Riddell, *Life of John Graves Simcoe*, p. 393, fn. 7 and 9.

³⁵ See Lower Canada Statutes, 1793 (2nd sess.) c. 6, s. 2.

Justice of the King's Bench for the district of Montreal; the Honourable Thomas Dunn, the Honourable Jenkin Williams and the Honourable Pierre Amable De Bonne, Justices of the King's Bench of the district of Quebec. David McLane, an American citizen, was accused of conspiring with other Americans from Vermont, New York and Philadelphia, and certain malcontents from Lower Canada, to overthrow the government by force. The men in the locality of Quebec from whom McLane sought help in his abortive attempt "were in humble life and without the least influence. He himself was destitute of appliances to commit injury."³⁶ Implicated in the plot was Adet, French revolutionary minister to the United States, who was soon afterward recalled, probably because his efforts to undermine British rule in Canada were no more effective than those of his predecessors, Genet and Fauchet.

At the trial of McLane, who stood alone, testimony submitted by the Crown was conclusive of guilt. No evidence was offered in rebuttal, unless a rambling statement made by the accused in open court may be considered evidence. Two counsel were assigned to defend McLane, but they called no witnesses, and nothing was said in extenuation. The trial before the Chief Justice seems to have been conducted throughout with scrupulous fairness and impartiality. The jury was directed to give the accused the benefit of the doubt, and to determine his guilt or innocence entirely upon the evidence, that any observations of the court upon the facts should be regarded as observations only and have no weight as evidence. The Chief Justice's explanation of the law of high treason was reported as having been full and comprehensive. The report of the trial in *The Quebec Gazette* is quoted in part because of Osgoode's position as the presiding judge:

On Friday last came on before a special court of Oyer and Terminer the trial of David McLane for High Treason: the indictment was read by Mr. Caron, and the case stated by the Attorney General. . . . The evidence . . . was summed up by the Chief Justice who observed, that most of the overt acts charged, which were fourteen in number, were proved by three or four witnesses, many of whom (which was rarely the case in prosecutions of this sort) were not at all implicated in the crime.

The Jury after being out about half an hour, returned with a verdict of GUILTY. . . . the Chief Justice proceeded to give sentence, as nearly as we could collect it, to the following effect: .

³⁶ See *The Quebec Gazette*, Thursday, July 13th, 1797, for a detailed account of McLane's trial, conviction and punishment, in the Public Archives of Canada. See also Kingsford, *History of Canada*, vol. vii (Toronto, 1894) pp. 439-51; and D. B. Read, *Lives of the Judges* (Toronto, 1888) pp. 24-26. Both Kingsford and Read present very full and fair reports.

David McLane,

You have been indicted for the crime of High Treason, to which indictment you pleaded not guilty, and for your trial put yourself on God and the country, by which country you have been found guilty. You have been tried by a respectable and intelligent Jury, many of whom have heretofore served on the grand inquest. Your trial has been attended by such circumstances of fairness, openness and lenity, as do not obtain in any country upon earth except where the laws of England prevail.

.

It remains that I should discharge the painful duty of pronouncing the sentence of the law, which is: That you, David McLane, be taken to the place from whence you came, and from thence you are to be drawn to the place of execution, where you must be hanged by the neck, but not until you are dead, for you must be cut down alive and your bowels taken out and burnt before your face; then your head must be severed from your body, which must be divided into four parts, and your head and quarters to be at the King's disposal; and the Lord have mercy on your soul.

