

WILLIAM FIRTH

The Third Attorney-General of Upper Canada.
1807-1811.

BY THE HONOURABLE MR. JUSTICE RIDDELL.

When in August, 1806, Thomas Scott, the second Attorney-General of the Province of Upper Canada, became Chief Justice, D'Arcy Boulton was Solicitor-General; having succeeded Gray in office in 1805, he was given charge of the duties of Attorney-General until a successor to Scott should arrive. But as yet it was not thought wise to appoint "Colonials" to the high office of Attorney-General; moreover, Boulton although he was an Englishman had not been called to the Bar in England but had been given a licence to practise law under the provisions of the Act of 1803.¹ Francis Gore, the Lieutenant-Governor, urged the appointment of an Attorney-General and instructions for him to come to the seat of Government without delay, as there was a necessity for a legal adviser to whom to apply where it would be improper to apply to the Judges. But he was forced to wait until the Secretary of State should select the proper man.

At length in March, 1807, William Firth, an English barrister, received the appointment, then considered of great value;² but it turned out a bitter

¹ (1803), 43 Geo. III. c. 3 (U.C.), which empowered the Lieutenant-Governor to authorize not more than six British subjects "to practice the profession of law in the Province." In fact only five were so authorized, Dr. William Warren Baldwin of York, William Dickson of Niagara (who killed William Weekes in a duel at Fort Niagara, October, 1806), D'Arcy Boulton of Augusta, John Powell of York and William Elliott of Sandwich. See my "Legal Profession in Upper Canada," Toronto, 1916. pp. 15, 31. Gore's request is to be found in his letter to Windham from York, November 20, 1806. Can. Arch. Q. 305, p. 69. It should be said of Boulton that there is no record of his requesting to be appointed Attorney-General—almost the only instance in his times of any officer not personally urging his own advancement: he did apply for the whole and receive a part of the salary, etc., of the Attorney-General from the resignation of Scott till the arrival of Firth. Can. Arch. Q. 311, p. 414.

² The salary and the other emoluments of the Attorney-General in the year 1807 are given in an official despatch from Lieutenant-

disappointment to him. He never ceased to lament his fatal acceptance of the post.

Firth was the only son of William Firth, of the ancient city of Norwich; he was educated at Trinity Hall, Cambridge, "a Civil Law College;" he devoted himself to the study of Civil Law, and attended the University lectures of the Civil Law Professor; he was admitted to Lincoln's Inn, November 16, 1792, and was called to the Bar in Michaelmas Term, 1787.³ As he himself says, he "pursued a studious path thro' ye crabbed lore of Westminster Hall;"⁴ and it is apparent that he prided himself on his knowledge of "Black-letter law."

After his call he joined the Norfolk Circuit but

Governor Francis Gore to Castlereagh, from York, April 4, 1805. Can. Arch. 311, I, 132 (the amounts are in Halifax currency, worth 9/10 of sterling).

	£	s	d
Salary	333	6	8
Office rent and Clerk	110	0	0
Travelling expenses on Circuit	55	11	1
For miscellaneous services behalf of the Crown.. ..	287	11	8
Fees on Patents	259	8	2
	£1,045	17	7
Private practice about	400	0	0
(Halifax currency)	£1,445	17	7

(a little over \$6,000 of our money.)

Gore adds, "The Attorney-General usually goes two circuits, which is at least £150 in addition to what is above stated"—perhaps the £150 might balance the expenses, making the net income something over \$6,000, a very handsome revenue at the time.

³His education appears from his own letters, e.g., in a letter to Liverpool. Secretary of State, from York, April 10, 1810, Can. Arch. Q. 313, 2, 527, he says: "I have had the education of a Scholar and a Gentleman, having been brought up in an English University and through the legitimate medium of an English Inn of Court." In his letter to Castlereagh from York, April 4, 1808, Can. Arch. Q. 311, p. 133, applying for the Chief Justiceship of Lower Canada (or if C. J. Scott should receive that appointment, the Chief Justiceship of Upper Canada), he says: "I should, I presume, find some advantage from having attended a Civil Law College (Trinity Hall, Cambridge), when besides attending ye Civil Law professor's Lectures, our attention was by ye College Statute particularly directed to this branch of science in our College lectures, ye Professor Jowett being Tutor of that College." Joseph Jowett was fellow and tutor of Trinity Hall, 1775, and professor of Civil Law at Cambridge, 1782; 30 D. N. B. 215.

