

## Sedition in Upper Canada: Contested Legality

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### Article abstract

The paper examines the uses of sedition law in Upper Canada. Largely neglected by historians, sedition prosecutions were frequently resorted to by the government between the 1790s and the 1820s, and are suggestive of larger patterns in the Canadian experience of dissent and national security measures. The essay focuses on the series of cases connected to the Gourlay affair as the best illustrations of the various facets of sedition law in the province. The availability and use of sedition law by the government to regulate provincial politics, and in particular, to delineate the loyal community and its enemies, was contested, sometimes successfully, by opposition leaders. The formal claims of the legal system, while helping to legitimate the exercise of power, also limited the repression to some extent. The cases brought to the fore the tension between the rule of law and discretionary power, played out in terms of issues about executive control over criminal prosecutions, jury selection and the scope for the jury's verdict, and judicial independence. These contested issues appear to have had some degree of broader public engagement based on popular understandings of the British constitution. The sedition cases not only suggest the importance of law in the exercise of authority, but also the importance of the courts as a site of oppositional struggles.

## ARTICLES

### Sedition in Upper Canada: Contested Legality

Barry Wright

LEGAL PROCEEDINGS FOR POLITICAL OFFENCES such as treason and sedition figured prominently in every episode of popular dissent and political opposition in Upper Canada, from the first substantial manifestation of unrest in 1804-08 to the events immediately surrounding the rebellion of 1837. Yet while much has been written about political conflict in the province, the role of the courts as an arena of struggle has received little critical attention. As E.P. Thompson and others have shown in the English context, the historical record of the uses of law (and the contestation of these uses) casts considerable light on the nature of authority and social conflict. It illuminates the relationship between discretionary power and the rule of law, the repressive and ideological roles of law, as well as law's social meanings.<sup>1</sup> Similar research on early Canada remains largely undeveloped, although Paul Romney's work and his recent debate with Blaine Baker on the rule of law and legality in Upper Canada, along with Murray Greenwood's forthcoming book on legal repres-

<sup>1</sup>In addition to revealing law's complex role in social ordering and repression, and how its administration has been designed to influence the climate of popular thought, such research provides a glimpse of the lives and struggles of people who left few records of their own — see esp. E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York 1975); *The Poverty of Theory* (London 1978); "The Moral Economy of the English Crowd" *Past and Present*, 50 (1971), 76-136; D. Hay, et al., *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (New York 1975).

sion in Lower Canada, appear to open the way.<sup>2</sup> The Upper Canadian cases examined here suggest that the administration of criminal law was repressive even by the contemporary British standards of constitutionalism and legality. Moreover, legal issues that may seem technical from a modern perspective, and consequently neglected, were of great significance to the historical actors. For the authorities, the cases reflect the importance of law in the regulation of provincial politics. For those subject to the proceedings, the legal struggles formed a significant part of the pre-confederation battlefield, involving issues which resonated with popular meanings.

This paper looks at the uses of sedition law to deal with unrest in Upper Canada, and how they were contested. Although politics and conflict over privilege and abuse of power certainly extended to civil proceedings and the ongoing, routine business of the criminal courts, the central legal engagements of the opposition leadership involved prosecutions for treason and sedition.<sup>3</sup> Numerous treason proceedings were initiated during the War of 1812 and the rebellion of 1837-1838, when officials, faced with large-scale popular resistance, seized on the ideological mechanisms of the criminal law in an ambitious effort to shape the climate of popular thought.<sup>4</sup> Sedition proceedings examined here were even more prevalent. The sheer number of cases in the province suggests that they were not isolated or

<sup>2</sup>G.B. Baker, "So Elegant a Web: Providential Order and the Rule of Secular Law in Early Nineteenth Century Upper Canada," *University of Toronto Law Journal*, 38 (1988), 184-205; P. Romney, "Very Late Loyalist Fantasies: Nostalgic Tory History and the Rule of Law in Upper Canada," in W.W. Pue and B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa 1988), 119-47; F.M. Greenwood, *Legacies of Fear* (forthcoming) and "The Development of a Garrison Mentality Among the English in Lower Canada, 1793-1811," PhD thesis, University of British Columbia, 1970. See also J.-M. Fecteau, "Mesures d'exception et règle de droit: Les conditions d'application de la loi martiale lors de la rébellion de 1837-38," *McGill Law Journal*, 32 (1987), 465-95.

<sup>3</sup>Although this research, focussing on a slightly earlier period, tends to confirm Romney's observations, he has recently suggested that the oppressive use of law was probably more common in the civil courts. This perhaps underestimates the frequency and significance of the political prosecutions in the criminal courts, especially before 1820. P. Romney, "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in Canadian Political Culture," *Law and History Review*, 7 (1989), 133.

<sup>4</sup>See B. Wright, "The Ideological Dimensions of Law: The Treason Proceedings of 1838," *Criminal Justice History: An International Annual*, 10 (1989), 131-77; E.A. Cruikshank, "John Beverley Robinson and the Trials for Treason in 1814," *Ontario History*, 25 (1929), 191-217; W.R. Riddell, "The Ancaster Bloody Assizes of 1814," *Ontario History*, 20 (1924), 107-25. There were both court-martial and abortive civilian treason proceedings during the War of 1812 and fifteen civilians were eventually convicted at the Ancaster "bloody" assize in 1814, eight of whom were hanged and had their heads severed for public contemplation. During the rebellion period, *habeas corpus* was suspended and more than 800 persons were subject to capital political charges (many were simply interned; others who were convicted were hanged, or pardoned on condition of transportation to Australia or imprisonment).

extreme exceptions. Their frequency is revealed in the archival judicial records for Upper Canada which indicate 34 prosecutions up to 1828.<sup>5</sup> This excludes a large number of summary deportation proceedings taken under the authority of the Sedition Act. In addition, there was a handful of parliamentary privilege proceedings of questionable constitutionality taken against members of the Assembly as well as outsiders for seditious statements. Taking into account the province's tiny population, the frequency of sedition proceedings appears to exceed the rash of prosecutions taken during Pitt's repression of dissent in Britain during the French revolutionary scares of the 1790s.<sup>6</sup>

Beyond the evidence of repression disclosed by comparing the incidence of proceedings, what can be said about their relative importance and the social dynamics which formed their context? Differences may be discerned in the range of provincial cases, one direct indicator being the record of penalties imposed. The most heavily punished cases appear to occur in the context of clearly expressed official concerns about authority and social stability, and in particular, about an emergent opposition press, seen as an ominous indicator of the potential popular influence of the opposition leadership. Such perceptions were matched by clearly articulated objectives: to use the proceedings to silence and marginalize opposition leaders, and to characterize their criticism as disloyalty. By these measures, the most important prosecutions took place at roughly ten-year intervals and were directly connected to the culmination in the development of organized political opposition. In 1804, passage of the repressive sedition and aliens laws accompanied the rise of the province's first opposition movement which led to the eventual prosecution of Joseph Willcocks, editor of the province's first firmly established independent newspaper, for sedition in the courts and through parliamentary privilege. A decade later, veteran British radical Robert Gourlay, organizer of popular provincial constitutional conventions, was subjected to two dramatically unsuccessful seditious libel prosecutions and ultimately banished under a curious application of the 1804 Sedition Act. His editor, Bartemus Ferguson, was convicted of seditious libel. In 1828, resurgent dissent came to a head in a series of seditious libel prosecutions of newspaper editor Francis Collins. After this period, the government appears to have been reluctant to resort to the courts.

This study centres on the Gourlay affair. It is the most illustrative case, involving the range of legal measures available to authorities in the province. This included, most notably, the common law offence of seditious libel, an imported English judicial doctrine devised in the eighteenth century to limit civil liberties

<sup>5</sup>Most of the prosecutions are recorded in the "Court of King's Bench Termbook," Public Archives of Ontario (hereafter PAO) RG 22. See chart (p.24) for a more complete summary.

<sup>6</sup>See C. Emsley, "An Aspect of Pitt's Terror: Prosecutions for Sedition During the 1790's," *Social History*, 6 (1981), 155-75; F.K. Prochaska, "English State Trials in the 1790's: A Case Study," *Journal of British Studies*, 17 (1973), 63-82.

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flowing from the Revolution Settlement. Local sedition legislation supplemented this offence, creating largely-unprecedented indigenous measures evocative of recurring themes in the area of criminal proceedings and dissent in Canadian history — most notably, security concerns about aliens, and the passage of draconian emergency legislation on a permanent rather than temporary basis. The Gourlay affair also highlights the highly discretionary nature of the administration of these laws, a reflection of the executive nature of the colonial government, which lacked even the semblance of separation of Crown and judiciary. The measures, and the tension between the rule of law and discretion in their administration, provided a rich array of constitutional and legal issues which Gourlay and his supporters used to contest repressive measures.

After first exploring the legal background to the cases and summarizing them, the essay examines patterns discerned in them as well as their social meanings. In sum, the sedition cases illustrate the repressive uses of criminal law as well as the possibilities and limits of counter-hegemonic struggles in the criminal courts. They underline the importance of the criminal law as a repressive social ordering mechanism, but one which must be distinguished from the use of brute coercive force. The resort to criminal law was intended to legitimate official actions; a more convincing course of action but one with certain costs and limitations, deriving from the formal claims of the law. The ideological effectiveness of law depends on the impression that it is “above” partisan politics. From the standpoint of the accused, such limits on the partisan manipulation of the law represented crucial possibilities for contesting its repressive uses. This contestability, however, provided a slender means of defeating repressive initiatives and those subject to the proceedings were largely limited to defensive struggles, within a process which hardly constituted a “level playing field.” If the game could be turned around, which did take place through rare sensational acquittals, the results not only embarrassed the authorities but raised radical consciousness and helped fuel reform efforts in the political sphere.

This examination of the importance of law to the historical actors in these struggles, which loom large in our historical experience, suggests the more general importance of legal issues to the work of social historians and the readers of *Labour/Le Travail*. It must be acknowledged, however, that there remain difficulties in generalizing from the individuals involved in the trials, of drawing precise connections between the repression of opposition leaders and the existence of mass discontent. Terms such as “elite” and “popular dissent” must be placed in the provincial context of undeveloped class formation, particularly before the 1830s. Nonetheless, continuing social and political conflict did derive from the basic economic division in the province, between the mass of agrarian smallholders (the primary producers) and a ruling alliance, or more precisely, a loose network of regional elites consisting of officials, lawyers, and merchants bound together by the authority of, and privileged access to, the provincial government.

The ruling alliance had at its core a group of officials in York (Toronto) which by the 1820s had become known as the "Family Compact." Ideologically united by the Loyalist experience, the Compact favoured a paternalism entailing a preoccupation with a stable social order and a sensitivity to dissent which verged on hysterical intolerance. Its power derived from the monopoly of government offices and patronage, facilitated by the colonial structure of government administration and its self-recruiting corporation, the legal profession. The Compact's alliances with regional administrators and merchants were important but tentative. Public enterprises such as the Bank of Upper Canada and the Welland Canal, as well as land speculation, became sites of collaboration with mercantile capitalists, the economic power in the province.<sup>7</sup> This elite alliance was closed off from the rest of society because of the inability of the agrarian community to move into the legal profession or business. Public policies favouring this group were facilitated by the government's lack of accountability to the elected Assembly.

Ranged against this elite social configuration was the vast majority, largely smallhold farmers. Most of these people were neither United Empire Loyalist nor British (until the 1830s) but of recent American background (sometimes called "late loyalists"), lured to the province by cheap land. Originally welcomed, official concerns about them grew from the late 1790s and accelerated after the War of 1812 with a series of discriminatory policies designed to test their loyalty and brand them as aliens, threatening their voting rights and their land.<sup>8</sup> Compounding this discrimination were economic policies which tended to favour mercantile interests at their expense.<sup>9</sup> Although clashes between the mass of smallholders and the elite

<sup>7</sup>Whiggish generalizations about the Compact by such historians as J.C. Dent and W.D. LeSueur have been reexamined from the perspectives of political culture, legal profession, and mercantile connections: R.E. Saunders, "What was the Family Compact?" *Ontario History* 49 (1957), 165-78; S.F. Wise, "Upper Canada and the Conservative Tradition," in E.G. Firth, ed., *Profiles of a Province* (Toronto 1967), 20-33; J. Errington, *The Lion, the Eagle and Upper Canada: A Developing Colonial Ideology* (Kingston and Montreal 1987); R.L. Fraser, "Like Eden in Her Summer Dress: Gentry, Economy and Society, Upper Canada 1812-1840," Ph.D. thesis, University of Toronto 1979; T. Cook, "John Beverley Robinson and the Conservative Blueprint for Upper Canadian Community," *Ontario History* (1972) 64, 79-94; G.B. Baker, "The Juvenile Advocate Society, 1821-26: Self Proclaimed School-room for Upper Canada's Governing Class," in CHA, *Historical Papers, 1985* (Ottawa 1986), 74-101; H.V. Nelles, "Loyalism and Local Power, 1792-1837," *Ontario History*, 58 (1966), 99-114; H.G.J. Aitken, *The Welland Canal Company: A Study in Canadian Enterprise* (Cambridge 1954); P. Baskerville, *The Bank of Upper Canada* (Ottawa 1987).

<sup>8</sup>See P. Romney, "Reinventing Upper Canada: American Immigrants, Upper Canadian History, English Law and the Alien Question," in R. Hall, W. Westfall and L. Sefton Macdowell, eds., *Patterns of the Past: Interpreting Ontario's History* (Toronto 1988), 78-107.

<sup>9</sup>Farmers depended on merchants who supplied them and took their products to market, and faced the brunt of the downturns in the imperial market. Merchants did clash with the Compact (Niagara merchants actively opposed anti-American policies which drove down

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alliance suggest the dynamics of "pre-labour problem" social conflict, it should be noted that wage labourers were becoming increasingly important, especially by the 1830s, consisting largely of the recently-arrived poor of Ireland and Britain, whose objective was to join the ranks of the smallholders. These immigrants were also feared as a source of disorder.<sup>10</sup>

The relations between this oppressed social configuration and the opposition political leadership require further research. Active opposition figures appear to have been of a different social background, often highly-educated and experienced in reform or radicalism in Britain or Ireland. Although opposition manifestations before 1814 may be interpreted simply as shots at leadership in the context of unstable elite formation, there are strong suggestions that popular grievances formed a significant part of their constituency. Such grievances certainly loomed large by the time of Gourlay, evident in the rural support for his constitutional conventions and petitions. His appeals stressed how difficulties stemmed from the privileges of the Family Compact and its favoured dealings with the merchants, depriving the oppressed of basic rights supposedly enjoyed by all British subjects. There appears to have been considerable popular consciousness of constitutional rights; opposition newspaper criticism and petitions were widely read or were discussed at popular meeting places and more formal, well-attended township assemblies.<sup>11</sup> It is precisely because opposition leaders threatened to raise the consciousness of the discontented and mobilize a provincial populace believed to

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the value of their speculative land investments before Gourlay's arrival). D. McCalla suggests a positive coexistence between agriculture and commerce on issues such as rural credit and default debts, although this does not appear to have been well-established until midcentury. "Rural Credit and Rural Development in Upper Canada, 1790-1850," in R. Ommer, ed., *Merchant Credit and Labour Strategies in Historical Perspective* (Fredericton 1990), 255-72.

<sup>10</sup>On preindustrial protest see G. Rudé, *The Crowd in History: A Study of Popular Disturbances in France and England, 1730-1848* (New York 1964); Thompson "The Moral Economy"; T. Crowley, "Thunder Gusts: Popular Disturbances in Early French Canada," in M. Cross and G.S. Kealey, eds., *Economy and Society During the French Regime, to 1759* (Toronto 1983), 122-51. Eric Tucker identifies the province's first use of criminal law explicitly against labour organizers in 1837. "That Indefinite Area of Toleration: Criminal Conspiracy and Trade Unions in Ontario, 1837-77," *Labour/Le Travail*, 27 (1991), 15-54; see also B. Palmer "Labour Protest and Organization in 19th Century Canada, 1820-1890," *Labour/Le Travail*, 20 (1987), 61-83; R. Bleasdale, "Class Conflict on the Canals of Upper Canada in the 1840's," in M.S. Cross and G.S. Kealey, eds., *Pre-Industrial Canada, 1760-1849* (Toronto 1982), 100-38.