The trial lasted from seven o'clock in the morning till nine in the evening. Obviously of unsound mind, McLane by modern standards deserved to be dealt with less cruelly; but the law provided no alternative. His conviction and subsequent execution, however, were quite effectual in suppressing further treasonable designs within the province.³⁷

Osgoode's relations with the governors at Quebec — Dorchester, Prescott and Milnes — were not always happy. He did not get on very well with Dorchester; but neither did Dorchester's predecessor, Haldimand, nor Simcoe for that matter; nor Chief Justice Livius or Hugh Finlay, member of the executive council and deputy postmaster general. Osgoode's known friendship for Simcoe may have had something to do with Dorchester's coldness; though there is nothing in Osgoode's letters to justify this attitude. For the most part these consisted of news of local happenings, which one friend

³⁷ See Osgoode's letter to John King in which he says, "Inclosed I send a Quebec Gazette giving an account of the Trial which lasted 14 hours the thermometer varying from 80 to 90 — It is hoped that his Majesty's Courts of Justice in the Province of Quebec will not be found obnoxious to the Censure cast on them in other Quarters." Quebec, July 22nd, 1797, P.A.C. Again, writing to Simcoe, he reverts to the same theme: "When Rogues fall out honest Men come by their own. . . . The misunderstanding between the French and the Americans has insured us Tranquillity for a Season — The Execution of McLain for High Treason and the conviction of Frichette a Canadian for misprision have totally extinguished all outward Symptoms of Disaffection — All the Property of the latter being Seized under an Inquest for the King's Use has produced a much stronger Effect among his Country men than the Imprisonment for Life — Touch a Canadian's Pocket and You touch his Feelings." Quebec, October 25th, 1798, Simcoe-Osgoode Correspondence, Ontario Archives.

might pass to another, comment on current social activities, and comment on affairs of general interest, as well as, less often, matters of official concern to both. Of proof of disloyalty to Dorchester there is none; the truth is that Osgoode would as soon have been guilty of disloyalty to the king as to the king's representative.³⁸ Chagrin, disappointment and at times irritation and resentment at his cavalier treatment by Dorchester are present, but of disloyalty there is no sign.

Some of Osgoode's letters cover as many as ten or more pages, indicating that either he had much time on his hands or that he was fond of letter-writing, possibly both. His correspondence now and then contains personal references with the cautionary inscription, "private and confidential". Occasionally, unsure that his letters would pass without being tampered with, he resorted to the screen of anonymity. Curiously, although letters from Osgoode to Simcoe are numerous, there are few replies from Simcoe to Osgoode. Goodnaturedly, Osgoode rallies his correspondent upon his dilatoriness, but seemingly without effect.³⁹

His correspondence from 1793 to 1801, when he went home, includes a number of letters to his friends in England, John King, permanent undersecretary of the department of Home Affairs, in which personal gossip sometimes becomes entangled with official views. But enough letters are extant to convey an intelligible idea of Osgoode's varied topics of discussion, his style and his often felicitous forms of expression. His pen was fluent, his manner easy, if not graceful and, except now and then when Dorchester is mentioned, refreshingly free from bitterness and resentment.

Osgoode had come to Lower Canada at his own request to succeed Chief Justice Smith. As the known friend and protégé of Lieutenant Governor Simcoe, who himself was antipathetic to Dorchester, he would naturally be suspect.⁴⁰ And Dorchester was apparently resolved to give him no cause for prejudicing his position with Simcoe; or, what is more likely, with the authorities at home. These and other points of difference, not always favourable to Dorchester, served to keep them apart except on occasions of state business. Their relations were customarily marked by a

³⁸ Much of the friction between civil and governing authorities presumably arose from the appointment, necessary at the time, of military governors used to giving orders rather than taking them, and who, by reason of their previous training, were not always patient of advice or calm in opposition. For a detailed explanation of these differences, see A. L. Burt, *The Old Province of Quebec* (1933) pp. 248-275.

³⁹ Simcoe-Osgoode Correspondence, Ontario Archives and Public Archives of Canada.

⁴⁰ Osgoode to King, Quebec, May 23rd, 1795. C.O.R., No. 42, P.A.C.

starched formality which seldom went beyond the exchange of tepid civilities. The truth is, as Osgoode's letters show and other sources indicate, Dorchester was very much of a busybody with a finger in every pie. He interfered with Osgoode's appointments to the courts, he meddled in matters of education for which he was unfitted, if not unauthorized, and he treated with singular lack of consideration men whose qualifications were at least the equal of his own.