I owe the date of his admission and call to a courteous answer to my enquiry by the Treasurer of Lincoln's Inn, July 1, 1919.

⁴The language is found in the letter first mentioned in Note (3).

achieved no extensive practice although the Leaders of the Circuit had a good opinion of his learning and abilities. He retired from his Inn, but he kept up a sedulous attendance on the Courts at Westminster Hall, and settled as a Provincial Counsel in his native city. A prophet rarely has honour in his own country but Firth was an exception; he was made Lieutenant-Colonel of the Norwich Regiment of volunteers, and for some years held the honourable position of Steward of the City of Norwich, a judicial position which had been dignified by the great names of Hale, Spelman and Coke; in his court he held plea of all criminal cases not capital and of all civil cases without restriction of value or cause of action.

Although (or perhaps because) he had not a large practice he seems to have been a close student rather than a man of affairs. He loved his profession, and his library was large if his income was not. His friend, the well-known William Windham, came to his assistance. He was of an old Norfolk family, and had represented Norwich in the House of Commons.⁵ It is not quite certain, but is very probable, that Firth and Windham were related; however that may be, Windham interested himself in Firth and became his patron. Windham was from February, 1806, until March, 1807, Secretary of State for War and Colonies, being succeeded in that position by Castlereagh (Windham, however, continued in charge of the Department for some time). Being notified of the vacancy of the Attorney-Generalship in Upper Canada he appointed Firth to the position and entrusted him with certain despatches to Gore.⁶ He arrived with

⁵ His conduct in opposing the Peace with Napoleon whom he heartily hated and wholly distrusted, cost him his Norwich seat in June, 1802, but he was elected for St. Mawes, in Cornwall, for which he sat till November, 1806, when he was elected for New Romney, and in the same month for Norwich again. He was unseated but elected May 8, 1807, for Higham Ferries, which seat he held until his death in 1810.

⁶ Windham, writing to Gore, June 19, 1807, says: "Mr. Firth, who has been appointed Attorney-General of the Province under your Government, will have the honour of delivering this despatch." Can. Arch. Q. 306, p. 206. That Firth had no acquaintance with

his wife, two servants, books and luggage at York late in the Fall of 1807, the transit costing him £600, two years' official salary.⁷

On arriving at what he calls "this Ultima Thule," he was much disappointed in the place; like all newcomers, then even more than now, he found difficulty in procuring a suitable dwelling, and he was forced to build a house for himself at an expense of £1,750. This was on the north side of Market (now Wellington) street, west of York street and was later occupied by the two Houses of Parliament for a few years after the vandal act of the American Forces in 1813 in burning the original Parliament Building.

Taking up the duties of his high office, he exhibited faults of temper and lack of judgment and of balance. As Gore says, he had "an irritable habit of mind." An Englishman, he had the contempt for the mere Colonial quite too obvious in many of his time and even later; a Barrister of some experience at the English Bar, he belittled the ability, attainments and honesty of his colleagues at the Bar of Upper Canada and included the Bench in his want of respect. He openly and repeatedly boasted of being the only regular Barrister practising in either Upper or Lower Canada, and even pointed out that, with the possible exception of Chief Justice Monk, not one of the Lower Canadian Judges was a regularly trained English lawyer. In the Courts,

Castlereagh appears from his letter to Gore from Elmsley House, York, April 2, 1808, Can. Arch. Q. 311, I. p. 134. "I have not the honour to be personally known to Lord Castlereagh"—he asks for a letter of introduction: he was applying for the Chief Justiceship of Upper Canada or Lower Canada. Can. Arch. Q. 311, p. 133. In the letter mentioned in note 3, Firth says: "For myself I do not consider myself *Novus Homo* or a mere foundling of Fortune, recollecting that when I was appointed by Mr. Windham to ye Attorney-Generalship of Upper Canada . . ." Firth always claimed that he was "induced to accept the appointment to the Attorney-Generalship of Upper Canada in the assurance that I should succeed in the usual routine to the Chiefships in case any fell vacant": but there is no other evidence of such an assurance.