<sup>11</sup>Literacy rates in this period are unclear, although Harvey Graff's work on midcentury Kingston, Hamilton, and London suggests that literacy was surprisingly high. (In Hamilton, 93 per cent of those of Protestant backgrounds and 70 per cent of those of Catholic backgrounds, with slight variation downwards according to age and Irish or American origins.) *The Literacy Myth: Literacy and Social Structure in the Nineteenth Century City* (New York 1979), 59.

be of questionable loyalty and on the verge of revolt that the government was so anxious to use the sedition laws against them. Organized political opposition was proclaimed 'disloyal conspiracy,' and the independent press, its chief agent, "republicans" and "traitors" using the dangerous engine of the "libertine press" to propagate radical views and fuel revolution. The sedition prosecutions were not only intended to marginalize the leaders and silence the press; they were intended to discredit criticism by authoritatively portraying it as disloyalty, delineating the loyal community and its enemies for the contemplation of the beleaguered majority in the province. A brief examination of the development of sedition laws reveals their considerable repressive potential. As we shall see, the administration of these laws reveal their limitations in the form of contestable legal issues resonant with social meaning.

### *1. The Legal Terrain*

#### *a) The English Legal Background*

LEGALLY, THE PROCEEDINGS examined here largely involved the common law offence of seditious libel, although indigenous legislation also figured prominently. The English common law sedition offences in Upper Canada had their origins in the Court of Star Chamber, although seditious libel, the most important of these, was largely developed later by courts to limit civil liberties flowing from the Revolution Settlement.<sup>12</sup> Seditious libel prosecutions became the favoured means of silencing criticism in 18th- and early 19th-century Britain.

The reforms surrounding the Revolution Settlement had created a lacuna by limiting the availability of other repressive measures. Treason, although the ultimate political offence, was too blunt and contentious a device for controlling dissent short of open rebellion. Treason legislation passed in 1695 introduced significant procedural safeguards for the defendant, and in any case treason prosecutions required proof of overt acts or designs against the state.<sup>13</sup> Censorship

<sup>12</sup>The settlement of 1688-89 formally ended the English revolution and had at its core the Declaration of Rights which stated the terms on which the Crown was offered and accepted, established the supremacy of the acts of Parliament, as well as the liberties of the subjects as represented by Parliament, including freedom of speech. The settlement did not resolve all issues between the executive and legislature, giving rise to very different interpretations of its application. In this context, indirect limitations on criticism of the state emerged through executive control over appointed officials, paving the way for the judicial development of seditious libel.

<sup>13</sup>7&8 Wm.III (1695-96) c.3 provided the accused with the right to legal counsel, an advanced look at the Crown's evidence and obliged the Crown to provide at least two witnesses. See L.M. Hill, "The Two Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law," *American Journal of Legal History*, 12 (1968), 95-123. The act discouraged the resort to treason, unless the extremity of the situation facilitated passage of temporary emergency legislation to suspend the procedural rights.



through licensing legislation, which had expired in 1679, was politically impossible.<sup>14</sup> Another offence related to criticism of authorities, *scandalum magnatum*, permitted truth as a defence, something which could prove politically embarrassing. No such defence was available to the defendant charged with sedition. The offence merely involved criticism that "scandalized" the government or brought the authorities into "disesteem." No proof of actions against the state was required, merely proof of an expression through spoken words, conspiracy, or written publication (libel), the nature of which was deemed to foster disaffection and the potential disturbance of the public peace.<sup>15</sup>

Published criticism caused the most concern and seditious libel consequently received the most attention from the courts. Drawing upon libel laws, the English judges quickly established the essentials of this form of the offence during the period c1725-50.<sup>16</sup> The new doctrine contained curious twists which greatly favoured the Crown. It set out a wide scope of prohibited conduct, provided a minimal burden of proof on the prosecution, and left contentious questions in the hands of the judge rather than the jury. The latter involved the arbitrary narrowing of the issues to be decided by the jury and attempts to preclude jurors from giving a general verdict as a disguised protest against the oppressiveness of the proceedings. A judicially-engineered manipulation of the fact/law distinction emerged: the sole matter for the jury to decide was the fact of publication, the remainder, including the seditious quality of the statement, was deemed a question of law for the judge to decide.<sup>17</sup>

With its rapid judicial development and evident political overtones, seditious libel raised potent constitutional issues which put it at the centre of 18th-century political controversies concerning interpretation of the Revolution Settlement, freedom of the press, and the right to criticize government. It also highlighted a range of legal issues concerning the jury, prosecutorial authority, and the inde-

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Such legislation often also set up wide or "constructive" definitions of treason but proof of overt acts against the state was necessary, unlike sedition.

<sup>14</sup>See P. Hamburger, "The Development of the Law of Seditious Libel and Control of the Press," *Stanford Law Review*, 37 (1985), 661-765, on the executive's long search for a new means of controlling the press.

<sup>15</sup>See J.F. Stephen, *A History of Criminal Law: Vol.2* (London 1883), 298, T.A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury* (Chicago 1985), 319.

<sup>16</sup>Stephen, *Criminal Law*, 299-300 suggests that the law gradually "evolved" as a reasonable compromise between contrary political principles — a whiggish interpretation which avoids questions about the judiciary's role in political repression. Hamburger's detailed examination of the doctrine in "Development" highlights the shortcomings of Stephen's interpretation.

<sup>17</sup>Hamburger, "Development," 738, 742, 761. See also Green, "Verdict," 321; *The Trial of John Tutchin* (1704) 14 *State Trials* 1095, 1128. *Rex v. Franklin* (1731) 17 *State Trials*, 625.

pendence of the judiciary.<sup>18</sup> These controversies were most dramatically enacted in the prosecutions of John Wilkes and the celebrated later battles between the criminal defence barrister Thomas Erskine and Lord Chief Justice Mansfield. Mansfield stubbornly maintained judicial control, precluding the jury's consideration of the seditious quality of the comments in question.<sup>19</sup> Erskine asserted that criminal (seditious) intent had to be proved, as intent had to be proved in all other criminal cases, and whether the prosecution had proved this was properly a question of fact for the jury which should not be confined in its verdict.<sup>20</sup> The campaign to reform this doctrine culminated in contentious parliamentary debates in 1791-92 and the passage of Charles James Fox's Libel Act.<sup>21</sup> The legislative victory against the judiciary and executive vindicated the jury's right to deliver a general verdict on all the real factual issues (including intent and whether inferences from the publication suggested sedition).<sup>22</sup>

Fox's Libel Act proved to be a limited advance. While it confirmed Erskine's arguments on the jury, the authorities were able to find ways around the legislation. As the political atmosphere changed, prosecutions for sedition became an important aspect of "Pitt's Terror" in the 1790s.<sup>23</sup> The government's repression took full

<sup>18</sup>Rights of the jury rhetoric were fueled by the doctrinal narrowing of the jury's verdict. Reformers warned of the erosion of rights won under the Revolution Settlement and in Bushell's case, 1670 where freedom of the jury's verdict from the threat of punishment was vindicated. Green, "Verdict," 321-23; A.W. Schefflin, "Jury Nullification: The Right to Say No," *Southern California Law Review*, 45 (1972), 168; E.P. Thompson, "Subduing the Jury," *London Review of Books*, December 3, 10, 1986. Also: R. v. Owen (1752) 18 *State Trials* 1203 as well as R. v. Wilkes (1763-70) 19 *State Trials* 982-1002, 1075-138, R. Almon (1770) 20 *Howell State Trials* 803, R. v. Woodfall (1770) 20 *Howell State Trials*, 895.

<sup>19</sup>Mansfield declared: "Jealousy of leaving the law to the Court, as in other cases, so in the case of libels, is in the present state of things, puerile rant and declamation...[adding in the attempt to dispel impressions of executive manipulation]. The judges are totally independent of the ministers that may happen to be, and of the King himself." From *The Dean of St. Asaph's Case* (Shipley) (1783) 21 *State Trials*, 1039-40.

<sup>20</sup>Stephen, *History*, 338; Shipley, 1040-4; R. v. Stockdale (1789) 22 *State Trials* 237.

<sup>21</sup>32 Geo.III c.60 'An Act to remove doubts respecting the functions of juries in cases of libel.' See W. Holdsworth, *History of English Law: Vol. 10* (London 1937), 688-92 for a description of the lengthy parliamentary battle.

<sup>22</sup>See Green, "Verdict," 330-1, 349. The legislation did not explicitly convert questions of seditious intent into questions of fact nor did it entitle jurors to disregard instructions from the bench on questions of law. It purported not to create new law but rather to "declare" the jury's right to return a general verdict on the whole of matters in issue to clarify "confusion" that had arisen in libel cases.

<sup>23</sup>See Emsley, "Aspect." Politicians such as Edmund Burke, fearing the French Revolution, threw their support behind a new ministry headed by William Pitt the Younger. Thompson observes: "Fox's Libel Act had reached the statute book in the temperate early months of 1792, making the jury the judge of the matter as well as of the fact. It was, perhaps, Fox's greatest service to the common people, passed at the eleventh hour before the tide turned towards repression." *The Making of the English Working Class* (Harmondsworth 1984), 135.

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advantage of the wide scope of the doctrine.<sup>24</sup> More significantly, there was resort to the special prerogative powers of the Crown on prosecutions through the Attorney General's exercise of *ex officio* informations, which gave the authorities enormous procedural advantages such as the bypassing of pretrial procedures (eliminating presentment and indictment before a grand jury, thus depriving the defendant of advanced information about the nature of the charges and evidence), the Crown's discretion in the selection of court and time of trial (thereby keeping the defendant in suspense, and if unable to supply bail, in prison for an indefinite period of time); and enhanced powers to call a special jury (facilitating the Crown's ability to "pack" a sympathetic jury).<sup>25</sup> Furthermore, there was little action on formalizing judicial independence through a more effective separation of powers. Judges were to repeat Mansfield's involvement in executive decisions and judicial inclusion in cabinet continued until 1807, after Pitt's demise. Even after this period, new connections between political radicalism and the emerging labour movement posed a profound new threat to established interests. A further series of sedition prosecutions during the 1810s stood as an immediate example to Upper Canadians.<sup>26</sup>

### *b) English Laws in Upper Canada and Local Legislation*

NOT ONLY WAS THE COLONY of Upper Canada influenced by England's political experience, but the core of the province's criminal laws were formally-received English laws. Its criminal law institutions and practices, with the notable exception of prosecutorial authority, were as closely modeled on England's as conditions would permit. The local legal picture, however, especially when it came to sedition, was a little more complex than these generalizations suggest. Doctrinally, the received package of English criminal law included the offence of seditious libel but it was thought to be unreformed by Fox's Libel Act, resulting in the resurrection of Erskine's arguments against Mansfield. Procedurally, the colonial structure of provincial government affected the administration of law in a manner which

<sup>24</sup>Emsley, "Aspect," 169. Publishing was interpreted to include distribution of publications as well as production.

<sup>25</sup>The exceptional and controversial prerogative power was increasingly resorted to in London. Prochaska, "English State Trials," 63 indicates that the conviction rate in sedition cases following Fox's Act ran at well over 50 per cent, with most acquittals taking place in cases proceeded by regular indictment outside the metropolis. Other procedural advantages included the Crown's full discretion to discontinue proceedings if it sensed a potential acquittal, with no embarrassing inquiry into the reasons and saddling the accused with the costs. See D. Hay, "Controlling the English Prosecutor," *Osgoode Hall Law Journal*, 21 (1983), 168; Emsley, "Aspect," 168-9.

<sup>26</sup>See Thompson, *Making*, 19-27. Resurgent radicalism led to another rash of sedition proceedings involving Burdett and Sir Vicary Gibbs, as well as the eventual passage of the Six Acts. These events stood as influential contemporary examples during the Gourlay affair, influencing both prosecutorial and defence strategies in the province.

accentuated the constitutional issues surrounding the jury, prosecutorial authority, and judicial independence. Added to this was legislation to supplement the received English law — indigenous criminal laws reflecting local concerns that went much further than the emergency measures passed in England at the height of Pitt's repression.

English criminal law statutes and common law in effect until September 1792 made up the core of Upper Canadian criminal law, which the provincial legislature could supplement or amend, while English laws passed after that date did not apply unless legislatively adopted.<sup>27</sup> Seditious libel doctrine raises an interesting "reception" question because 1792 was the year that Fox's Libel Act was passed. Solid technical arguments can be made that the act was part of Upper Canadian law. It was passed and proclaimed before the reception date. Moreover, it was not new law but declaratory of existing law, clarifying the scope of the jury's verdict and the error of judicial restrictions on it.<sup>28</sup> However, contemporary understanding, at least on the part of those subject to proceedings, was that the act did not apply in the province, an error perhaps based on the assumption that 1791 (the provincial Constitutional Act) was the relevant date.<sup>29</sup> As a result, Erskine's arguments were resorted to when the question of the scope of a jury's verdict came up.

Provincial procedures had more repressive implications than those of England. Unlike contemporary English practice, where the vast majority of criminal cases (including sedition) were privately prosecuted, regular prosecutions

<sup>27</sup>The Constitutional Act, 31 Geo.III c.31, split Quebec into the upper and lower provinces (the Commons debate also decisively split Fox and Burke). Upper Canada received English civil law in addition to its criminal law (which Lower Canada received under the *Quebec Act*, 1774). The province's first Chief Justice, William Osgoode, did not think it necessary to explicitly legislate the adoption of English criminal law, but confusion over the *corpus* of received English criminal law led to 40 Geo.III (1800) c.1 (U.C.) which specified the exact reception date as 17 September 1792.

<sup>28</sup>After a number of delays, Fox's Act was passed in the parliamentary session which ended 31 January 1792 and was then proclaimed. As the 1800 provincial reception statute made clear, all criminal laws in existence up until 17 September 1792 were in force. And since the legislation did not create new law but rather corrected a judicially manufactured error in its administration by clarifying the way the jury's verdict should operate in such cases, it would constitute persuasive authority on what the received law was.

<sup>29</sup>A pamphlet printed by the *Kingston Gazette* after one of Gourlay's acquittals declared..."This act [Fox's Libel Act] was passed the year after the constitution was given to this Province. The right of Juries, therefore, is here, still only an arbitrary right. It might be well, therefore, to have it made absolute by provincial statute" — National Archives of Canada (Hereafter NAC) RG 1 *Address to the Jury, at the Kingston Assizes, in the Case of the King v. Robert Gourlay* (Kingston, August 1818). The Lower Canadian practices in such cases, where Fox's Act was not part of the received law may have facilitated the confusion. Such uncertainty characterized eighteenth century criminal law, a confusing array of overlapping statutes and common law which facilitated its discretionary exercise. See Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree*, 17-63.

by indictment were monopolized by the provincial Attorney General or Solicitor General.<sup>30</sup> They effectively controlled the invocation of process, not only in initiating proceedings, but also in enjoying the freedom to stay any private prosecution potentially embarrassing to the authorities. As law officers of the Crown, they had the strategic advantage of the last word to the jury (which was not enjoyed by other prosecutors). And whereas the *ex officio* information rather than indictment was extremely rare except in crisis in England, it was widely resorted to in the province.<sup>31</sup> There are numerous possible explanations for this departure, although the executive nature of the colonial government was no doubt important.<sup>32</sup> This factor undoubtedly facilitated executive influence over the judiciary and other important legal officials. Serious misdemeanours like sedition, along with felonies and treasons, were tried by the Court of King's Bench touring the assize circuit or sitting under special session. Until the 1830s the chief justice of the provincial King's Bench was included in the Executive Council and was *ex officio* Speaker of the Legislative Council, putting him at the centre of political power in a manner that went further than the controversial political involvement of Lord Mansfield. Moreover, judicial appointment and tenure depended on executive pleasure (that of the Lieutenant Governor and Executive Council, though such decisions were vetted by the Colonial Office) so that all judges were controlled to a greater degree than their British counterparts. The executive's control also affected other appointed officials; its influence was particularly important in the context of the sheriff's powers over jury selection as it facilitated packed juries.