Later Osgoode was to cross swords with Lieutenant Governor Prescott and his successor, Robert Shore Milnes, as he had with Dorchester before them: with Prescott because of the distribution of waste lands in which the older settlers alleged unfair treatment, with Milnes because of his reluctance, ending in refusal, to discipline Judge De Bonne, a puisne justice of the Court of King's Bench in the district of Quebec, on charges preferred by the Chief Justice. De Bonne was accused, among other things, of having persistently neglected his judicial duties; out of five successive terms he was recorded as having given his attendance on the bench at Quebec for one term only.⁴¹ For this gross negligence there appeared to be no adequate excuse or explanation; nor was one proffered. Quite as serious, if indeed not more so, was the charge of adulterous conduct, which had become an open scandal.

On this dual accusation Osgoode wrote in part to the Lieutenant Governor:⁴²

With respect to the Complaint prefixed I am ready to acknowledge with regret that from the General Terms in which it is framed, it has justly given rise to His Grace's judicious remark on the difficulty of settling by any fixed Rule what degree of misconduct in private life may render a man unfit to continue in a public function. . . . I had always understood it to be a standing Royal Instruction that no one should be admitted to a public trust and Employment where ill fame and conversation might occasion scandal, and that the public scandal attached to the general bruit of a continued intercourse of double adultery came within the intent and meaning of such Instruction. I had no doubt, neither can I entertain a doubt of the result of Your Excellency's enquiries when you shall have informed yourself on the subject of the complaint so as to be able to give an opinion on the expediency of Mr Justice De Bonne's removal.

In transmitting a statement of Osgoode's charges to the Home Office, Milnes wrote in a manner indicative of doubt where, on the basis of the evidence, none should have existed. Quite obviously

⁴¹ Osgoode to Milnes, formal statement of charges against de Bonne. Q. February 19th, 1800. C.O.R., Lt. Gover. Milnes, 1800, L.C., No. 84, pp. 314-316. P.A.C.

⁴² Osgoode to Milnes, Q. May 6th, 1800, *loc. cit.*, pp. 317-319. P.A.C.

Milnes was looking for a way out; he found it in the cautious remark of one three thousand miles from the scene:⁴³

. . . respecting [he wrote] the expediency of dismissing Judge De Bonne from the Bench, feeling as I do the justice of your Remark concerning the difficulty of fixing what degree of misconduct in private life may be deemed sufficient to render one unfit to be continued in a Public Function. From further information I can Confirm what I before stated to Your Grace that the Particulars set forth in the Chief Justice's Memorial respecting the conduct of Mr De Bonne are of such Public Notoriety as to require no investigation, and that the Connexion complained of has existed for five years, but, I must add that the Parties do not live under the same roof and that Mr De Bonne's wife is separated from him and married, according to the Laws of the United States where she now is, to another man. . . . in case of vacancies on the Bench I most undoubtedly would not recommend a Person with such a Scandal attached to his character. Yet I do not feel myself competent to decide on the Expediency of Judge De Bonne's removal on this account, and I hope I may be excused if I again apply to Your Grace for further Instructions without my giving a decided opinion on the subject.

If the king's representative on the ground could not be expected to submit a decided opinion on the point at issue, it might be pertinent to inquire who could? In reality, however, there is little here for controversy, only something for reproach. As head of the judiciary, and in a measure responsible for its acts, it was incumbent upon the Chief Justice to maintain the law. He had, moreover, a very high conception of his judicial office and upheld its dignity on every possible occasion. Consistent with his professional honour and his oath as judge, there was no course open to him other than to charge De Bonne for his flagrant offence against common decency and the honourable traditions of the bench, which involved its status in the eyes of the public. That Osgoode was warranted in acting as he did is clearly shown by De Bonne's belated and evasive explanation of his conduct to the Lieutenant Governor,⁴⁴ which covered only his unauthorized absences from court and took no account of the charge of adultery. Even this formal acknowledgment came to the governor's desk after a delay of five months. However that may be, the failure of the authorities to discipline De Bonne, as his dual offence clearly deserved, was in line with the settled policy of Prescott and Milnes, as it was with their predecessors in office, to conciliate the Canadians, sometimes at the sacrifice of other interests. It may be noted that, far from being

⁴³ Milnes to Portland, Q. July 8th, 1800, *loc. cit.*, pp. 311-319. P.A.C.