⁷ See his letter from York, February 6, 1808, Can. Arch. Q. 311, 2, p. 414. Of course his *Mandamus* had been made out before this time; he applied in this letter for his salary from the appointment of Scott to the Chief Justiceship till the date of his *Mandamus*. "Gore was allowed £100 for the expense of his removal from the Bermudas to Canada."

he made an ostentatious exhibition of his Common Law learning and arrogantly lectured the Judges on their ignorance. Cutting remarks on Firth's "Black-letter law" followed, and it was not long before it was known that the Attorney-General was not *persona grata* in the Court of King's Bench. For a time he got on well with the Lieutenant-Governor, Francis Gore. After his quarrel with Gore he described Gore as

"boisterous and unruly . . . capricious yet violent in his resentment and totally uncontrollable when pursuing the . . . object of his displeasure . . . with restless curiosity to hear tales and know the private history of every individual . . ."

This is scarcely too strong a characterization of the Governor; but he had a real and sincere love of the Province and desire to do his duty. Firth in a moment of irritation applied to the Governor and told him of the manner in which he had been treated by the Bench; Gore was at the time in one of his ever-recurring disagreements with Powell. Scott, the Chief Justice, was too lethargic and indifferent to quarrel while the recalcitrant Thorpe had been removed. Gore sympathized with Firth. In the strongest terms he reprobated "the total imbecility of one Judge (Scott) and the known disaffection and Rebel Yanky principles (I use his words) of the other" (Powell).^s It was deemed advisable to wait until "some flagrant and unequivocal instance of partiality and corruption should occur when he could

^sLetter to Castlereagh January 18, 1812, see note 3. My own relationship to Scott—not very distant as Scottish relationships are reckoned—does not prevent me from recognizing the want of vigour and capacity in him: Powell was born in Boston, Massachusetts, before the Revolution, and though he took the Loyalist side was under suspicion as to his loyalty almost till the end of his life—once indeed being directly charged with Treason—there does not seem to have been the slightest ground for the suspicion. Firth is not the only authority for the fact that Gore in some of his many disagreements with his close friend Powell, openly called him "Rebel Judge," "Republican Rascal," "Yanky Scoundrel," "Concealed Traitor," and the like.

act upon irrefragable proof," but no such instance ever became available. Moreover Firth himself soon fell under Gore's displeasure.

Almost on Firth's first appearance in the Province, there was trouble about the fees and allowances to be made to him; £100 had been allowed to Gray, the Solicitor-General (acting as Attorney-General), for a clerk and office rent upon the death of John White but as a temporary measure; this had been continued on the verbal order of the Governor during Scott's time and also after Scott's elevation to the Bench, when Boulton, the Solicitor-General, was acting Attorney-General, but without legal warrant. Firth insisted upon having this allowance. When the charge came before the Board of Audit of the Executive Council it was objected to as it had been by the Inspector-General of Public Accounts; but at length Gore directed that it should be allowed. A number of warrants under the Governor's seal-at-arms which had not passed through the Attorney-General's office because it was supposed that the Great Seal was not required, Firth attempted to charge for, but these were disallowed,⁹ and there were other matters in the same case. Firth when he heard of the reduction in his fees, did not hesitate in public or in private to charge the members of the Executive Council with a conspiracy to ruin him; so far from crediting them with just or honourable motives he openly ascribed to them those the most corrupt and partial. He went so far as to speak and write in this way to the Governor in official communications.¹⁰ He wrote to Lower Canada as to the practice there; he went to that Province to see the Chief Justice and failing to see him obtained statements from him; and generally he left no stone

⁹ Special attention should be paid to this, as it was the *fons et origo mali* of much that followed.