The repressive suggestions of provincial procedure are reinforced by a look at the local legislation. The indigenous measures to supplement the received English laws evoke themes that recur in this area of Canadian history. Security concerns around "aliens" are prominent, fitting into a pattern that goes back to the Acadian expulsion. The provincial legislation also suggests interesting parallels with sweeping national security measures imposed in this century to deal with "war and apprehended insurrection" and labour radicalism. The imposition of emergency executive enabling legislation on a permanent basis (the War Measures Act), the widened definitions of unlawful assembly and seditious activity, as well as aliens and the summary deportation of aliens (amendments passed during the Winnipeg

<sup>30</sup>See D. Hay, "Controlling," and P. Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature, 1791-1899* (Toronto 1986). Most sedition cases in Britain were conducted by an individual taking a government reward or an agent retained by the state. The law officers of the crown seldom prosecuted personally, except in London.

<sup>31</sup>See W.R. Riddell, "The Information Ex Officio in Upper Canada," *Canadian Law Times*, 41 (1921), 5-12, 87-96.

<sup>32</sup>Romney, *Mr. Attorney* stresses that monopoly over the fees and rewards for prosecution was regarded as a prerequisite of provincial law officers' appointments. Other explanations involve the rapid rejection in Quebec of private prosecutions after the conquest, and imperial strategic concerns about colonial stability which may have encouraged greater control of the criminal law process through local government officers.

General Strike followed by sections 41 and 42 of the Immigration Act and section 98 of the Criminal Code), all have precedents in the Upper Canadian measures.<sup>33</sup> In many respects the provincial legislation went well beyond the temporary emergency measures passed at the height of Pitt's "Terror" or even under the British "garrison mentality" of Lower Canada.

The main measure in question is the Sedition Act, which was in effect in the province from 1804 to 1829.<sup>34</sup> To understand the genesis of the legislation it is necessary to examine the government's fears, as well as its use of conspiracy theories to justify repressive measures against domestic dissent. An important dimension of "Pitt's Terror" was official concern about French revolutionary intrigues and alliances with disaffected Irish. These intrigues were extended to British North America. In Lower Canada, the British authorities saw themselves as particularly vulnerable, vastly outnumbered by discontented francophones of uncertain loyalty and possible sympathies with France, sharing a large border with the United States where numerous interests wished to strike a blow against Britain. Murray Greenwood has examined how this resulted in repressive Lower Canadian legislation through the 1790s and culminated in the treason trial and bloody execution of David McLane in 1797.<sup>35</sup> The presence of vast numbers of recent American immigrants of uncertain loyalty fueled similar fears in Upper Canada. The discovery of a series of French Revolutionary and later Bonapartist intrigues against the province with Irish, American and Indian support resulted in the enactment of a temporary repressive measure in 1797 followed by the more comprehensive and permanent Sedition Act.<sup>36</sup>

<sup>33</sup>Whether the federal government actually referred to the Upper Canada legislation and practices for precedents in 1914 and 1919 has yet to be determined. On available Department of Justice records during the general strike, see K. Kehler and A. Esau, eds., *Famous Manitoba Trials: The Winnipeg General Strike Trials — Research Source* (Winnipeg: Legal Research Institute of the University of Manitoba, 1990); also L. Katz, "Some Legal Consequences of the Winnipeg General Strike of 1919," *Manitoba Law Journal* 4 (1970), 39-52; D.H. Brown, *The Craftsmanship of Bias: Sedition and the Winnipeg General Strike*, *Manitoba Law Journal* 14 (1984), 1-33. On 1914 see F.M. Greenwood, "The Drafting and Passage of the War Measures Act in 1914 and 1927: Object Lessons in the Need for Vigilance," in Pue and Wright, eds., *Canadian Perspectives*, 291-327.

<sup>34</sup>"An Act for the better securing of this Province against all Seditious Attempts or Designs to disturb the Tranquility thereof" (1804) 44 Geo.III c.1 (U.C.).

<sup>35</sup>F.M. Greenwood, "The Treason Trial and Execution of David McLane" *Manitoba Law Journal*, 20 (1991), 3-14; Greenwood, *Legacies of Fear*. Greenwood has coined the phrase "garrison mentality" to characterize the British repression in Quebec.

<sup>36</sup>In 1797 Upper Canada passed a temporary emergency measure directed against "enemy aliens" which forshadowed the much wider ranging and permanently implemented Seditious Aliens Act of 1804. See "Enemy Aliens Act" (1797) 37 Geo III c.1 (U.C.) (It specified a death penalty but largely reflected existing executive prerogative powers during war). The province was first implicated in intelligence reports in the mid-1790s which suggested that agents of the Directory in France were at work in the American southwest mounting an attack

However, concern about foreign designs formed only the broadest context, providing justification and initial imperial encouragement for local measures. Certainly in Upper Canada, such fears were exploited for clearly partisan purposes. The local preoccupation was the immediate and tangible socio-political situation in the province — the uncertain loyalty of recent American immigrants and local manifestations of reform and radicalism led by post-1798 Rebellion Irish immigrants — a situation that profoundly disturbed an increasingly ambitious and self-conscious official class. The Sedition Act was introduced in the Legislative Council and passed immediately before the emergence of an organized opposition presence in the Assembly.<sup>37</sup> Lieutenant Governor Hunter's speech from the throne in February 1804 referred to the need for new legislative measures to ensure security against the activities of "enemy" aliens. Legislation was quickly implemented that went well beyond British concerns. The definition of alien embraced not only visiting foreign "enemy" subjects (as was the case in the temporary 1797 legislation) but also recently arrived British subjects, and concern about foreign intrigues and subversion was extended to include a broad range of opposition activity.<sup>38</sup> Moreover, dissenting views in the Assembly seeking to limit the life of

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through the Mississippi and Upper Canada, to be coordinated with a French attack on Lower Canada through the St. Lawrence. After the 1797 crackdown Napoleonic intrigues replaced revolutionary ones. In 1804 there was word of a new scheme supported by American and Irish adventurers involving the seizure of Peter Hunter (Lieutenant Governor of Upper Canada and Commander in Chief in both provinces). These intrigues were connected to the alleged operation of "secret societies" in both provinces. See NAC "Report of the Archivist," "Political State of Upper Canada in 1806," *Report of the Canadian Archives, 1892* (Ottawa 1893), xivii, lii, 383; Greenwood, *Legacies of Fear*.

<sup>37</sup>(1804) 44 Geo.III c.1, variously called the "Sedition Act" or "Alien Act," had the dual character of dealing both with radicalism and undesired immigrants. Gourlay stressed the British role in framing the legislation. "There can be no doubt," he said, that "... the statute was framed in the Cabinet of London and sent abroad to be palmed on the poor sycophantish wittings of the Province by some pawkie, well-paid politician, perhaps trebly installed in power with a seat in the Executive Council, a seat in the Legislative Council and on the Bench." (R. Gourlay, "General Introduction," *Statistical Account of Upper Canada* (Toronto 1967), lxiv. There is no evidence to suggest that the legislation was drafted or its details specified in London. Britain urged legislation in the most general terms which the provincial government extended to address specific local concerns. See also W.R. Riddell, "Mr. Justice Thorpe: Leader of the First Opposition in Upper Canada," *Canadian Law Times*, 40 (1920), 912 and "Robert (Fleming) Gourlay As Shown By His Own Records," *Ontario History*, 14 (1916), 41.

<sup>38</sup>See Speech from the Throne, 8 February 1804 reproduced in the *Sixth Report of the Bureau of Archives for the Province of Ontario* (Toronto 1911). The Legislative Council and Assembly responded to the speech 8-9 February. The Bill was introduced and moved in Council and was considered by the House Committee (where modifications were made on 14 February).

the act, as usual with such emergency measures, were quickly suppressed.<sup>39</sup>

Although there is no concrete evidence of reference to legislative models, comparison with similar measures is illuminating. The measures around the *Le Grand Dérangement* of the Acadians point to an expansive definition of alien. The closest contemporary British legislation was a temporary act passed in 1793 which regulated the registration of aliens and British subjects who had lived in France since June 1789, enlarging the scope of royal prerogative to deport, and later amended to intern without trial or bail any of such persons suspected of treasonable practices.<sup>40</sup> A legislative model even closer to home was the Lower Canadian Alien Act passed in 1794. This measure combined the immediate British legislative precedents on registration, deportation, and internment but widened the ambit of prohibited activity from treason to sedition, thus allowing detention without trial for promoting disaffection, with no proof of overt acts.<sup>41</sup> The Alien Act had to be renewed every year. In 1795, renewal was achieved only when clauses suspending *habeas corpus* were dropped. Renewing the legislation in 1797 proved impossible, and it was replaced by the temporary "Better Preservation Act."<sup>42</sup>

There were precedents, therefore, in emergency legislation to adopt an expansive definition of alien and to suspend *habeas corpus*. The Lower Canadian legislation went further than British precedents by expanding the range of prohibited activity. The government in Upper Canada adopted this and took things a step further. Unlike the Lower Canadian legislation, the Sedition Act was not a temporary measure that required renewal every session of the legislature. It was permanent and could only be repealed through a bill with the consent of the Legislative Council and executive (as shall be seen, repeal bills passed by majorities in the Assembly in the 1820s were repeatedly defeated by the Compact-dominated Councils). The Sedition Act also exceeded its Lower Canadian counterpart in penalties: failure to obey a deportation order, and subsequent conviction by a court of violating the act, was punishable by death.

The provisions of the Sedition Act permitted the deportation of anyone who had not been a permanent resident in the province six months before proceedings were initiated, or who had not taken the oath of allegiance in the province. Any

<sup>39</sup>*Sixth Report*, 23 and 24 February. Further amendments were made on 25 and 27 February. It was received in the Assembly on the 27th and on the 29th, Angus Macdonell, seconded by Ralfe Clenche, moved that since it was essentially a war measure, the legislation should be in force for only four years. Their motion was roundly defeated, the Bill was passed and returned to the Legislative Council. The Bill received royal assent from Hunter on 9 March.

<sup>40</sup>(1793) 33 Geo.III c.27 (G.B.); (1794) 34 Geo.III c.54 (G.B.).

<sup>41</sup>(1794) 34 Geo.III c.5 (L.C.) Penalties for first offences were fines and imprisonment, second offences up to transportation for life. Greenwood, *Legacies of Fear* examines the legislation and its application. In reviewing the King's Bench records down to 1798 he finds no convictions under the legislation, although summary internments and deportations took place under it.

<sup>42</sup>(1795) 35 Geo.III c.11 (L.C.); "Act for the Better Preservation of His Majesty's Government," (1797) 37 Geo.III c.6 (L.C.) patterned closely on (1794) 34 Geo.III c.54 (G.B.).



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such persons engaged in seditious activity (as noted earlier the judicial definition of sedition was expansive) could be arrested on a warrant of Lieutenant Governor, any judge of the King's Bench, or any member of the Executive or Legislative Councils. The person would then be subject to summary deportation hearings where the burden of proof was shifted to the defendant to show that he or she did not come within the terms of the legislation as a "seditious alien."<sup>43</sup> Failure to obey a deportation order constituted an offence without benefit of *habeas corpus*, for which the accused could be interned without bail or specified trial date. The Lieutenant Governor had discretion to issue an order for a trial for the offence of disobeying the deportation order. If the court found the accused guilty, further refusal to leave the country was punishable by death.<sup>44</sup>

The provisions were so vague and ambiguous that after the legislation was applied over a decade later to Robert Gourlay, Chief Justice Powell observed:

[The Act] subjects the Earl [of] Bathurst if he should pay a visit to this Province and his Looks should offend Isaac Sweezy [Swayze, who informed against Gourlay] to be ordered out of the Province by the enlightened Magistrate, and if that disobedience which constitutes the offence is found by a jury, to be banished, under penalty of Death, should he remain or return without the Slightest Enquiry into the Cause or Justice of the worthy Magistrate's suspicion that he was a Suspicious Character.<sup>45</sup>

The efforts to repeal the act, after Gourlay's trial and banishment under it, was an important issue in the struggles for responsible government.

The Seditious Meetings Act of 1818 represented another indigenous measure, in effect from 1818 to 1820, and similar to its contemporary among the British Six Acts.<sup>46</sup> Its purpose was to close a gap in the sedition laws by prohibiting the extra-legislative constitutional meetings and popular petitioning organized by Gourlay. As shall be seen, the direct suppression of such meetings was considered but it was decided that the safer legal route was to prosecute him for seditious libel. After failing to secure convictions, the authorities enacted the seditious meetings legislation.<sup>47</sup> Although never invoked, it deterred assemblies, and Gourlay's criticism of the legislation provided the specific pretext for proceedings against

<sup>43</sup>Section one, 44 Geo.III c.1.

<sup>44</sup>Section two, 44 Geo.III c.1.

<sup>45</sup>Powell to Gore, January 18, 1819 quoted in Riddell, "Robert (Fleming) Gourlay," 41.

<sup>46</sup>See "An Act to Prevent Certain Meetings in the Province of Upper Canada," 58 Geo.III c. 11 (U.C.) repealed March 7, 1820 after Gourlay had been banished. Pitt's seditious meetings legislation (1796) 36 Geo.III c. 8, and the "Six Acts" passed in Britain the year following the provincial legislation, were temporary measures.

<sup>47</sup>By the end of October, legislation urged by Lieutenant Governor Maitland and drafted by Attorney General Robinson was quickly passed. See Debates 21, 22 23 and 31 October reproduced in Gourlay, *Chronicles of Canada* (St. Catharines 1841), 34; Robinson to Hillier (Secretary to Maitland), 18 November 1818 reproduced in E.A. Cruikshank, "The Government of Upper Canada and Robert Gourlay," *Ontario History*, 33 (1936), 165.

him under the Sedition Act. The Gourlay affair illustrates most of the facets of the legal terrain examined here. We can now turn to see how this array of laws and procedures was played out in practice.

## *2. A Selective Account of the Proceedings*

THE ARCHIVAL RECORDS reveal 34 prosecutions for various common law offences of sedition.<sup>48</sup> It should be noted that this rather startling measure of criminal proceedings does not include all sedition-related measures taken against dissent in the province. Added to the record is Gourlay's trial for violating a deportation order under the Sedition Act. The act was also the basis for a yet-undetermined number of summary deportation hearings during the War of 1812 which never found their way to the courts.<sup>49</sup> A full picture also demands an account of parliamentary privilege procedures under charges of sedition, a measure made famous by the Wilkes controversies in Britain and which was ultimately applied in the Willcocks affair and affected Charles Durand, Hugh Thomson and William Lyon Mackenzie as well. Courts were not resorted to after 1828. Although there were discussions about the utility of bringing prosecutions against Mackenzie and others in the mid 1830's, it appears that criticism surrounding the Attorney General's arbitrary exercise of prosecutorial power, and fears of jury acquittals precluded actions other than the parliamentary privilege proceedings, notably the repeated expulsions of

<sup>48</sup>See table. Political misdemeanours such as sedition were tried by the Court of King's Bench, its technical record being PAO RG 22 "Court of King's Bench Termbook." It should be noted that these official records are incomplete and have been tampered with. There are evident irregularities for proceedings during the period 1812-15 (when there were also special courts in operation) and the Gourlay affair, which require reference to other archival sources (see, for instance, PAO MU1368 "Register of Persons Connected to Treason"). It should also be noted that none of these cases were published in the modern sense of reported cases available to the public. The cases must be reconstructed from the technical records of the court as well as confidential official correspondence, contemporary newspaper accounts and pamphlets. This research base actually provides a more complete picture than traditional legal methodology based on reported cases. The archival record provides insight into official deliberations and strategies accompanying the cases. Contemporary newspapers and pamphlets provide a glimpse of public views and responses.