⁴⁴ De Bonne to Milnes, Q. October 18th, 1800, C.O.R., Lt. Govr. Milnes 1800, L.C., No. 85, pp. 183-186. P.A.C.

punished for his sins, De Bonne went on to gather fresh honours and emoluments. Small wonder if Milnes' timorous and vacillating course provoked first the contempt and then the just enmity of Osgoode, as it likely did that of less interested men.⁴⁵

Few will be found to question, it has been said, the supreme importance of public lands in a frontier economy; but if it is the most important business of government, it is also in all probability the dullest. To which may be added the thought that it is also one of the most disputatious and troublesome. From the first the distribution of the waste lands of the Crown in Lower Canada offered little prospect of an early and harmonious settlement. To deal with the increasing applications for land, a committee was appointed, with the Chief Justice as chairman, from the legislative council. Associated with Osgoode on the committee were the Lord Bishop of Quebec (Jacob Mountain), Hugh Finlay, John Young, François Baby and Thomas Dunn. The difficulties attending the equitable allotment of Crown lands gave Osgoode and his colleagues of the land board much cause for anxious concern. Fault for the subsequent dispute over the allocation of the waste lands reserved for settlement seems to have rested on both sides, the land board and the lieutenant governor. That there was considerable and possibly unwarrantable delay in the granting of patents to applicants is clear enough, whatever the reason. As Prescott said,⁴⁶ "since the conclusion of the American war (which was then thirteen years) many public invitations had been given for people to settle in this Province; that several hundred families had embraced those invitations, and that many thousands would have gladly followed their steps; but that, during that whole length of time, only one Grant had passed the seal".

Lands, it is true, had been settled by the "robust title of occupancy", or by what nowadays would be called "squatters' rights". The governor contended that in simple justice those settlers who had in any way improved their holdings in the interval since tak-

⁴⁵ See Milnes letter to Portland, Q. March 26th, 1801, inscribed "Duplicate, Separate, and Secret", in which he complains of Osgoode's attitude toward him. C.O.R., R.S. Milnes, 1801, No. 86, pt. 1, L.C., pp. 142-151. P.A.C.

⁴⁶ See "Extract from the Minutes of Council, Containing His Majesty's late regulations relative to the waste lands of the Crown, with His Excellency, the Governor General's order of reference respecting the same, to a Committee of the whole Council, of the Province of *Lower Canada*, the said Committee's report thereon, and His Excellency's speech in reply, Quebec: Printed at the New-Printing Office, Palace Street, 1798". A copy of this brochure should be and probably is available at the Canadian Public Archives, Ottawa. The material I have quoted is taken from my own copy.

ing possession should have their right to ownership established by title. In opposition to this view, the council took the stand that for lands to be granted to such intruders, as they were termed, would only encourage others to disregard the regulations governing the settlement of the waste lands; that those, as the board expressed it, who acted "in dutiful submission to the Law . . . will not fail to complain that, while others triumph in their transgression, they have not received an equal benefit from their obedience". There the matter for the time rested. In default of evidence to the contrary, one cannot but suspect the board of dilatoriness and procrastination in the awarding of land grants. Yet a difficulty which may very well have stood in the way of a prompt delivery of patents was the lack of properly trained administrative help. Osgoode speaks of broken-down shopkeepers being made greffiers to the courts. The incoming settlers may have assumed, as they likely did, that the king's bounty was for all regardless, and have been inclined to treat the stipulated preliminaries with impatience or to be altogether ignored. However correct or incorrect this assumption may be, a perusal of the report of waste lands of 1798⁴⁷ affords little help in determining responsibility for the deadlock. Solution remains finally a matter of conjecture. Summarized, a conclusion may be briefly stated: that the Lieutenant Governor, interpreting the royal instructions, was desirous of effecting a settlement of the waste lands of the province with or without regard to whether early or present settlers held legal title to their properties; opposed, the board took the position that only such settlers who had abided by the regulations governing the settlement of land should have their claims confirmed. To such settlers alone, the board insisted, should lands be granted.