¹⁰ For example, writing to Gore from York. August 11, 1808. Can. Arch. Q. 318, p. 284. Firth says: "They appear to me to have done this at their arbitrary pleasure, subject to no control, allowing no appeal, calling for no explanation, and not even abiding by the Rules they themselves have either laid down or affect to adopt." This is mild compared to his charges in other communications.

unturned to establish his claim; but in vain. Firth spoke of an appeal to the Secretary of State, and the Board of Audit asked to be relieved of passing upon his accounts by reason of his atrocious charges against them. This he considered proof positive of their animus and charged them openly with malice toward him personally.

Apparently it was by reason of the objection to his fees for documents under the Great Seal which did not pass through his office, that Firth wrote to the Governor's Secretary, Halton, his official opinion that all "Great Seals must regularly pass through the Attorney-General's office or they may be voided as *improvidē emanavit*." Halton sent it on to Small, the Clerk of the Executive Council; the Executive Council at its next meeting, April 4, 1811, considered the matter carefully; the Councillors while they asserted that the Great Seal of the Province had not yet been put to any Grant of which the Attorney-General had not furnished the first draft (which had been considered sufficient unless some change was to be required) decided that his claim that a fiat (for which he claimed a fee of £1:16 Sterling) was necessary was too important for them to decide and determined to follow the opinion of Firth; but they asked the Governor to submit it to the Colonial Office for the opinion of the Imperial Law Officers of the Crown. This was done at once and the opinion was adverse to Firth's contention,¹¹ but advised the established practice to be followed.

But in the meantime events had moved swiftly in Upper Canada. By direction of the Governor, Halton, April 8, notified Firth that instructions had been given to the Secretary not to affix the great seal until he should have received the Fiat of the Attorney-General

¹¹ Letter from Firth to Halton, March 8, 1811, Can. Arch. Q. 314, p. 77. Letter from Halton to Simcoe, March 19, 1811, Can. Arch. Q. 314, p. 80. Minutes of Executive Council, April 4, 1811, Can. Arch. Q. 314, p. 81. Letter Gore to Liverpool, April 4, 1811, Can. Arch. Q. 314, p. 72. Letter Liverpool to Gore, August 10, 1811, Can. Arch. Q. 314, p. 128. Opinion of Sir Vicary Gibb and Sir Thomas Plumer. Lincoln's Inn, August 9, 1811, Can. Arch. Q. 314, p. 238.

and added "during the continuance of such a regulation, it will be requisite that the Attorney-General should receive special permission from the Lieutenant-Governor whenever he may be desirous to be absent from the Seat of Government."¹² Firth does not seem to have appreciated the effect of this apparently innocent statement. But when the Circuits came round he learned too well what it meant. He applied to Gore for leave to go the Eastern Circuit with the Chief Justice, adding that it was not practicable for him to conduct the prosecutions on all the Circuits and that the Lieutenant-Governor would probably deem it expedient to appoint some Barrister to conduct prosecutions for D'Arcy Boulton, the Solicitor-General, during his absence.¹³ Now was Gore's time for a body blow; he directed his Secretary to write Firth that his request to go Circuit with the Chief Justice was "altogether incompatible with the public service so long as you remain an indispensable party to every act of government requiring the Great Seal;" but said the matter would be referred to the Executive Council.¹⁴ Firth protested that the first and most important duty of the Attorney-General was to conduct prosecutions against criminal offenders and that Instruments under the Great Seal could generally wait as the delay of a few months was not of the least consequence. He added the very important statement "The Circuits constitute now at least three-fourths of the emoluments of my appointment."¹⁵ In vain — the Executive Council reported that the claims to be a party to every "Great Seal" and to go on Circuit were incompatible and they could not advise the Governor to accede to both. They went further and reported that

¹² Letter Halton to Firth, April 8, 1811, Can. Arch. Q. 314, p. 101.

¹³ Letter Firth to Halton, July 6, 1811, Can. Arch. Q. 314, p. 103. Boulton had sailed to England and had been taken prisoner by a French Privateer; he remained three years in a French prison, returning to Canada in 1814.

¹⁴ Letter Halton to Firth, July 7, 1811, Can. Arch. Q. 314, p. 105.

¹⁵ Letter Firth to Halton, July 8, 1811, Can. Arch. Q. 314, p. 107.