<sup>49</sup>The wartime operation of the Sedition Act was eventually supplemented by emergency legislation which included vesting the lands of aliens into the hands of the Crown. The measures affected large numbers of American immigrants who had failed to take the oath of allegiance. Local commissions were set up by order of the Executive Council in 24 February 1812 and boards operated in York, Niagara, and Kingston to systematically investigate and deport, and magistrates in other areas were instructed to vigilantly enforce the Act. E.A. Cruikshank, "John Beverley Robinson and the Trials for Treason in 1814," *Ontario History*, 25 (1929), 191 suggests that there were hundreds of deportations, although no sources are cited.

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**Common Law Sedition Prosecutions  
(Excluding Sedition Act Proceedings)**

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- S. Springstein: Oct. 1794, Niagara (convicted and fined 13 pounds)  
 I. Swayze: Apr. 1795, York (convicted and fined 10 pounds)  
 E. Graham: Sept. 1803, Kingston (not guilty, henceforth n.g.)  
 J. Campbell: Sept. 1804, Kingston (convicted - 2 sessions in pillory and 6 mo. imprisonment)  
 A. Brown: Aug. 1805, Cornwall (n.g.)  
 R. Curlet: Aug. 1808 Kingston (n.g.)  
 J. Willcocks: Sept. 1808, Niagara (withdrawn-proceeded on again by information, later tried by parliament and convicted - see text)  
 W. Cale: Sept. 1810, Sandwich (n.g.)  
 A. Lazatere: Aug. 1812, Niagara (n.g.)  
 J. Willcocks, J. Bemmer: Sept. 1812, London (indicted but not tried - Bemmer later interned w.o. trial, Willcocks expelled *in absentia* from Assembly)\*  
 E. Bentley: June 1813, York (convicted - imprisoned for six months and sureties for good behaviour for five years\*; indicted again, York Oyer and Terminer October 1813 and convicted in March 1814, sentenced to six month, 200 pound fine and extensive sureties)  
 G. Clarke: Sept. 1813 Kingston (convicted sentenced to two hours in the pillory, one month's imprisonment, fine of 50 pounds and sureties for good behaviour)  
 J. Cody, J. Mulat, A. Patterson, M. Terry: Oct. 1813, York\* (traversed to the York assizes with Bentley in March 1814, but not proceeded against)  
 G. Collver, J. Hanning, J. Sprague: Aug. 1814, Ancaster (Sprague only convicted - sentenced to one hour in the pillory, imprisonment and a five pound fine)  
 B. Gerow: Aug. 1814, Kingston (convicted, sentenced to one hour in the pillory, one month's imprisonment and a fine of 5 pounds)  
 S. Cody, A. Dalteron: Oct. 1814, York (convicted, sentenced to one month and 20 pound fines each)  
 G. Orton: March 1815, York, (convicted, sentenced to two hours in the pillory, one month's imprisonment, a 5 pound fine)  
 P. McGee: Aug. 1816, Newcastle (convicted, fined twenty pounds and one week in prison)\*  
 J. Vincent: Aug. 1818, Kingston (convicted, sentenced to two months imprisonment and fined 10 pounds)\*  
 R. Gourlay: Aug. 1818 Kingston, Aug. 1818 Brockville (acquitted on both, convicted of violation of deportation order under Sedition Act Aug. 1919 Niagara and banished on pain of death - see text)\*  
 B. Ferguson: Aug. 1819, Niagara (convicted and sentenced to 18 months imprisonment, 50 pound fine, extensive securities/sureties)  
 W.L. Mackenzie, F. Collins: April 1828, York (indicted but not tried, Collins tried on his indictment 13 October, York and acquitted; prosecuted again and convicted 24 October, sentenced to 12 months imprisonment, 400 pound fine, extensive securities/sureties - see text)  
 H. Crompton: Oct. 1828, York (jury could not agree and discharged)

\*not listed in King's Bench Termbook PAO RG 22

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Mackenzie as a member. During the rebellion period from 1837 on, it appears that sedition-related cases were dealt with under the wide definitions of treasonable practices found in the emergency legislation rapidly passed to deal with the crisis.<sup>50</sup>

Excluding the war-time proceedings, and while not minimizing the repressive examples of the other cases, the most important and contentious proceedings fell into roughly ten year intervals: the Willcocks affair, 1804-08; the Gourlay affair, 1818-19; and the Collins Affair, 1826-28. Of the range of convictions, they were the most heavily punished. The record of "sentences" for those convicted fall into three rough categories: minor fines for seditious utterances, the pillory for more serious cases, and finally, in the proceedings focussed upon here, lengthy prison terms and ruinous fines. That the authorities do not appear to have contemplated or imposed the pillory in the most important cases suggests the magnitude of popular support for the accused. The severity of the pillory depended upon the sense of community vengeance, and where this sense was inaccurately gauged, the punishment could backfire and prove embarrassing for authorities.<sup>51</sup> And while it is difficult to assess precisely the level of popular support around these cases, Willcocks, Gourlay, and Collins were all charged with seditious libel at the culmination points of organized political opposition and an active independent press, when official fears of popular disorder were at an apex.

There is one early case prefacing Willcocks, which while not actually involving sedition, appears to mark the beginning of the substantial political use of criminal law, and reflects official concerns about the press, political radicalism, and the emergent alien question. As noted earlier, a temporary capital measure, the Enemy Aliens Act, was passed in 1797 to deal with reported French intrigues in the Canadas. During that spring Gideon Tiffany, an allegedly disloyal, American-born printer in conflict with the local establishment, was convicted of blasphemy and later frustrated in his attempts to establish the province's first independent newspaper.<sup>52</sup>

<sup>50</sup>The legislative compliance in early 1838 contrasts sharply with the Assembly's frustration of repressive legislative measures in 1812 and 1813 —see Wright, "Ideological Dimensions."

<sup>51</sup>See PAO RG 22. In many cases there was a combination of penalties. The fines and imprisonment in the most serious sedition cases proved to be of sufficient magnitude to silence the opposition press involved, although it also led to popular subscriptions and petitions for mercy.

<sup>52</sup>W. Colgate vaguely suggests that the province's first printer, Louis Roy, had republican sympathies and that the authorities regarded him with suspicion. "Louis Roy: First Printer in Upper Canada," *Ontario History*, 43 (1951), 123-42. He was replaced in 1794 by the American Tiffany, the only person in the province who offered printing skills. See W.S. Wallace, "The First Journalists in Upper Canada," *Canadian Historical Review*, 26 (1945), 372-81. He was carefully watched for disloyalty, and criticism culminated with charges of having brought God into disesteem, resulting in conviction in the Home District April 1797, a sentence of one month's imprisonment and substantial fines, as well as loss of his lucrative

The Tiffany case and its context reflect official concerns that were elaborated in the period 1804-08 with the rise of the first substantial organized political opposition movement in the province.<sup>53</sup> The period opened with the passage of the Sedition Act which, as described above, was passed in the spring session just before the opposition won a presence in the Assembly with the byelection victory of radical barrister and former United Irishman William Weekes. Shortly before Weekes's election, authorities issued a sober warning to the disaffected with the prosecution for seditious "words" of James Campbell in Kingston on 28 September 1804. He was convicted and sentenced to two sessions in the pillory and six months' imprisonment.<sup>54</sup> The next session of Parliament saw the rapid development of the organized opposition led by Weekes and supported by other reformers recently arrived from Ireland, having experienced frustrated home rule, rebellion followed by bloody repression in 1798, and legislative union with Great Britain. They saw Irish grievances and British policy being replayed in the province; the full and proper implementation (Simcoe's promised "very image and transcript") of the British constitution as set out in the provincial Constitutional Act of 1791 contradicted the realities of unaccountable executive colonial administration. Weekes was killed in a duel.<sup>55</sup> His influential supporters were removed from the scene through elaborate tactics masterminded by Lieutenant Governor Gore.<sup>56</sup> Robert

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licence as King's Printer (see PAO RG 22 Court of King's Bench Term Book, s.125). When Tiffany and his brother later attempted to set up independent papers, they were warned that they risked ruinous prosecutions for seditious libel. Close government surveillance and economic difficulties prevented an opposition press from finding a permanent footing; Gideon published the short-lived *Canadian Constellation* 1800 and his brother Silvester suffered a similar fate with the *Niagara Herald* in 1801.

<sup>53</sup>Previous opposition to executive policies by figures such as the Tiffanys appears to have been fragmented and unorganized. The leaders of the emergent organized opposition were united by experience, ideology and programme, articulating sophisticated "Irish Whig" constitutional arguments. See W.R. Riddell, "Mr. Justice Thorpe," 907-24; H. Guest, "Upper Canada's First Political Party," *Ontario History*, 54 (1962), 275-96; G. Patterson, "Whiggery, Nationality and the Upper Canadian Reform Tradition," *Canadian Historical Review*, 56 (1977), 25-44; J.B. Walton "An End to All Order," M.A. thesis, Queen's, 1977; NAC "Political State of Upper Canada in 1806," *Report of the Public Archives, 1892* (Ottawa 1893); PAO *Sixth and Eighth Reports of the Bureau of Archives for the Province of Ontario* (Toronto 1911, 1912).

<sup>54</sup>PAO RG 22 "Court of King's Bench Termbook" s. 125, Kingston Assize, 28 Sept. 1804.

<sup>55</sup>See NAC "1892 Report," 67 and Guest, "First Political Party," 284.

<sup>56</sup>Benefitting from the experiences of the Irish repression, Gore's actions against oppositionists such as Robert Thorpe, Joseph Willcocks, Charles Burton Wyatt, and David McGregor Rogers included official secret surveillance, use of paid informers, and manipulation of executive powers on appointment. According to Gore's sources "the Jacobin paper" was sponsored by exiled United Irishman Thomas Addis Emmet and a Monsieur Genet from France (see Gore to Castlereagh, York, 21 August 1807, NAC "1892 Report," 81-6). Reflecting a mastery over cloak-and-dagger methods, Gore had been intercepting opposition

Thorpe, who through powerful British connections in Ireland had secured an appointment to the provincial Court of King's Bench, was removed from office by the Executive Council.<sup>57</sup> Joseph Willcocks, who was editor of the first firmly-established opposition paper in the province, the *Upper Canada Guardian*, and who assumed leadership of the opposition by announcing he would seek a seat in the Assembly in a byelection, proved to be more difficult to neutralize.<sup>58</sup> After an abortive attempt to proceed on seditious libel by indictment, Gore authorized Attorney General Firth to file an *ex officio* information against Willcocks.<sup>59</sup> The legal proceedings became complicated when Willcocks won the election and took his seat on 26 January. On 16 February Firth used the information to obtain leave to strike a special jury in York, where he intended to have Willcocks tried.<sup>60</sup> Willcocks, fearing a packed jury — indeed, fearful of any jury based in York — was fortunate in successfully applying for a change of venue to the Niagara District where both the paper and his constituency were based. Fearing the embarrassment of a jury acquittal, authorities stayed the prosecution.

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members' mail from the U.S., noting "[t]he venality of the American postmasters made it an easy matter for the agent employ'd to procure a sight of letters address'd to the parties...." (see Gore to Watson, York, 4 October 1807, NAC "1892 Report," 113).

<sup>57</sup>Thorpe provided opposition members with constitutional arguments from the bar of the House and promoted the opposition cause by his charges to grand and trial juries, including statements on the Constitution and the rights of British subjects and importance of the jury in upholding these rights against tyranny. See Addresses Petit Jury Home District 5 April 1806; Grand Jury Western District 4 September 1806; Petit Jury Western District 6 September 1806; Grand Jury London District 17 September 1806; Petit Jury of Niagara 6 October 1806; Address, Grand Jury of the Home District 30 October 1806; NAC "1892 Report," 48-65). Thorpe was ultimately struck from the commission of assizes for his conduct before Imperial approval was received (see Report of the Executive Council York, 4 July 1807, and Castlereagh to Gore, Downing Street, 19 June 1807, NAC "1892 Report," 82, 80); also Gore to Castlereagh, York, 14 November 1807, Gore to Watson, York, 4 October 1807, PAC "1892 Report," 87, 114; Gore to Cooke, York, 14 January 1808, NAC State Papers — Upper Canada Q Series 311, 2.

<sup>58</sup>Gore first attempted to silence Willcocks by removing him from office of sheriff. See Affidavits of Titus Geer Simons, Joseph Cheniquy, and George Richard Ferguson, 2 February 1807, reproduced in Gore to Windham, York, 23 April 1807, NAC "1892 Report," 76-9 (re: seditious remarks made at a dinner party at the home of John Mills Jackson). Willcocks instead turned to running the opposition paper. The *Upper Canada Guardian or Freeman's Journal* was published out of Niagara from 24 July 1807 initially because the government newspaper, *The Upper Canada Gazette*, refused to publish opposition election addresses or rebuttals to libels made by government supporters.

<sup>59</sup>The prosecution was initiated 14 November 1807 and a warrant was issued for Willcocks to appear and plead before a judge on 4 January 1808. Willcocks pleaded not guilty and was given notice of trial at the next assizes. Evidence for the libel included affidavits from the Jackson dinner party as well as extracts in the *Guardian*. See Riddell, "Information Ex Officio," 91-2.

<sup>60</sup>See Riddell, "Information," 91-2.

Willcocks was instead proceeded against by parliamentary privilege, the provincial legislature acting as a court, a process made famous in its use against John Wilkes. The motion carried; Willcocks was convicted by Parliament of seditious libel and sentenced to imprisonment in the district's common gaol for the duration of session.<sup>61</sup> Gourlay, commenting on the case a decade later, observed that:

Had Mr. Fox [the sponsor of the Libel Act in England] been still alive Mr. Fox, who pleaded so warmly for the popular rights of Canadians, what would he have said, when he found the Representatives of these Canadians converting Parliament into a judicial court for trial of offences with which Parliament had nothing to do? ... What would Mr. Fox have said to all of this? Certainly had he moved at all in the matter, it would have been worthy of him to have gone out to Upper Canada, purposely to kick the dirty fellows of Assembly into Lake Ontario.<sup>62</sup>

Indeed, Wilkes in 1763, and the more contemporary case of Burdett suggest that this use of parliamentary privilege was unconstitutional. In the House itself, freedom of speech was privileged and precluded sedition prosecutions or libel actions in the courts against members. Members could be expelled only if they were convicted of a serious crime or otherwise formally disqualified to sit (as opposed to being deemed by the House as unfit to sit). The Assembly had no jurisdiction to take over a prosecution which was still before the courts, nor did it have the authority to imprison one of its members. In short, Willcocks was deprived of his right to a trial because authorities deemed a jury less certain than a malleable Assembly majority acting as a "kangaroo" court.<sup>63</sup>

<sup>61</sup>As Willcocks recounted, "There were two or three glaring contradictions in the evidence of those gentlemen [Crown witnesses], that would in a court of justice have destroyed the veracity of the whole; but in a court of parliament was considered as nothing ... I never saw a prosecution conducted with more evident disadvantage to the defendant, ...I implored the House to have witnesses sworn, but this benefit was denied me as were the advantages of representation. I had but one clear day's notice of trial; and when it did commence, I was not permitted to put a single question to a witness that was at all likely to make him contradict or invalidate his testimony...." See "Address to the Electors [Willcocks's constituents] from the Home District Gaol, March 6, 1808," *Upper Canada Guardian*, 6 February and 18 March 1808, reproduced in Gourlay, *Statistical Account of Upper Canada* Vol. 2, note 35, 655-9.

<sup>62</sup>Gourlay, *Statistical Account*, 650-1. As noted earlier, Fox played a central role in the debates around the Constitutional Act, 1791.