The importunities of speculators and land-jobbers, eager to profit by the offer of free land, created in Osgoode a distaste for his place on the land board to which he gave free expression in his letters to Simcoe and King. He was happy in the end to give up what had been for him, as for his associates, a disagreeable, disillusioning and on the whole unrewarding task.⁴⁸

As payment for their work on the public lands committee, each of its members was granted a quarter of a township. A township of ten square miles was computed to contain, exclusive of Crown and clergy reserves, 44,000 acres, worth, unimproved, about fifteen

⁴⁷ *Ibid.*

⁴⁸ See letter of Osgoode to John King, Quebec, August 15th, 1800, inscribed "Secret and most confidential". C.O. 42, vol. 22, Misc. Papers, 1793-1821, p. 175. P.A.C.

pence currency an acre. The total value of the grant, after necessary deductions had been made, was somewhat under 2,500 pounds sterling; not wholly inadequate payment for their labours if the land was readily salable. It was in the natural order of things that a good deal of land-jobbing should take place and speculation in waste lands be common. At a later period, or more precisely on February 24th, 1802, Milnes, in a despatch to the Home Office, undertook to explain a ruse adopted by applicants for grants by which a speculator would arrange to buy the holdings of a group of six grantees and so become the illegal possessor of five-sixths of a township, or almost 37,000 acres, instead of the 1,200 acres allotted to him and meant to be his share.⁴⁹ This fraudulent practice led Milnes to impugn the good faith of the committee on lands, although their names should have been sufficient protection against attack. Whatever contravention of the land regulations may have occurred beyond the control of the committee carried with it exemption from direct responsibility. Lax the committee may have been, but of actual dishonesty there is no trace.⁵⁰

“Dans son ouvrage, *La colonisation du Bas-Canada sous le régime anglais*”, says the historian P. G. Roy, “L’abbé Ivanhoë Caron a raconté les demeles au juge Osgoode avec le gouverneur Prescott”:⁵¹

M. Osgoode était président du comité du Conseil executif chargés de la concession des terres de la Couronne. Ce comité commit des abus scandaleux en faisant d’immenses concessions, sous les noms d’emprunts à des favoris. Osgoode était-il intéressé dans ces tripotages? I est difficile de l’affirmer. Il est certain, toutefois, qu’il savait ce que se passait. Il est non moins prouvé qu’il devint très riche. Célibataire et sans parents, sa fortune retourna à la Couronne.

There is no ground for such insinuations. Indeed, in the absence of precise knowledge on the subject, a little reflection should have suggested to the Abbé Caron that such malfeasance as here implied was not possible with a man of Osgoode’s high character and distinguished services. On the contrary, unwilling it would seem to lay his conduct open to suspicion, Osgoode refused land to which he was legally entitled, although some years later, after his return to England in 1801, he made formal application for it, as was his right. Land allotted to him at York by the land board at Niagara in 1793, he left with the board, which presumably transferred the grant to an incoming settler before the patent was made

⁴⁹ C.O.R., Lt. Gover. Milnes, 1802, *loc. cit.*, P.A.C.

⁵⁰ P.A.C. Report, 1891, Q. 82, p. 178, *passim*.

⁵¹ Les juges de la province de Québec (Québec: Redempti Paradis, Imprimeur de Sa Majesté le Roi, 1933) p. 401.

out. Osgoode does not appear in the records as assuming ownership of the land even nominally.⁵²

Writing in a mood of momentary vexation to his friend John King, Under Secretary of State, on March 17th, 1801, just before his return to England, he says: "Am extremely sorry I have not secured some dirty acres of land for myself among the Millions I have disposed of—What think you of the Report on that hateful business—did you read it? or was it shelved as so many Laborious Productions are without notice"? Historians who have hinted that Osgoode used his office on the land board to enrich himself might with advantage study his personal letters.