“under actual circumstances there is no need for an Attorney-General or Solicitor-General or a substitute for either to attend the Assizes unless matters especially regarding the King’s interests are to be there agitated.”¹⁶

Gore relented; although he agreed with the Executive Council he gave Firth leave to proceed on the Circuit as usual, “apprehending that the public may not be at present prepared for the change.” And he said he would direct some person to conduct the business in the Western Circuit before Mr. Justice Powell.¹⁷ Firth then asked for “leave to go home to England,” adding “In order to obviate any objection to the granting of my request on account of the Solicitor-General’s absence (being a prisoner in France). . . I do not intend to return again to this country.” Whereupon the telling reply was made, “Your solemn opinion that no instrument under the Great Seal of the Province can legally issue without the Fiat of the Attorney-General having been submitted to His Majesty’s Ministers, the Lieutenant-Governor does not think he can with any propriety cancel the order made on that opinion until he receives directions from the Secretary of State”; and it was pointed out that the Lieutenant-Governor’s power to appoint an Attorney-General until His Majesty’s pleasure was known was limited to the case of a vacancy.¹⁸ Firth did not accept or act upon the delicate hint that he should resign, but let it be known indirectly that he would go to England,

¹⁶ Can. Arch. Q. 314, p. 111—the meeting was held July 11, 1811.

¹⁷ Letter Halton to Firth, July 13, 1811, Can. Arch. Q. 314, p. 113. It may be of interest to mention the sums paid for conducting the Crown business at the Assizes from 1792 to 1797, Can. Arch. Q. 314, p. 115 (the amounts are in sterling).

1792—£ 8 17.	1798—£ 65 15. 6.	1805—£139 1.
1793— 25 10.	1799— 69 15.	1806— 230
1794— 58 7.	1800— 60 9.	1807— 160 5.
1795— 24 15.	1801— 99 8. 8.	1808— 203 1.
1796— 27	1802— 113 0. 6.	1809— 195 8.
1797— 34 1.	1803— 135 1.	1810— 316 4.
	1805— 235 8.	

¹⁸ Letter Firth to Halton July 2, 1811, Can. Arch. Q. 314, p. 119. Halton to Firth July 29, 1811, Can. Arch. Q. 314, p. 121.

leave or no leave.¹⁹ He, however, began to hedge and said that all he meant in his former opinion was that regularly the Attorney-General's Fiat was necessary, but that if Great Seals "did not pass in ancient form they were voidable in law, which is a very different thing from that being *ipso facto* illegal;" this called out the obvious and crushing retort from Gore, "It cannot be imagined that any gentleman much less the King's Representative should sanction by his name any Act which he knows from the best legal opinion to be voidable."²⁰

Firth did not wait for leave, but being at Cornwall in September, 1811, he wrote to Liverpool complaining of his treatment and left the Province to embark at Quebec with his family, wife and two little daughters.²¹

Leaving him on his way to England, we shall mention some other incidents of his life in Upper Canada.

The abolition of the local Courts of Common Pleas and the institution of one central Court of King's Bench in their stead was displeasing to many in the Province especially in places remote from the Capital. The wretched roads made it an intolerable burden to attend the Court in Term from the ends of the Province. The fate of Mr. Justice Cochran and Solicitor-General Gray gave a vivid example of the dangers of the water ways. The Eastern District particularly complained and at length two members of the House brought the matter squarely up for determination. Mr. Samuel Sherwood, member for Grenville (always somewhat radical and a little later suspected or more than suspected of disaffection), seconded by Mr. Peter Howard, member for Leeds, obtained leave,

¹⁹ Letter Firth to Holton, July 22, 1811, Can. Arch. Q. 314, p. 116.

²⁰ Letter Firth to Halton, July 22, 1811, Can. Arch. Q. 314, p. 123. Letter Gore to Liverpool July 29, 1811, Can. Arch. Q. 314, p. 116. Gore said that he would appoint an acting Attorney-General if Firth carried out his expressed intention. Can. Arch. Q. 314, p. 116.