<sup>63</sup>The process was also abused in Lower Canada against Bédard in 1810 under Governor Craig's "terror." Willcocks was able to resurrect his paper and his parliamentary career, leading an opposition which controlled close to half the votes in 1812. He initiated what became a series of bills to reform the jury, and with the outset of war he led the Assembly's intransigence which frustrated repressive legislative measures. He was again indicted for sedition in September 1812. When the Executive Council bypassed the Assembly and commenced repression through secret orders in council, Willcocks fled to the U.S., was expelled from the Assembly in absentia for sedition and later killed in action.

While the activities of the first opposition may be interpreted as shots at provincial leadership and the response of the authorities a reflection of instability at the top, the existence of popular discontent is more apparent in the years following the War of 1812, with the existence of serious economic difficulties and the virulence of new official policies against Americans. Although a resurgent provincial opposition movement found a focus around Robert Gourlay, the events that gave rise to dissent went far beyond the agitation of any single person and certainly preceded his arrival. Executive abuses continued unabated. Gore, who orchestrated the demise of the first opposition, had returned as Lieutenant Governor after an interregnum of military administrators. Old Executive Councillors were joined by ambitious new Tories, most notably John Strachan and John Beverley Robinson, and the "government party" began to expand its influence province-wide. With its social pretensions and political hegemony it became known as the "Family Compact." Popular grievances fuelled by the postwar economic difficulties and new discriminatory measures related to the "alien question" were supplemented by conflicts over land grants and compensation for war losses. Official policies not only affected the small-holders but also antagonized mercantile interests in the western part of the province.<sup>64</sup>

Provincial grievances became organized under the formidable leadership of the Scotsman Gourlay, a veteran of agricultural experimentation, tangled litigation, and British radicalism. He was a colleague of Cobbett and Hunt, and left for the province shortly after the Spa Fields Riots just before a spate of prosecutions for sedition in England. His arrival in Upper Canada in 1817, his 27-month stay, and his banishment under the repressive 1804 Sedition Act have been subject to much historical commentary. The political events require only a brief summary here.<sup>65</sup> The legal measures against him have not been subject to close critical scrutiny, although they richly illustrate the various facets of sedition in the province. The proceedings fell into two phases. The first involved prosecutions for seditious libel which led to jury acquittals. The second involved the direct suppression of his constitutional meetings with the passage of the "Seditious Meetings Act."

<sup>64</sup>Continuing abuses involving land grants were accompanied by new controversies over Crown lands and the Clergy Reserves, unsatisfied war claims, and new policies around the alien question, arising out of renewed postwar government fears about the security risk posed by the American immigrant population. Niagara District, where tensions were extreme, was the scene of complex alliances. See A. Dunham, *Political Unrest in Upper Canada, 1815-1836* (Toronto 1963), 47-51; Romney, *Mr. Attorney*, 28, 65-80.

<sup>65</sup>See Dunham, *Unrest*; J.C. Dent, *The Story of the Upper Canadian Rebellion* (2 vols.) (Toronto 1885); G.M. Craig, *Upper Canada: The Formative Years, 1784-1841* (Toronto 1963). On Gourlay's life see Lois Darroch Milani, *Robert Gourlay, Gadfly* (Toronto 1971). The best documented earlier sources are E.A. Cruikshank, "The Government of Upper Canada and Robert Gourlay," *Ontario History*, 33 (1936), 65-169 and Riddell, "Robert (Fleming) Gourlay," 5-133. The long-lived Gourlay himself left a rich legacy of written accounts, declaring that "man is a recording animal."



Gourlay's public reponse to the legislation resulted in the application of the Sedition Act against him and an *ex officio* information prosecution for seditious libel against Bartimus Ferguson, editor of the new opposition paper the *Niagara Spectator*. The sedition prosecutions appear to have quickly cut off mercantile support for opposition and solidified the elite alliance. However, the equation of criticism with disloyalty had longer-term implications in fueling dissent and the reform effort through the 1820s.

After the election of late 1816, the discontent in the province was reflected in the new Assembly. The 1817 session started with a parliamentary privilege prosecution against James Durand for seditious libel based on comments in an election handbill and an article in the *Niagara Spectator* which criticized executive policies and "tended to bring the government and legislature into disesteem."<sup>66</sup> These policies went beyond limiting American immigration by authorizing magistrates to register all US subjects and recommend any for deportation under the Sedition Act, while prohibiting the administration of the oath of allegiance to Americans, a prerequisite to holding land in the province. Members of the previous legislature had been compliant, even supporting the measures by entertaining a bill to suspend *habeas corpus* in certain cases.<sup>67</sup> Durand was tried when the new Assembly convened, again with the questionable use of the Wilkes precedent. The House resolved that seditious libel was proved and on 4 March, Durand was sentenced to gaol for the duration of the session, which he avoided by going into hiding, resulting in his expulsion as a member.<sup>68</sup> But this did not dispel opposition in the House. Rather, it led to a period of parliamentary crisis where the Assembly was twice prorogued by the Lieutenant Governor. Robert Nichol, after heading the prosecution of Durand and thereby impressing his loyalty, proceeded to articulate the grievances of various land speculators concerning the government's policies and moved for a general committee to consider the state of the province. Resolutions condemning the executive were in the works when Gore prematurely prorogued the House.<sup>69</sup> The process was largely repeated in the 1818 session when

<sup>66</sup>The proceedings are reproduced in their entirety in Gourlay, *Statistical Account: Vol. 2*, 628-65.

<sup>67</sup>See Journals, House of Assembly 1816; PAO RG 1 E1 Minutes of the Executive Council, York 7 October 1815; Report, Gore to Bathurst, York, 17 October 1815 reproduced in Cruikshank, "The Government," 108-9. The policies cast in doubt the titles of provincial residents who had emigrated to Upper Canada after American independence. The executive's wide reading of the peacetime scope of the Sedition Act paved the way for the creative application of the legislation to Gourlay. See also Romney, *Mr. Attorney*, 83.

<sup>68</sup>Durand responded to Nichol's use of the Wilkes precedent by noting that Wilkes had been previously convicted by a court. He added that his comments had been quoted out of context, that seditious intent was not evident, and that the proper measure was a civil action. See Gourlay, *Statistical Account Vol.2*, 633, 635-44, 651. Gourlay contrasts the case with the more contemporary Commons proceedings against Burdett.

<sup>69</sup>Nichol had war-loss claims and speculative landholdings, and he was joined by the Niagara District magistrate William Dickson in opposing the aliens policies. See Journals, House of

Samuel Smith, who was temporarily acting as Administrator after Gore's departure and before Lieutenant Governor Maitland's arrival in the summer, abruptly ended it.<sup>70</sup>

Robert Gourlay strode heavily into the midst of this complex political turmoil. Initial tentative support in some official quarters for his statistical accounting of provincial improvement quickly turned to suspicion when he called for township meetings to collect local grievances in his first "Address to the 'Resident Landholders of Upper Canada'."<sup>71</sup> In February 1818, Gourlay's second "Address," published in the *Niagara Spectator*, went further by adopting an overtly political tone, openly denouncing the provincial establishment and backing the Assembly opposition call for a general enquiry into the affairs of the province.<sup>72</sup> When the House was again arbitrarily dissolved, Gourlay issued his third "Address" in which he declared that "Parliament is broken up and the Constitution is in danger." He proposed township meetings to elect delegates to a political convention in York and to collect popular grievances for direct petition to the sovereign.<sup>73</sup>

For the authorities this smacked of advocacy of popular revolutionary councils and Gourlay was placed under close surveillance as they pondered their response.<sup>74</sup>

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Assembly, 1817. See also Romney, *Mr. Attorney*, 83-4; Dunham, *Political Unrest*, 49. The Colonial Office eventually concluded that the policies of Gore and the Executive contradicted the Treaty of Paris, 1783, imperial legislation passed in 1790 and the Constitutional Act, 1791.

<sup>70</sup>See Dunham, *Political Unrest*, 49; Craig, *Formative Years*, 92-3.

<sup>71</sup>The address was printed 30 October 1817 in the *Upper Canada Gazette* noting that the first necessary step for provincial improvement was an accurate statistical account, and for this purpose questions were posed and each township was requested to reply. Gourlay quickly clashed with Strachan calling him "a monstrous little fool of a parson." See Riddell, "Robert (Fleming) Gourlay," 16; see also Strachan to Harvey, 22 June 1818 reprinted in J.L.H. Henderson, ed., *John Strachan: Documents and Opinions*, (Toronto 1969) 67.

<sup>72</sup>See *Niagara Spectator*, 5, 12 February. Gourlay reproduced the 1790 imperial legislation which explicitly invited American citizens and criticized Gore's high-handed and arbitrary dismissal of the previous session of Parliament. He pointed out that citizens had the right to directly petition for grievances Parliament under the Revolution Settlement.

<sup>73</sup>*Niagara Spectator* 2 April (reprinted in Cruikshank, "The Government," 134-8; also Riddell, "Robert (Fleming) Gourlay," 24-5. British constitutional convention was that the Crown's prerogative on dissolution was to be exercised circumspectly. Gourlay again emphasized the constitutional basis for township meetings and petitions.

<sup>74</sup>Administrator Smith wrote to Bathurst on 18 April, "I have ... directed the Attorney General to watch the progress of this person and his employees in order to seize the first proper occasion to check by criminal prosecution the very threatening career now entered upon." Robinson arranged for close surveillance and interception of Gourlay's mail. He also induced loyalist citizens to intimidate. Thomas Clark wrote an address claiming that the British constitution prohibited conventions of the people other than Parliament, adding that legislation prohibiting such meetings as seditious was used in Ireland and Scotland. See Smith to Bathurst, York, 18 April 1818 reprinted in Cruikshank, "The Government," 139-41, also Strachan to Harvey, 22 June 1818, reproduced in Henderson, *Strachan*, 68; Gourlay, *Chronicles of Canada* (St. Catharines 1842).

Mercantile support for him quickly dissipated as it became clear that merchant interests were best realized by backing the official repression of Gourlay and his popular cause. Attorney General Robinson was cautious however, conscious of the popular impact of legal proceedings:

... It requires undoubtedly to be well considered in cases of this kind how far it may be expedient to commence prosecutions, for however unquestionable the law may be, the improper lenity, or worse conduct of Jurors frequently screens the offender from punishment. This gives importance to what otherwise might perhaps have sunk into contempt, and the acquitted libeller is immediately elevated into a Champion for liberty and against imaginary oppression ... No time more than the present ever afforded stronger evidence of this truth in the experience of the Mother Country.<sup>75</sup>

Robinson made it clear that a seditious libel prosecution, despite the risks of a jury trial, was the sole secure legal option against Gourlay, one lent legitimacy by the similar activity of his British contemporary, Sir Vicary Gibbs. Robinson added that the prohibition of popular conventions required new legislation to have a firm legal basis.<sup>76</sup> Despite his caution, Robinson did not prepare the ground carefully enough. The two prosecutions for seditious libel backfired badly and provided an important platform for the anti-government cause.

The government made its move in June, ordering Gourlay's arrest on warrant for seditious libel issued by the Attorney General. To back this up, Robinson also arranged through Jonas Jones and Duncan Fraser to have a private complaint of sedition brought up.<sup>77</sup> Thus, the authorities had two cracks at Gourlay: one for the

<sup>75</sup>Robinson to Jarvis, York, 13 June 1818, reproduced in Cruikshank, "The Government," 145-6.

<sup>76</sup>"The only Law I know of, under which these meetings ... might be suppressed is the British Act of 13 Charles 2d Stat. 1. Ch. 5th against tumultuous petitions. It has indeed been asserted that this act is virtually repealed by the Bill of Rights [Revolution Settlement] ...nothing certainly would give more consequence and popularity to Mr. Gourlay's wild measures than to attempt to suppress these meetings by any harsh construction of Law ... But as there can be no doubt that Mr. Gourlay's publications are gross libels on the administration of the Government, I apprised Your Honour of my intention of adopting the only course sanctioned clearly by the Law..." Robinson to Smith, 29 June 1818; reproduced in Cruikshank, "The Government," 150-2. In a further letter Robinson requested assistance from the justices of King's Bench on the question of proceeding against the meetings which cleared the way for the drafting of the Seditious Meetings Act passed later in the year. See Robinson to Smith, 4 July 1818; Powell to Smith, 7 July 1818 (reproduced in Cruikshank, "The Government," 153-4).

<sup>77</sup>Jones was given the task of following Gourlay's movements. On 25 June in Johnstown, Jones induced Fraser, a local magistrate, to lay an information against Gourlay for his "seditious words" after a speech (Gourlay was touring the townships to recruit representatives for the Toronto convention). See Gourlay, *Statistical Account*: Vol. 2, 665; Riddell, "Robert (Fleming) Gourlay," 28-9.

sedition libel initiated by the Attorney General, for which he was to be indicted and tried at the Kingston assizes, and another for "sedition words" through the private information, for which he was to be indicted and tried at the Brockville assizes.<sup>78</sup>

The Kingston prosecution, conducted by Solicitor General Boulton before judge William Campbell, came up 15 August.<sup>79</sup> Boulton suggested that Gourlay, hiding behind a printer, sought to destroy the freedom of the press. His constitutional meetings were as unacceptable in the province as they were in Britain and if the people continued to listen to Gourlay, he would overturn the constitution. Gourlay was compared to the vilified Willcocks. Beyond the polemics, Boulton's legal argument was simply in accordance with the applicable doctrine before Fox's Act: if Gourlay was responsible for the production of the publication in question, then the jurors must find him guilty.<sup>80</sup>

Gourlay's defence and address to the jury involved a much more thorough exploration of the law and an exploitation of its contestable elements. In preparing it Gourlay had the benefit of advice from Barnabas Bidwell, a former Attorney General of Massachusetts.<sup>81</sup> Gourlay's legal arguments can be broken down into procedural and substantive matters. Procedurally, he began by stressing the general need to consider principles of due process based on constitutional and legal rights and the contemporary English practice in cases of this nature.<sup>82</sup> He then focussed on particulars, arguing that the assizes had suddenly been scheduled a month early, that he had not been notified, and had only accidentally avoided being found in contempt.<sup>83</sup> He pointed out that a copy of the indictment had been withheld from

<sup>78</sup>In the meantime, the newly arrived Lieutenant Governor Sir Peregrine Maitland wrote to London that "a man of the name Gourlay half-Cobbet, and half-Hunt, has been perplexing the Province. They have found a Bill of Indictment against him, for a libel against the government. I have not very great confidence in the issue before a petty Jury. But I hope he will not at least escape a heavy fine for a libel on a Individual, which will cripple him." See Maitland to Bathurst, 19 August 1818 in Cruikshank, "The Government," 156-7.

<sup>79</sup>The warrant of arrest (the indictment was not made available) states Gourlay was proceeded against for "false, wicked and seditious libel styled Principles and Proceedings of Inhabitants of the District of Niagara and Petition to the Prince Regent." It remains unclear why Boulton rather than Attorney General Robinson was chosen to prosecute especially since there was scandal surrounding Boulton's recent involvement in the Jarvis duelling death. As Milani, *Gadfly* points out, the official records were manipulated in the Gourlay case; an extensive record of the Kingston trial does survive in the form of the pamphlet, *Address to the Jury* NACRG 1 1051, noted earlier. See also Gourlay, *Chronicles of Canada*, 23 and *The Banished Briton and Neptunian* (Boston 1843); Robinson's Report (unsigned) on the Gourlay affair (NACCO 42/368/161-7).

<sup>80</sup>Address to the Jury, 4.

<sup>81</sup>Riddell, "Robert (Fleming) Gourlay," 34.

<sup>82</sup>Address to Jury, 4

<sup>83</sup>Address to Jury, 20. This was likely an attempt to prevent his return to the province. By scheduling the proceedings a month early when Gourlay was expected to be in New York,

him (on application to the court after the trial, a copy was still refused, possibly because the Crown feared an action for malicious prosecution). When told that this was legal practice (in fact, it was still in this period a matter within the court's discretion), he noted that this practice was contested in Britain as putting the accused at an unfair disadvantage in preparing a defence.<sup>84</sup> Gourlay added that the Crown had refused him the right to examine all the witnesses he had called, and that his examinations had been barred until after he had presented his defence.<sup>85</sup> He had chosen to defend himself, but he pointed out the unfairness of the court retaining discretion to prohibit defendants from employing counsel.<sup>86</sup> The procedural theme which pervaded his address was that the arbitrary rules and practices of the court were used to frustrate the constitutional rights of citizens.<sup>87</sup> He was to reiterate this theme in his comments on judicial interference with the jury's verdict.