On two counts alone does Osgoode seem to have left himself open to censure: in his strange unreasoning opposition to the passage of an Act in 1794 for the relief of settlers on crown lands, upon which the *lods et ventes* and the mutation of fees were then due; and, again, when the legislative assembly asked for a statement from the legislative council of the immoveable property of the Crown within the royal domain held *en roture*. The council agreed to a report, signed by Osgoode as chairman, acceding to the request. On the ground, however, that the demand had come from the assembly, and that its interference was irregular, Osgoode appended a protest to the report, which the council condemned as out of place and improper, and recommended that it be expunged from the record. Although Osgoode's action was supported by the Duke of Portland, Secretary of State, who conceived him "as acting from laudable motives", the move was plainly at variance with his customary good sense and merited Milnes' reproof and the refusal of council to consider it. In extenuation, it might be urged that Osgoode proceeded not as a layman but as a lawyer.

With similar lack of plausibility, Osgoode protested the remission of the *lods et ventes* and the granting of relief to certain owners of crown lands, some of whom had defended Quebec in 1775, because the remission had not emanated from the clemency of the crown, and that the debtors would feel gratitude to the legislature not to the King. Here again Osgoode erred, since, as Kingsford has well said,⁵³ the measure could not have been introduced without permission of the Crown and it could have become law only by royal assent. But Osgoode was then as always a King's man.

⁵² Smith Papers, Lots and Locations, 1795-1799, p. 352 (Toronto Public Reference Library). Maps of early York for the period under discussion, which I have examined in the City of Toronto Registry Office, show no allocation of lots to Osgoode.

⁵³ W. Kingsford, The History of Canada (Toronto 1894), vol. vii, p. 491.

and any seeming slight to his sovereign he was quick to resent. His jealous regard for the honour of the throne made him for once at least more loyal than the King. In the land business, however, Osgoode acquitted himself with honour to the committee and credit to himself; although popular applause was withheld, as it commonly is, from a display of the humdrum virtues. At the end he had the satisfaction of knowing that his record was clear.

In all Osgoode's correspondence one is not allowed to lose sight of the man in the official. Kingsford seems to suggest that Osgoode was captious, haughty, prickly and generally hard to get along with. The truth probably is that Osgoode had too clear an understanding to neglect that urbanity which renders society pleasing. I can find in his letters little that reveals him as other than a man of calm, even temper, gravely ceremonious and correct in his relations with others, singularly free from cant, open-minded, generous in his views as with his purse,⁵⁴ ever-zealous for the dignity of the bench and resolute to perform his judicial duties in keeping with the traditions of his high office. Throughout his stay in Canada and after, he maintained a friendly footing with Lieutenant Governor Simcoe and his wife, and took, as his letters indicate, an avuncular interest and pride in their growing family. Mrs. Simcoe mentions the Chief Justice a number of times in her diary, and always in a manner expressive of good will; but what she really thought of him, we can only surmise. The record being intended for eyes other than her own, she cautiously refrains from writing anything upon which predatory gossip could fasten. In the light of what she must have known of Osgoode, her casual, if not studied, references are, to the student, disappointing. And John White in his diary does little better. In both diaries, indeed, the personality of the Chief Justice assumes all the substance and vitality of a shadow on the wall.