²¹ Letter Firth to Liverpool, from Cornwall, September 15, 1811. Can. Arch. 314, p. 249. Letter Gore to Liverpool, York, September 30, 1811, Can. Arch. Q. 314, p. 125.

The opinion of Sir Vicary Gibbs, Attorney-General, and Sir Thomas Plumer, Solicitor-General, Lincoln's Inn, August 9, 1811, Can. Arch. Q. 314, p. 238.

February 2, 1808, to introduce a Bill "for establishing a Court of Common Pleas in each and every District of this Province." The Bill was introduced and read the first time on the following day; it had its second reading and went to Committee of the Whole sitting on February 8. On February 8 the motion was voted down by 10 to 2, the only two supporters being David McGregor Rogers, of Hastings and Northumberland, and Thomas Dorland of Lennox and Addington, the Solicitor-General, D'Arcy Boulton, voting with the majority.

Firth, not expecting to have a hearing, on February 6 took the extraordinary course of appealing direct to the Under Secretary of State in Downing Street. He attacked the provisions of the Bill, said it was intended

"to have for Judges herdsmen from the woods (Bubulci Judices) to be selected from a few unlearned (*native*) Barristers . . . without any but a *Yanky* education."

His strongest argument, however, was

"I believe it to be the first step to the Province declaring its independency, it being a perfect Republican Bill abolishing the English Law and Practice and substituting a crude, undigested, incongruous mass of error and injustice instead."²²

²² It will be remembered that in 1794, when Hamilton in the Legislative Council opposed Simcoe's scheme for abolishing the Courts of Common Pleas and erecting the Court of King's Bench, Simcoe called him a "Republican." The letter referred to in the text is a P.S. to one of February 6, 1808, by Firth to Edward Cooke, Under-Secretary of State for War and Colonies, Can. Arch. Q. 311, p. 416. It is worth quoting in full, as showing Firth's conception of a perfectly simple Provincial measure.

"P.S. It was intention to have informed you (in the body of my letter) of a Bill which ye House of Assembly are bringing here, and which I think will have a very injurious and evil tendency both with regard to ye rights and prerogatives of ye Crown and ye final welfare of ye King's Subjects of ye Province. It is a Bill to establish a Court of Common Pleas in every District of ye Province, to have a universal Jurisdiction in holding all civil pleas, and ye decision is to be *final*, without appeal in all Causes (that in 19 out of 20) where ye sum recvd does not exceed £50. The

The Bill pursued the usual course and finally February 11, 1808, passed the third reading by a majority of 12 to 2, Joseph Willcocks, a notorious mal-content and David McGregor Rogers alone voting nay. In the Council the Bill failed to get through Committee of the Whole and no more was heard of it.²³

Judges are to be appointed by ye Lt. Govr. with a suitable salary to be paid by ye Province. The manifest tendency (and that is ye intention in my mind of ye member bringing it in) of ye Bill is to make ye Office of Judges appd. by ye King a mere sinecure place, and to have for Judges Herdsmen from the woods (*Bublei Judices*) to be selected from a few unlearned (*native*) Barristers, made so by a Provincial Act, without any but a *Yanky* Education, I believe it to be ye 1st step to ye Province declarg its independency, it being a perfect Republican Bill, abolishg ye English Law and Practice, and substitutg a crude, indigested, incongruous mass of error and injustice instead.

I yesterday (as Atty. Genl.) petitioned ye House against ye Bill prayg to be heard at ye Bar.

. . . . I do not think they will grant me a hearg—The Lt. Govr. has desired my opinion on ye Bill which if he follows, will be peremptorily to refuse ye Royal assent—Indeed were it a Bill expct to be passed, I think it one of so revolutionary a nature, that it is included in ye 14th Clause of his Instructions amg those Acts wch he is inhibited givg his assent to, till ye King's pleasure be known. W. F.

Addressed to

Cook Esqr
Secretary of State's Office
Downing St.

²³ For proceedings in the House, see 7 Ont. Arch. Rep. (1910), pp. 201, 205, 206, 207, 208, 210, 212, 213: in the Legislative Council, 6 Ont. Arch. Rep. (1909), pp. 307, 311-313.

(*To be continued.*)