Although Boulton could have contested Gourlay's procedural points (he did not, in fact, do so), Gourlay's arguments on substantive law undoubtedly destroyed the prosecution's case. He admitted that under strict doctrine, "the lowest drudge employed to give it circulation is actionable."<sup>88</sup> However, even under this absurd law, he was not the principal but rather an accessory on the key point of publication of the pamphlet in question. He added that petitions by British subjects were hardly seditious: they were an important constitutional right, absolutely privileged and not punishable as libels.<sup>89</sup>

Beyond this fundamental flaw in the Crown's case, Gourlay referred to the basic need for the prosecution to prove intent in criminal proceedings. Far from demonstrating Gourlay's criminal intention, the Solicitor General had demonstrated only that the pamphlet had been published. This point, drawing from Erskine's defences, was the springboard to Gourlay's most powerful arguments on the jury. Gourlay noted, on the issue of jury selection, that the sheriff, under pressure from the Attorney General, had chosen the jurors exclusively from Kingston rather than impartially from the whole district, an abuse which reformers had attempted to deal with through jury-reform bills.<sup>90</sup> His most important point

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the authorities hoped to take advantage of Gourlay's absence to find him in contempt of court and thereby prohibit his return to the province. Upon a chance reading of the *Upper Canada Gazette*, Gourlay discovered that the Kingston assizes had been scheduled a month earlier than usual. See Milani, *Gadfly*, 166.

<sup>84</sup> Address, 19.

<sup>85</sup> Address, 6.

<sup>86</sup> Address, 20. Gourlay specifically referred to the infanticide case of Angelique Pilotte where the accused was prohibited from employing counsel and was capitally convicted.

<sup>87</sup> "The rules of courts of law, Gentlemen, are seldom founded on parliamentary statutes. They are often the capricious and selfish decrees of men [judges] greedy of power." Address, 21.

<sup>88</sup> Address, 5.

<sup>89</sup> Address, 13-6. Gourlay stressed petitions no matter how false or scandalous, were upheld by the Revolution Settlement, adding that "to deprive the people of submitting a petition...would indeed be taking away their bond of union."

<sup>90</sup> Address, 20.

related to the scope of the jurors' verdict. Addressing the insufficiency of Boulton's demonstration of the fact of publication, Gourlay stressed that bad intent and the seditious quality of the publication should be considered by the jury in its verdict. He referred directly to Erskine's arguments which, after much struggle, had resulted in legislative victory in Britain, overturning the common-law rule created by the judiciary:

It has been long inflicted that juries should give their verdict, in cases of libel *only* as to the fact of publishing; and as to the law, they were governed by the judge. The present Lord Erskine gained immortal honour by overturning this rule, by the bold and persevering expression of his opinion; and as it was of infinite consequence to the liberty of the Press Mr. Fox, and he, introduced a bill into Parliament, and had it enacted, that in cases of libel, jurors should be free to decide for themselves upon the whole matter.<sup>91</sup>

Judicial control over the important issues was both an artificial conversion of facts into law and a unconstitutional limit on the jury's right to find verdict according to conscience, which had been broken down after long struggle in vindication and confirmation of the rights of the people. The jury on this basis should give a verdict on the whole matter before them: "To leave this to the dictum of the bench would be a dangerous sacrifice of liberty. It is now therefore the established and undeniable right of jurors, impanelled for trials of libel, to give the verdict at their own discretion on the whole matter before them."<sup>92</sup> As the *Kingston Gazette* reported on 18 August, the Solicitor General exercised the Crown's controversial right to make the final statement to the jury and the jury returned a verdict of not guilty.<sup>93</sup>

Boulton appears to have fumbled the case badly. Although his position was broadly tenable on seditious libel doctrine as it was prior to Fox's Act, the charge as formulated was better levelled at Gourlay's publisher. More importantly, Gourlay was given room to make powerful arguments on contestable legal points which jurors would have difficulty rejecting if they were fully to exercise their rights on the verdict. In this regard, it is unfortunate that the minutes of the trial and Campbell's charge to the jury cannot be found, although the favourable report of the trial in the *Kingston Gazette* would suggest that Campbell did not attempt to control the jury on its verdict.

Gourlay and his supporters celebrated the victory, but there was still a trial to face at the Brockville assizes which began on 25 August.<sup>94</sup> When questioned on the trial date Boulton replied that the trial might be postponed to the next assizes.

<sup>91</sup> Address, 21.

<sup>92</sup> Address, 21.

<sup>93</sup> Address, 22.

<sup>94</sup> Gourlay's supporters met at Moore's Coffee House and toasted the integrity of judges, the independence of the jury, the liberty of the press, and the constitutional right of petitioning. See Address, 23-4.

When Gourlay demanded a discharge on the grounds that he had already been acquitted of sedition, an indictment was returned and a trial was scheduled for 31 August.<sup>95</sup>

The indictment charged Gourlay with "diffusing discontents and jealousies and raising tumults" that stemmed from other passages in his Third Address. The original charge and wording of the indictment would suggest the case related to Gourlay's declaration of the address in Johnstown, rather than the libel dealt with and settled by the Kingston jury. However, the Crown's pleadings focussed on the alleged published libel.<sup>96</sup> Gourlay's attempt at an *autrefois acquit* defence (based on his previous acquittal on this) appears, nonetheless to have been brushed aside. He again went on to stress the lack of malicious intent and the constitutionality of his actions; addresses similar to his own and similar to the one which caused Durand's expulsion from the Assembly were common in every borough of England, especially during general elections. When Gourlay attempted to call witnesses to prove that his conduct and his attempt to read the address did not, barring the actions of government supporters, cause tumults, the evidence was excluded. Gourlay ended as before by requesting that the jury consider the whole matter in its verdict.<sup>97</sup> The final reply was made by Boulton, whose arguments appeared even weaker than they had in Kingston. He dwelled mainly on his conduct and the reputation of his family and associates, perhaps goaded by Gourlay into discomfort about his involvement in a duelling scandal and his own professional competence. The jury again acquitted Gourlay.<sup>98</sup>

The government's next move involved turning to even more repressive legal measures: new legislation to suppress the resurgence of political meetings, fol-

<sup>95</sup>Gourlay, *The Banished Briton and Neptunian*, No. 12, 112; *Kingston Gazette*, 2 September 1818; Riddell, "Robert (Fleming) Gourlay," 35; Milani, *Gadfly*, 177-8. The Crown had evident difficulty with the wording of the indictment. If too similar to the Kingston indictment, Gourlay could successfully claim an *autrefois acquit* defence. On the other hand, the Johnstown evidence was complicated by Gourlay's action against Fraser for assault.

<sup>96</sup>Riddell, "Gourlay." Jonas Jones as a witness declared the address was a malicious defamation on members of the Assembly.

<sup>97</sup>Riddell, "Gourlay."

<sup>98</sup>As with the Kingston trial, there is no record of this trial. Milani, *Gadfly*, 178 notes an entry by the clerk, "The minutes of Proceedings for the Eastern, Johnstown and Midland Districts were taken away from the Crown Office by Henry John Boulton Esquire, Solicitor General, personally, and never returned, although often asked for, for want of which, they are not recorded." It appears that the government feared an action for malicious prosecution, especially given the irregularities surrounding the indictments. This ended Gourlay's counter-hegemonic triumphs, although he did manage to secure Fraser's conviction for assault at the Quarter Sessions and a public apology from Stephen Miles, editor of the *Kingston Gazette*, who had been pressured to publish government propaganda under his own name. See Riddell, "Gourlay," 28-9; H. Pearson Gundy, *Early Printers and Printing in the Canadas* (Toronto 1957), 26-7.

lowed by the dragging out of their heaviest weapon, the Sedition Act of 1804. The government was to be more successful this time, controlling the "loose cannon" of the jury by using the exceptional procedures of the 1804 Act against Gourlay and resorting to an *ex officio* information for the seditious libel against Bartimus Ferguson, the editor of the *Niagara Spectator*, for publishing Gourlay's response to the new seditious-meetings legislation.<sup>99</sup> Moreover, the tensions within the elite alliance were smoothed over; mercantile interests were decisively split away from popular discontent as the use of sedition powerfully equated criticism and protest with disloyalty.

Legislation to prevent further township meetings and conventions, which Robinson had earlier noted a legal silence, was the first matter of attention when the legislature was prematurely reconvened in October. It now proved compliant to the executive's wishes and the Seditious Meetings Act was passed by month's end.<sup>100</sup> It forbade popular committees or extraparliamentary elected assemblies from meeting to deliberate on public issues or to formulate petitions, complaints, or addresses to the King or Parliament seeking to redress grievances. Such activity was said to encourage riot, tumult, and disorder and also usurped the legislature's proper functions. All persons who organized or attended such meetings were guilty of a "high misdemeanour."<sup>101</sup> Although no prosecutions were brought under the new law, opposition to its passage furnished the pretext for other repressive measures.

<sup>99</sup>The *Kingston Gazette*, which had heavily publicized Gourlay's victories, was silenced when pro-government interests took over the paper in the autumn of 1818. This left Ferguson's *Niagara Spectator* as the main opposition newspaper on the scene, although the Ancaster based *Upper Canada Phoenix* (heir to Willcock's *Guardian*) was sympathetic.

<sup>100</sup>Although the early recall was ostensibly due to fiscal concerns, Maitland indicated the real reason in the Throne Speech of 12 October: "[We] feel a just indignation at the attempts which have been made to excite discontent and to organize sedition..." The Assembly apologized to Maitland for its lack of cooperation during the preceding session and ordered minutes referring to the recent struggles between the Houses expunged from the record (Maitland had offered generous concessions on the economic matters that were at issue). Robinson brought forward the legislation he had drafted with the assistance of the judges. The bill was opposed by only one member. See *Debates, House of Assembly* 21, 22, 23 and 31 October (reproduced in Gourlay, *Chronicles of Canada*, 30-4); also, Robinson to Hillier, 18 November 1818 in Cruikshank, "The Government," 165. Popular petitions calling for an end to the persecutions of Gourlay and for a general election quickly followed. See Milani, *Gadfly*, 184; Cruikshank, "The Government," 94-5.

<sup>101</sup>See 58 Geo. III c. 11. It was claimed in the debates that the Act was based on similar but unspecified British legislation. The Six Acts were not passed until the next year. As noted earlier, Pitt's "seditious meetings" act of 1796 36 Geo. III c.8., like the Six Acts, was a temporary measure. See Gourlay "Recapitulation and Conclusion, Concerning the Convention and Gagging Law," *Chronicles of Canada*, No.1, 38-40.



While the seditious meetings legislation was taking shape, the Sedition Act was submitted to the judges of the Court of King's Bench, secretly assisted by Attorney General Robinson, to ascertain whether Gourlay came within its terms.<sup>102</sup> On 10 November they reported that the oath of allegiance referred to in the legislation must be taken in the province and that the legislation "... was originally enacted to guard against the seditious practices of natural-born [British] subjects as well as aliens." They added that "in the sound Construction of that Act" the reference to "inhabitant" was to be given a particular meaning, denoting "any Person living in this Province for the continued term of six months."<sup>103</sup> Gourlay had not taken the oath of allegiance in the province, and had within six months visited the United States without leaving a permanent residence behind.

On 3 December, Gourlay's famous "Gagg'd, by Jingo" response to the seditious-meetings legislation was printed in the *Niagara Spectator*, triggering the Sedition Act proceedings and a seditious-libel prosecution against the editor.<sup>104</sup> As noted earlier, the legislation went further than any post-1688 British precedents and the Alien Act passed in Lower Canada in the 1790s. The Sedition Act's use and the nature of its provisions completely surprised Gourlay. His conviction under it caused much contemporary and historical debate.<sup>105</sup> While its constitutionality could be politically challenged, its legal provisions left no room for effective challenge in the courts.

Isaac Swayze (who many years earlier had been the second person in the province to be prosecuted for sedition) provided sworn informations against Ferguson for seditious libel and against Gourlay under the 1804 act.<sup>106</sup> On 16

<sup>102</sup> See Robinson's report on the Sedition Act and its application to Gourlay. NAC CO 42/368/153-9, 161-7.

<sup>103</sup> Report of the Judges to Sir Peregrine Maitland 10 November 1818 reproduced in Cruikshank, "The Government," 164.

<sup>104</sup> Gourlay repeated that county meetings, conventions, and petitioning were constitutional rights set out in the Revolution Settlement, adding that the Lieutenant Governor and councils had introduced the legislation rather than the elected representatives.

<sup>105</sup> See Dunham, *Political Unrest*, 59; Riddell, "Robert Gourlay"; A.R.M. Lower, *Colony to Nation* (Toronto 1946), 234. Gourlay sought legal advice from Edinburgh and London after he was denied *habeas corpus*. Sir James Mackintosh and Sir Arthur Piggott found the Sedition Act of questionable constitutionality (although there had been numerous temporary suspensions of *habeas corpus* since the Revolution Settlement, most notably from 1794-1802). See Gourlay, *Statistical Account*, "General Introduction," xxxiii, lxiii, lxx, cccx. A later Assembly Committee inquiry concluded in general terms that his treatment had been "illegal, unconstitutional and without possibility of excuse or palliation" "Resolutions," *Debates, Legislative Assembly, United Canada*, Vol. 1 (1841) E. Nish, ed., (Montreal 1970), 1004.

<sup>106</sup> Swayze in the intervening years had gone out of his way to ingratiate himself with the establishment. Confirming that he was acting on the government's instructions, Swayze boasted to Maitland's secretary on the day of the arrest that within ten days, Ferguson would

December, Ferguson and co-editor Benjamin Pawling were arrested, and after initial confusion, they were proceeded against by *ex officio* information, which gave the Crown full discretion in terms of when it could proceed to trial, with a warning that the subsequent conduct of the newspaper would determine the matter.<sup>107</sup> On 18 December, summary proceedings were initiated under the Sedition Act under Swayze's oath that Gourlay fell within the terms of the legislation and that he was a seditious person endeavouring to cause rebellion.<sup>108</sup>

On 21 December, Gourlay was brought before an hearing headed by William Dickson and four others sitting as commissioners. Gourlay's claim that the Act did not apply to him since he was a British subject was dismissed by the commissioners, who were armed with the interpretation provided by the judges in November. They proceeded to question him about his connections with Cobbett and Hunt and his activities at the Spa Fields Riots, in Ireland, and in the United States. He was then asked to prove that his words and conduct were not intended to promote dissaffection against the government. When Gourlay failed to do this to the commissioners' satisfaction, they issued an order in writing which declared him a seditious alien and stated that he must leave by 1 January. Gourlay refused to leave, arguing that he already had been acquitted twice of sedition-related charges and that he was entitled to be held innocent of the charges until proven guilty by a jury in a regular court. A warrant was then issued for his arrest for violating the banishment order, and on 4 January he was committed to the district gaol of Niagara without *habeas corpus*.<sup>109</sup>

Gourlay was kept in confinement for eight months until the following August. He petitioned Chief Justice Powell for a writ of *habeas corpus*, which was denied after Powell's consultations with the Attorney General on the provisions of the

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have Gourlay for company. Swayze to Hillier, Niagara 16 December 1818 reproduced in Cruikshank, "The Government," 165. See Gourlay, *Banished Briton and Neptunian*, no. 16, 163; no. 22, 263; "General Introduction," *Statistical Account*: lxviii; vol. 2, 498.