Nowhere in his letters does Osgoode show interest in contemporary art and literature, though he was to sit to Hoppner for his portrait, a proceeding which may evince not so much an interest in-art as a care for posterity. Except for a passing or incidental remark, the drama is not mentioned at all. A classical training, then imposed upon the student, gave Osgoode a ready knowledge

⁵⁴ During his stay in Quebec Osgoode took an active part in the social life of the town. For several years he was chairman of the library board and a director of the Quebec Fire Society. He headed the list of contributions to the war effort of 1799 and canvassed the prominent people of Quebec, in which he was aided by James McGill and others of Montreal. He subscribed £300, the highest amount given, toward the erection of the Cathedral of the Holy Trinity, Quebec.

of the ancient authors, as his letters and those of his friends bear witness. Beyond that point apparently, his concern for literature did not go. French novels, which the popular taste of the eighteenth century made fashionable, Osgoode read; for his friend Jekyll twits him about his fondness for them.⁵⁵ But he was a hunting man, and not apparently a reader in any real sense, except of newspapers and reviews with which he seems to have been plentifully supplied by Robert Nares, noted philologist and friend of his college days. Nor does he show any particular interest in his surroundings. Indeed, Mrs. Simcoe in her diary is more closely observant of her environment, the countryside, its topography, soil, native resources, its wild life, plants and vegetation.

William Osgoode none the less was a copious, indefatigable, often entertaining, if hardly distinguished letter writer. His discursive, easy-flowing prose is guiltless alike of style and punctuation. As was the habit of fine gentlemen of the day, he garnished his correspondence with French phrases, Greek and Latin quotations; with, at least once, a savoring of Italian verse. For the fashionable gentleman of the eighteenth century, with all his love of pleasure, had a profound respect for the writers of antiquity. Osgoode was no exception. As literature, then, Osgoode's correspondence is perhaps of no great importance; but as a running commentary by a man of the world upon the manners and morals, persons and politics, and the legal procedure of the time, it is instructive and valuable; and no less so as an original and authentic source of information of the man himself. In his personal relationships, as reflected in his correspondence, he relaxes and writes freely and unaffectedly, often with amusing and refreshing candour. His comments upon men and events are expressed in vivid and illuminating phrase, now and then pointed and sharpened with mordant wit.⁵⁶ Yet, he was by nature neither cruel nor vindictive.

⁵⁵ Joseph Jekyll, M.P., noted wit and friend of Osgoode. See his manuscript letters in the H. S. Osler Collection, Osgoode Hall Library, Toronto. Jekyll (1752-1837) was Solicitor General to the Prince of Wales and restored the Temple Church. A portrait of him, by Lawrence, was shown at the Royal Academy in 1817. A reproduction of this canvas appears in the Farington Diary (ed. by J. Greig), vol. viii, p. 112. See also vol. iii, pp. 218, 236, for a biographical note. In one of his letters to Simcoe (Quebec, May 11th, 1796) Osgoode quotes Dr. Johnson on character: "The Eulogy that Sam Johnson pays to Rag Smith to me would be most grateful—Rag was a man of Veracity—but Truth begets a certain bluntness and has its awkwardness in common with the World and I am afraid our habits are so artificial that in a series of Extensive Concerns it is not always practical, but I find I am preaching . . .". It is not unlikely that Osgoode had been delving in Boswell's "Life", a contemporary best seller.

⁵⁶ In a private letter to Simcoe from Navy Hall, November 14th, 1793, Osgoode discusses the justices newly appointed from the laity: "I am

For these reasons mainly his letters must be allowed to tell, so far as letters can, his life in Canada. In his letters Osgoode is revealed. The more we read them the better we know him; and the more we know him the better we like him. He improves on acquaintance.

In 1800, Osgoode resigned his commission as Chief Justice of Lower Canada, but was persuaded by Portland to retain office until the following year, when he returned to England. Early in 1802 he was granted a pension of £800 a year, payable in Canadian funds from revenue. Several times he was invited to enter Parliament but declined, preferring the ease and seclusion of private life. At no time ambitious by his own admission, he had probably had enough of public affairs. For a time he had chambers in the Temple. In 1804, however, with the opening of the Albany, formerly the Marlborough, a mansion in the west end of London, he took up quarters at No. 4, which was to be his home for the remainder of his life. Here he lived much to himself, going out to dine with a few old friends or having them to dine with him.⁵⁷ Among his distinguished neighbours in the Albany were Lord Brougham and George Noel Byron, the poet. Lord Byron occupied the chambers adjoining Osgoode's and the two became personally acquainted; but the wide diversity of their tastes and habits did not encourage intimacy.