<sup>107</sup> Although the procedural advantages of *ex officio* information allowed for this 'hanging threat' (the Six Acts limited royal prerogative by compelling the Attorney General to proceed within a year on informations), authorities were in fact obliged to proceed with this controversial measure. During his opposition to the aliens policy, William Dickson who was guiding Swayze, lost his appointment as commissioner of the peace which meant that he had no authority to swear indictments.

<sup>108</sup> Dickson, as a Legislative Councillor, was authorized to conduct the summary proceedings. Oath reproduced in "Order to Commit Robert Gourlay, 4 January, 1819," *NAC Documents Relating to the Constitutional History of Canada, 1819-1828* (Ottawa 1935), 14.

<sup>109</sup> It was well known that Gourlay had resided in the province for the past year and a half and owned property, but the technical interpretation of the legislation by the judges meant that temporary absence without a permanent residence sufficed. See "Order to Commit," in *Documents Relating Ibid.*, 14-5. See also Gourlay, *The Banished Briton and Neptunian*, No. 16, 165; Cruikshank, "The Government," 97; Milani, *Gadfly*, 187-8.

Sedition Act.<sup>110</sup> Gourlay communicated freely with visitors and wrote pieces in the *Niagara Spectator*, which became increasingly critical after the legislature was reconvened in early June. At this point, Attorney General Robinson ordered him placed in solitary confinement, in a dark and poorly ventilated cell.<sup>111</sup> Gourlay's correspondence had consequences for Ferguson as well. Supported by resolutions in the Assembly and Lieutenant Governor Maitland, Robinson proceeded with the seditious libel information of the previous December against Ferguson.<sup>112</sup> The decision was made to try Gourlay at these same assizes, which began on 16 August.

Chief Justice Powell presided while the Attorney General prosecuted for the Crown. Unlike Boulton the year before, Robinson came well-prepared. Moreover, both the Ferguson and Gourlay cases were tried by carefully packed juries. The Crown was able to achieve this in Ferguson's case through its powers to call a special jury under the *ex officio* procedure. Gourlay was simply unfit to stand trial due to his confinement and this made him incapable of challenging the sheriff's selection. Gourlay later claimed that the jury was notoriously packed.<sup>113</sup> An independent jury, persuaded to exercise a full verdict according to conscience might have acquitted in order to protest the law and oppressive prosecution, as the juries in Gourlay's previous trials were encouraged to do. This jury was not inclined to do so. Nor was Gourlay in any condition to persuade it otherwise.

As the indictment specified, Robinson had to prove only that there had been an order to leave the province under the terms of the Act and that Gourlay had disobeyed it.<sup>114</sup> The legislation reversed the burden of proof and Robinson did not have to establish the existence of sedition. If Gourlay conceded disobedience of the banishment order, the jurors were directed by the law to convict. After carefully examining the commissioners and the establishing the regularity of the hearing, he

<sup>110</sup>See petition of 13 January in Gourlay, *Statistical Account*: "General Introduction," xl. On 20 January Powell endorsed the writ and ordered Gourlay delivered to his chambers in York, where Gourlay demanded his rights to an immediate hearing before the King's Bench. Powell left the chambers to consult with the Attorney General, and returned declaring that Gourlay was not entitled to a hearing nor bail. See Gourlay, *The Banished Briton and Neptunian*, 189; Gourlay, *Statistical Account*: "General Introduction", x, xli-xliii.

<sup>111</sup>Riddell, "Gourlay," 65 refers to a grim contemporary description of the gaol and Milani, *Gadfly* describes Gourlay's ordeal in detail.

<sup>112</sup>The information was triggered by libel found in the June 28 issue of the paper. See *Journals*, House of Assembly, 5 July 1818, 173; NAC RG 5 B3 vol.21. Pawling died shortly after the initial arrests the previous December. As a result of the *ex officio* procedure, Ferguson's pre-trial proceedings were limited to his exceptional appearance before the full bench of King's Bench in York where he was remanded for trial at the next assizes in Niagara. See Riddell, "Gourlay," 51; Riddell, "Information Ex Officio," 93-4; *Niagara Spectator*, 29 July, 1819; Gourlay, *The Banished Briton and Neptunian*, No. 34, 476.

<sup>113</sup>Gourlay, *Statistical Account*: "General Introduction," xv-note; *Statistical Account*, Volume II, 342; See also Milani, *Gadfly*, 200-1.

<sup>114</sup>See Riddell, "Gourlay," 52.

put it to the jurors that their verdict was on the simple question of Gourlay's actions after the deportation order. All other issues were a question of law.<sup>115</sup>

Gourlay compounded his problems by insisting on defending himself. This time he was cut off from the sort of astute advisors he had in Kingston. As the trial drew near, Gourlay fell prey to the confused impression that he was being tried for seditious libel. It had originally been his intention to begin by protesting against the charge. He forgot about the protest, pleaded "not guilty," and the trial proceeded. He was unable to question the provisions of the legislation, destroying any remote possibility of persuading the jury to exercise a wider verdict. His defence reflected his unfitness to stand trial, the *Kingston Chronicle* noting that it was "idle and absurd to the extreme."<sup>116</sup>

Chief Justice Powell's charge to the jury appears to have narrowly followed the letter of the law which invariably favoured the Crown's position. The jury returned a guilty verdict, and in pronouncing sentence, reports suggest that Powell stressed the importance of the rule of law, expressing none of his private reservations about the legislation's constitutionality or the discretionary powers it created. Powell declared that Gourlay should turn his considerable energies to more positive ends and then ordered him to leave the province within twenty-four hours or face death.<sup>117</sup> Gourlay left for the United States and returned to Britain to begin the campaign of vindication which was to obsess him for the rest of his life.<sup>118</sup>

Ferguson's case came up on 19 August, the day before Gourlay's. The authorities, backed by parliamentary resolution, made good on their "hanging threat" issued the previous December. Having learned from Gourlay's trials in

<sup>115</sup>See Milani, *Gadfly*, 203; P. Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto 1984), 56-7.

<sup>116</sup>Reproduced in Gourlay, *Statistical Account*: "General Introduction," ccclvi. Gourlay's defence amounted to arguing a difference of opinion with Cobbett and Hunt (with whom he was connected by the Crown) and the illegality of his imprisonment. A question to a juror after he was convicted indicated that he was still unclear on the charge. He later admitted that he had descended into a state of temporary madness. Gourlay, *Statistical Account*: General Introduction, xiv-xv; *Statistical Account* Vol. 1, ccclvi. Gourlay's condition was verified by various witnesses who testified at the 1841 Assembly Committee Inquiry.

<sup>117</sup>See Dent, *Upper Canadian Rebellion*: Vol. 1, 38. Riddell, "Gourlay," 53 and *The Life of William Dummer Powell* (Lansing 1924), 119 maintains that there was no irregularity in Powell's role. Milani, *Gadfly*, 202, 208-9 explores Powell's dilemmas. Although Powell privately expressed discomfort with the legislation, his actions (including his repeated consultations with the the Attorney General) calls his impartiality into question and suggests that he was acting at the Crown's behest.

<sup>118</sup>His mistreatment perhaps precipitated longer-term madness: after his return to Britain he was imprisoned for four years for horsewhipping Brougham in the lobby of Westminster, after the future Lord Chancellor failed to press a petition concerning his treatment in Upper Canada. Obsessed with vindication, Gourlay continually petitioned Canadian legislatures for redress until the 1860s. See Milani, *Gadfly*.

Kingston and Brockville, Attorney General Robinson took no chances with the jury, carefully crafting a partisan one, facilitated by *ex officio* procedure.<sup>119</sup> Details of Ferguson's trial are sketchy; despite what was described as "an able defence" by Ferguson's counsel, it appears that Robinson successfully prevented the arguments from going beyond the fact of publication.<sup>120</sup> The jury was not interested in delivering a general verdict in any case and it quickly found Ferguson guilty. He was returned to gaol and confined until his sentence was delivered. As was possible with *ex officio* procedure, sentencing was postponed beyond the end of the assizes, in this case until the next term of the court of King's Bench (which began 5 November). It was obvious that the sentence would be determined by the legal outcome of Gourlay's trial and its political fallout.<sup>121</sup>

In contrast to the trial, details of Ferguson's sentence hearing are readily available.<sup>122</sup> Affidavits favouring Ferguson were countered by Robinson, who stressed the warning Ferguson had been given at his first abortive prosecution, his willfulness in encouraging the imprisoned Gourlay's sedition, and the powerful role played by a press run by irresponsible editors in promoting discontent. He also referred to the gravity with which the offence was regarded in England, where Attorney General Gibbs was busy with prosecutions. On 8 November Powell, Campbell, and Boulton delivered what even conservative legal historian Riddell has termed a "scandalous" and "atrocious" sentence, imposing imprisonment and fines which proved ruinous for Ferguson, his family, and his newspaper.<sup>123</sup>

<sup>119</sup>See generally Gourlay, *The Banished Briton and Neptunian* no. 34, 477. Gourlay describes the jury in Ferguson's case as "weak and notoriously packed like his own."

<sup>120</sup>As with Gourlay's trials, the official record of Ferguson's trial is thin and important information was withheld because Ferguson was not indicted by a grand jury. Ferguson's case also received less publicity than Gourlay's. See R.L. Fraser, "Ferguson, Bartemus," *Dictionary of Canadian Biography*: Vol. VI (Toronto 1987), 247.

<sup>121</sup>See Milani, *Gadfly*, 199; Dickson to Hillier, Niagara 23 August 1819, in Cruikshank, "The Government," 172. It is also possible that the Crown had little confidence in Powell's willingness to impose a serious sentence. Again Powell was privately uncomfortable with the repressive measures although he did not publicly question them, remarking "what is laughable in this is that the Gov't. in Compliance having ordered the Att. to prosecute, is now condemned, by themselves for the mode adopted by that officer, by Information instead of Indictment." (Powell to Gore, 11 July 1819 in Riddell, *Powell*, 106).

<sup>122</sup>PAO RG 22 King's Bench Term Book (Michaelmas Term).

<sup>123</sup>*Ibid*; Riddell, "Gourlay," 51; Riddell, "Information Ex Officio," 94-5 noting that "...he did not again sin in the way of speaking ill of the authorities." The sentence included a fine of 50 pounds, imprisonment for a year and a half, and the pillory for one hour daily during the first month of the sentence. Once his term of imprisonment was over, Ferguson would have to secure his release with 500 pounds in personal sureties and two further sureties of 250 pounds each for his good behaviour over a term of seven years. The pillory and half the term of imprisonment were commuted by Powell upon Maitland's instructions. (PAO Powell to Maitland, 17 November 1819, *Upper Canada Sundries*, Vol. 44, 21683-6).

As next session of Parliament commenced on 21 February 1820, the Lieutenant Governor suggested the repeal of the seditious meetings legislation, since it had served its purpose and since "there exists no reason at present for desiring more than the ordinary safeguards of the Constitution" and a bill was passed.<sup>124</sup> When Ferguson presented a petition to the Assembly pleading for remission of the remainder of his sentence, a favourable resolution was also passed (although barely) and Maitland agreed to direct the Attorney General to prepare a pardon. However, the leniency did not extend to support a motion raised in the Assembly to introduce a bill to repeal the 1804 Sedition Act. This was the first of numerous repeal bills which, along with bills to reform jury selection, would be pursued far more rigourously through the 1820's.

In the longer term Gourlay's mistreatment set off a resurgent opposition movement fueled by new legislative attempts to discriminate against American settlers and to preclude reformers from sitting as elected members of the Assembly based on spurious disqualifications and criminal proceedings. Romney has taken a thorough look at the complex events and their relation to the administration of law in this period.<sup>125</sup> While legal repression took on sophisticated new forms, what is of particular interest here is the renewed crackdown on the opposition press, beginning with parliamentary privilege proceedings against Hugh Thomson, editor of the *Upper Canada Herald*.<sup>126</sup> Editors William Lyon Mackenzie and Francis Collins faced even greater intimidations. The destruction of Mackenzie's *Colonial Advocate* press by young Tory hooligans reflected a larger pattern of official

<sup>124</sup>60 Geo.III c.4; *Journals*, House of Assembly, 21 February 1820. Maitland expressed similar sentiments to colonial authorities. Maitland to Bathurst, 7 March 1820, in Cruikshank, "The Government," 174.

<sup>125</sup>See Romney, *Mr. Attorney*, "From Constitutionalism," "Late Loyalist Fantasies." See also NAC, "Documents Relating to the Constitutional History of Canada, 1819-28:" Vol. 1-3 (Ottawa 1914-35); CO 42 /386 "Papers Relating to the Removal of the Honourable John Walpole Willis from the Office of One of His Majesty's Judges of the Court of King's Bench of Upper Canada" (Printed by the British House of Commons, 1829). The byzantine legislative attempts led by Robinson to disenfranchise late loyalists is examined in detail by Romney as are the related attempts to exclude Barnabas Bidwell and Marshall Spring Bidwell from sitting as elected members. A prosecution for perjury, with an eye to expelling Robert Randal, who took government informant Isaac Swayze's seat, backfired badly. See NAC RG 1 1186 A *Faithful Report of the Trial and Acquittal of Robert Randal Accused of Perjury* (noted by Collins, 7 September 1825).

<sup>126</sup>See *Journals*, House of Assembly, 1823; H.P. Gundy, "Thomson, Hugh Christopher," in *Dictionary of Canadian Biography*: Vol. VI, 773. The demise of Ferguson's paper and the new conservative ownership of the *Kingston Chronicle* suppressed opposition voices until the emergence of new papers edited by Thomson, Collins, and Mackenzie. Talk of libel actions surrounded Mackenzie in 1824-25 in a complicated set of events that led to Powell's retirement. See P. Romney, "The Spanish Freeholder Imbroglia of 1824: Inter-elite and Intra-elite Rivalry in Upper Canada," *Ontario History*, 76 (1984), 32-47.

complicity with the use of violence against selected symbols of the reform movement.<sup>127</sup> This and other unprosecuted abuses precipitated an inquiry by a Select Committee of the House of Assembly into the exercise of public prosecutorial power, supported by damaging testimony from Judge John Walpole Willis.<sup>128</sup> The Inquiry formed the immediate context of the remarkable series of seditious libel proceedings against Collins in 1828.

A prosecution was first taken in April 1828 in response to a series of articles in Collins' *Upper Canadian Freeman* which explored the connections between criminal activities by members of the Compact and the partisan exercise of prosecutorial authority.<sup>129</sup> Conscious of the Gourlay affair, Attorney General Robinson was sensitive to the dangers of providing the opposition a powerful platform:

<sup>127</sup> See Romney, *Mr. Attorney*. Other instances of this included the "tar and feathers" assault of George Rolph (brother of reform member of the House and defence lawyer John Rolph), the physical intimidations of William Forsyth and Robert Randal (in addition to his struggles in the civil and criminal courts) and the other activities of Tory hooligans in York (which culminated in the controversial murder trial of Charles French, Mackenzie's printing assistant).

<sup>128</sup> See *Journals, House of Assembly*, 1828 Appendix "Report of the Select Committee, to whom was referred the Petition of William Forsyth, with the Testimony of Evidence examined thereon." The Committee used expropriated Niagara hotelier Forsyth's petition as the pretext for a more sweeping examination of the accumulated instances of maladministration of law and, in particular, how they related to the partisan way prosecutorial power was exercised in the province. The Committee examined numerous expert witnesses including Willis who testified on the constitutional powers of Crown law officers and how the province departed from English prosecutorial practices. Willis arrived in September 1827, to fill a vacancy on the King's Bench and head a planned Court of Chancery. His interest in provincial improvement and reform — reminiscent of Robert Thorpe — quickly alienated the provincial establishment. See "Papers Relating to the Removal of Willis" and R. Hett, "Judge Willis and the Court of King's Bench in Upper Canada," *Ontario History*, 65 (1973), 19-30.