With Sir William Grant, Master of the Rolls, he was appointed to several legal commissions. One of these had for its object the codification of imperial statutes relating to the colonies; another an inquiry into the number and amount of fees receivable in the

going to observe that Since the new Commission of the peace, and the resolve of the Council with regard to the Excessive Authority assumed by the Land Board that there is a manifest Reluctance on the part of those who used heretofore to take the lead to give any Assistance towards the forwarding of public Business—I should conceive this backwardness may be attributed to various Causes which will readily suggest themselves to Your Excellency—One would not wish to give them Occasion to say that Authority in all instances is taken out of their hands and given to Strangers, and for that Reason I am glad that the newly appointed Justices have not shown the least Disposition to bring forward any public Business but should another Quarter Sessions prove as inefficient as the last a more active Spirit must be adopted by those who are desirous that Something should be done for the benefit of the Country". Simcoe-Osgoode Correspondence, Ontario Archives.

Later he writes to Simcoe from Quebec, February 28th, 1795: "I continue to receive many Civilities from his Lordship, but Confidential Inter-course does not abound. . . . Your factotum Mr Davidson is insatiate, he may merit some attention, but the Welfare of a Province deserves more." Simcoe-Osgoode Correspondence, *loc. cit.* In his letter to Simcoe of November 14th, previously noted, he refers to Dorchester as "the Master Wire Worker", probably having in mind Dorchester's known political sinuosities, which could hardly have been palatable to a dealer in equity.

⁵⁷ See the correspondence of Osgoode and his friends in England, H. S. Osler Collection, *loc. cit.*

Court of King's Bench. This inquiry was still pending at the time of his death, which occurred on January 17th, 1824. His burial took place at St. Mary's Church on the Hill, Harrow, Middlesex. A mural tablet above his grave bears the simple inscription:

TO THE MEMORY OF
WILLIAM OSGOODE, ESQ., M.A.
BARRISTER AT LAW
SOMETIME CHIEF JUSTICE OF CANADA
WHO DIED JANUARY 17TH, 1824, AGED 70 YEARS
AND LIES BURIED HERE
RESPECTED AND BELOVED FOR INTEGRITY AND TALENT
HE HAD "THAT WHICH SHOULD ACCOMPANY OLD AGE",
"HONOUR AND TROOPS OF FRIENDS".

In the annals of Upper Canada, Simcoe, as chief administrator, has been longest and most widely remembered. Osgoode is recalled chiefly because his name was given to law courts in Toronto he never saw, and to an Eastern Ontario township he knew only as a place on the map.⁵⁸ Yet he deserves well of history. As his letters reveal, no man of his day in Canada, as legislator and jurist, was more profoundly conscious of his obligation to society, none more perceptive and understanding as an interpreter of the law, none more impartial. As official and as citizen he remained as he began, a loyal, useful and trustworthy servant of the Crown.

The Future of Legal Education

Law schools should remember this well-established propensity for change and development in the subject matter of law practice. The odds are very considerable that the law student of today will be practicing something in ten or fifteen years of which he learned little or nothing, and could not have learned much, in law school. A certain amount of subject matter the law schools must surely teach. But if they regard subject matter as their sole objective they will almost surely fail to serve their students well. What they must teach is background, method, traditions, approach. Then students must know how to face problems, how to deal with new materials, how to go about getting to the bottom of a subject with which they have had little previous contact. Very likely these qualities will best be taught by classroom consideration of specific topics of the law as it is now. But neither teacher nor student should be lulled into thinking that this law bears close relation to the law which is likely to engage the attention of the student when he becomes an experienced practitioner. (Erwin N. Griswold, *The Future of Legal Education* (1953), 4 *Harvard Law School Bulletin* 2)

⁵⁸ The city of Toronto has honoured the memory of Osgoode by giving his name to a thoroughfare in the rear of Osgoode Hall, connecting Chestnut Street with University Avenue.