<sup>129</sup> Collins's paper was set up in 1825, and although differing with Mackenzie, he was a leading advocate of freedom of the press and repeal of the Sedition Act. Themes in Mackenzie's pamphlet, *The History of the Destruction of the Colonial Advocate Press by Officers of the Provincial Government of Upper Canada and Law Students of the Attorney and Solicitor General* (York 1827) were developed by Collins, who openly attacked the Attorney General and printed a vivid account of Boulton's and Sam Jarvis's involvement in the Rideout duelling death scandal. When libel actions threatened, Collins declared, "If this be Libel; if Desperadoes such as Jarvis and the Solicitor General can trample upon the Lives and Property of the People with the Patronage and Protection of Men in Power ...then we may bid good-bye to the Liberty of the Press — good-bye to the Rights of the People..." *Canadian Freeman*, 3 April 1828. Also "Papers Relating to the Removal of Willis," 37-47, 216-20.

Within a few Years Two Newspapers have been established in this Town, under the Conduct of Men [Collins and Mackenzie] of much less responsible Stations in Society than the editors of Public Journals commonly are ... I always regretted the Tendency which such Publications might have in misleading the Opinions of People... and perhaps a Sense of this ought to have induced me, for the sake of the Province, to attempt to put them down by Law ... [but] I feared to call the Papers into Notoriety, and to protract their Existence, by the political Excitements which Prosecutions for Libel usually occasion.<sup>130</sup>

The public controversy surrounding his activities as Attorney General compounded his caution and he was unwilling to resort to the expedient of an *ex officio* information. He was willing, however, to conduct prosecutions initiated by regular indictment upon the request of the Lieutenant Governor and the complaints of any individuals libelled. Thus the assize opened on 7 April with the grand jury returning true bills on two indictments.<sup>131</sup>

Robinson's caution did not, however, extend to anticipating Willis's presence at the assize. Just before the trials commenced, Collins, with the permission of the judge, expressed concerns about the partiality of the Attorney General as a prosecutor and went on to lay private charges in connection with criminal activities committed by supporters of the government.<sup>132</sup> Robinson was obliged to withdraw the indictment against Collins, but insisted on holding it over until the next assize in October, declaring the subsequent behaviour of the press would determine whether it would be proceeded on.<sup>133</sup>

<sup>130</sup>Robinson to Maitland, 10 May 1828, reproduced in "Papers Relating to the Removal of Willis", 24-5.

<sup>131</sup>Robinson to Maitland, 10 May 1828, 28-9. See also NAC CO 42/388/154-7 (Robinson's Report on the events surrounding Collins's Indictment). The grand jury found a bill against Collins and made another presentment for a libel on themselves based on Mackenzie's "scandalous comments" about them in *Colonial Advocate*, 10 April 1828.

<sup>132</sup>Robinson missed the beginning of the session and when he arrived to object, Willis told Collins was told to state his complaints before the grand jury and reminded the Attorney General of his duty to prosecute the known offenders. An enraged Robinson replied that he had been an even-handed law officer of the Crown for years, that he was not a "thief-taker" hunting about the province for evidence, that he knew his duty as well as any judge and that he was answerable to the government not the bench. See Willis to Maitland, Spring assizes 1828, reproduced in "Papers Relating to the Removal of Willis," 211. For public accounts of the altercation, see *Canadian Freeman* 17 April, *Upper Canada Observer* 5 May, *Canadian Freeman* 8 May 1828.

<sup>133</sup>Indictments for libel against both Mackenzie and Collins on the libel charges were temporarily suspended while the grand jury returned true bills against Boulton and Small for murder of Rideout in 1817 and against the types rioters for riot (Boulton and Small were acquitted and the rioters were convicted and fined nominal amounts). Collins and Mackenzie unsuccessfully requested that the indictments for libel be withdrawn; then immediate trials at the end of the assize. Robinson decided to hold the strongest charges over to the autumn assize as a "hanging threat." He declared that their subsequent conduct would determine the



In the period between the assizes, the executive removed Willis from the bench on the pretext of his challenge to the constitutionality of the court when fewer than three judges were sitting. As the *Upper Canada Herald* stated, "This high handed measure plainly shows that judges who hold their appointments during pleasure may not give an opinion contrary to the will of the Executive, without running the risk of being dismissed."<sup>134</sup> The general elections later in the summer resulted in an unprecedented reform presence in the Assembly and direct appeals to Britain to deal with the executive abuses. Robinson did not find acceptable the conduct of the opposition press between the assizes.

The Attorney General proceeded on the indictment against Collins when the autumn assize commenced on 13 October. Collins tried to have the case postponed, pointing out that he had not been formally arraigned in the confusion of the April assizes. When this was confirmed, Robinson demanded and won an impossibly high security for Collins' good behaviour.<sup>135</sup> To avoid imprisonment, Collins had to opt for immediate trial where the jury acquitted him. Despite the acquittal, the Attorney General brought new charges of seditious libel based on different evidence — Collins' recently published remarks on Robinson and Judge Hagerman during the trial itself.<sup>136</sup> The Crown's third crack at Collins came up on 25 October

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matter, and hinted darkly at a special jury (proceeding by *ex officio* information) if the libel chill was not effective. See Robinson to Maitland 10 and 20 May 1828, reproduced in "Papers Relating to the Removal of Willis," 16-23, 33.

<sup>134</sup>1 July 1828. Fewer than three judges resulted in split decisions on controversial cases (Rolph's application for a new hearing on the tar-and-feather assault was defeated in this way). Willis' objection called into question the validity of years of King's Bench decisions involving less than a full bench and Maitland intercepted Willis' explanation to the Colonial Office, noting that Willis' announcement would cause "great public excitement." When King's Bench reconvened on 16 June, Willis announced he would not preside until the bench was fully constituted. Maitland and the Executive Council removed him from the bench and he returned to London to contest it. A constitutional meeting was held in York resulting in petitions to the sovereign and the British Parliament in Willis' support. See *Canadian Freeman*, 5 June to 3 July 1828; Baldwin, Rolph and Baldwin to Maitland, 23 June 1828; Willis to Stephen, 30 May 1828; Willis to Huskisson, 31 May 1828; Maitland to Huskisson, 6 June 1828, in "Papers Relating to the Removal of Willis" 199, 189, 177, 187. The Privy Council upheld Maitland's removal of Willis in February 1829. See Hett, *Willis*, 26-30.

<sup>135</sup>See *Canadian Freeman* 16 and 30 October; NAC RG1 E3 Vol. 15 "Statement of the case of Francis Collins Editor of the Canadian Freeman to be Laid Before His Excellency the Lieutenant Governor."

<sup>136</sup>NAC RG1 E3 Vol. 15 (Copies of Indictments and Extracts from the *Canadian Freeman*) Collins wrote just before the trial, "The Attorney and little Boulton have put their heads together on Tuesday, to see if they can do any thing in the way of libel...The Attorney General, with a view of bringing us to trial unprepared, rose and stated a palpable falsehood in Court — namely, that we had been arraigned last assizes. When we contended to the contrary, to the satisfaction of the court, the Attorney, in his native malignancy, took till next day (yesterday) to look up authorities to see if he could force us to trial without the privilege

before Mr. Justice Sherwood (whose son and brother-in-law, Boulton, were tried on Collins' criminal charges at the spring assizes).<sup>137</sup> Collins' counsel attempted to raise truth as a defence since the Attorney General had indeed stated a falsehood in court and at the end of arguments unsuccessfully moved for an immediate acquittal based on Robinson's refusal to read the alleged libels to the jury.<sup>138</sup> These uses of Erskine's arguments were skillfully sidetracked by Robinson and Sherwood, although it is evident that the jury had a great deal of trouble with the case.<sup>139</sup> While they deliberated, Sherwood left the bench and Hagerman (who was allegedly libelled) filled his place. The jury brought in a verdict of guilty on libel against the Attorney General only. Hagerman rejected this, instructing the jury to deliver a general verdict which covered all the libels (including the one on him). The jury, after retiring for ten minutes, complied with a general verdict of guilty.<sup>140</sup> The court then sentenced Collins to imprisonment and fines, a sentence which British law officers later declared at least twice as severe compared to English decisions.<sup>141</sup>

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of traverse... and our old customer Judge Hagerman was in favour of the measure." Sensing the possibility of new charges on these passages, Collins also wrote of a recent English case where a man was prosecuted for sedition for toasting "Curse the King and Constitution" during election celebrations, adding "... We therefore hope that if the Crown Officers will be silly enough to institute frivolous proceedings of this kind, an intelligent jury of the country will be liberal enough, as at home, to crush them." *Canadian Freeman*, 16 October 1828.

<sup>137</sup>See Sherwood to Colborne, 5 December 1828; Manuscript report of trial *The King v. Francis Collins* 25 October, 1828. NAC RG1 E3 Vol. 15.

<sup>138</sup>*The King v. Francis Collins*, Ibid.

<sup>139</sup>The jurors deliberated for more than five hours on the limited evidence that did go to them and their request for a dictionary was refused. See *Canadian Freeman*, 30 October 1828. They also had difficulty with a sedition prosecution against Henry Crompton, resulting in his discharge.

<sup>140</sup>See NAC RG1 E3 Vol. 15 "The King v. Francis Collins" and *Canadian Freeman*, 30 October 1828.

<sup>141</sup>One year's imprisonment, a 50 pound fine, a security of 400 pounds, and two sureties of 100 pounds for good behaviour for eight years. Popular subscriptions on Collins's behalf, as well as Assembly petitions, were made to the new Lieutenant Governor Colborne. Colborne was reluctant to interfere, replying that, while he was an advocate of a "free and well-conducted press," he was also an advocate of that most revered part of the constitution, trial by jury, and that there was great danger in interfering with the verdict of juries or the opinion of judges. NAC RG1 E3 Vol. 15 "Addresses to His Excellency, Sir John Colborne, Lieutenant Governor of Upper Canada" and "Reply"; *Journals*, House of Assembly, 1829 Appendix "Report of the Select Committee on the Petition of Francis Collins." An Assembly petition was referred by the Colonial Office to the English law officers who reported that the sentence was grossly out of proportion to comparable English cases and recommended that the sentence be halved. Scarlett and Sugden to Murray, 30 June 1829, NAC C042/390/49-50. Collins was released after 45 weeks and his fines and securities were remitted.

After this, the provincial authorities were reluctant to resort to the criminal courts. The exercise of the crown's prosecutorial authority was in public disrepute and there was little confidence in obtaining compliant regular juries.<sup>142</sup> The petitions from the reform-oriented assembly — concerning matters such as executive control over the judiciary and the upper house's refusal to pass jury reform and Sedition Act repeal bills — met an increasingly sympathetic response from the British government. In 1829, imperial intervention ensured the success of the eighth majority Assembly bill to repeal the Sedition Act.<sup>143</sup>

### 3. *The Meanings of the Proceedings*

HOW THEN DO WE MAKE SENSE of the sedition proceedings? Their frequency suggests that they were a prominent and prevalent part of provincial experience. The difficulty lies in interpreting their real significance to the historical actors. Baker's examination of some of the provincial controversies in the 1820s suggests that there was no such concept as the rule of law in a political and legal culture which celebrated a "peaceable kingdom ruled by virtuous men."<sup>144</sup> While historians interpreting the significance of the events must indeed be wary of presentism, insensitivity to past cultures, and the filters created by modern standards of legality and political pluralism, the rule of law does seem important. This examination suggests that Romney's response to Baker is closer to the mark; there was no homogeneous political culture; society was divided by conflict and most importantly, there were widely-held and sophisticated understandings of the rule of law.<sup>145</sup> The sedition cases fueled controversy about the tension between the rule of law and the discretionary exercise of power, and more particularly, related issues about executive influence over the prosecution process, the jury, and the judiciary.

For the government, the law was an important means of regulating provincial politics. The cases do reflect the extent of official fears of opposition once it had achieved a certain level of organization. The aim was to divide and marginalize the opposition, silence the means of propagating radical thought, construct criticism as disloyalty and thereby head off the possible mobilization of popular discontent. It is evident from the patterns in these cases, however, that the uses of sedition law

<sup>142</sup>Public consciousness of official abuses through the criminal courts was highly developed by the end of the 1820s. As Romney suggests ("Constitutionalism," 133), there was a move towards more subtle legal measures such as civil proceedings where the jury could be more easily managed with a writ of attain or the ordering of a new trial.

<sup>143</sup>A British government committee on the Government of the Canadas was set up in 1828. Among its recommendations were that judges be removed from all government councils, and that the Legislative Councils be made more popularly representative and independent of executive control. See Dunham, *Political Unrest*, 115-22; Colborne to Hay, 17 September 1830, NAC CO 42/391/43.

<sup>144</sup>See Baker, "So Elegant a Web."

<sup>145</sup>See Romney, "Very Late Loyalist Fantasies."

were not simply a matter of elite conspiratorial manipulation or even instrumental control. This oversimplifies the nature of the legal process and neglects the sometimes-successful struggles and the meaning of the proceedings both for those subject to them and for the general public. While the executive's hegemony over the legal processes cannot be denied, a complex and subtle analysis is necessary to make sense of the repressive uses of the law and the contestation of these uses. The criminal courts must be seen as arenas of struggle dominated, but by no means controlled, by the ruling alliance.

A number of factors underline this point. As noted earlier, the self-styled patrician ruling elite of office holders was in tentative alliances with those who held regional and economic power. This limited the possibilities of concerted repressive actions, as illustrated by the difficulties encountered with the Niagara merchants during earlier stages of the Gourlay affair. Moreover, there was also a form of institutional accountability "from above," as the actions of the provincial authorities were subject to review by the imperial government in London. The Colonial Office was not particularly concerned about political freedoms but it did have a bureaucratic interest in smooth administration and the prevention of any colonial instability aggravated by local repression. As discussed above, while imperial concerns about French revolutionary or Napoleonic intrigues prompted local repressive measures in the early period, a reorganized Colonial Office in the years following the War of 1812 became an increasingly formidable check, one which resulted in imperial intervention to secure the repeal of the Sedition Act and action on other provincial grievances about executive influence over the administration of criminal law at the end of the 1820's.<sup>146</sup> The most important factor, however, was a form of social accountability "from below."

The legal system was not amenable to overt manipulation because of its formal claims and popular expectations concerning them, powerfully rooted in popular notions of the rule of law and the fairness of "British justice." The use of criminal law is not the same thing as resort to brute coercive force. Part of the calculated advantage of resorting to criminal law rather than physical coercion is the attempt to legitimate official perceptions and actions, to generate greater public support for them. The fact that resort to law lends legitimacy to the official exercise of power means that the formal claims of the law (that it is above politics, that it applies equally to all) have to engage some degree of popular ideological support. The resort to criminal law also brings with it a certain cost. The law can only be stretched so far; its manipulation cannot become too apparent, precisely because of the

<sup>146</sup>See P. Buckner, *The Transition to Responsible Government: British Policy in British North America* (Westport, Conn., 1985). The Colonial Office became an even bigger obstacle to local repression in the 1830s. The battles between Colonial Undersecretary James Stephen and John Beverley Robinson constitute an important theme during the treason proceedings in 1838. See Wright, "The Ideological Dimensions."

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constraints of popular expectations concerning its formal claims. To do otherwise would jeopardize its effectiveness. As Thompson observes:

For what we have observed is something more than the law as a pliant medium to be twisted this way and that by whichever interests already possess effective power....Over and above its pliant, instrumental functions it existed in its own right, as ideology; as an ideology which not only served, in most respects, but also legitimized class power...If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just.<sup>147</sup>

Popular expectations not only limit, constrain and compromise official action; they also form the basis for contesting that action. The formal claims surrounding the rule of law lie at the root of the possibilities for contestability.

For those subject to the proceedings examined here, the fact that there was resort to criminal law as the means of repression yielded opportunities for contesting it. The popular awareness of the formal claims of law figured prominently in the perceptions and strategies of the opposition. The claims were exploited to question official measures and call the authorities to popular account. This is amply demonstrated in the Gourlay affair. While the resort to the law, rather than brute coercive force, lent greater legitimacy to official actions, it was at a certain cost, as both Robinson and Gourlay clearly realized. The government could not completely control the process, and despite Robinson's careful prosecutorial calculations, Gourlay was able to exploit the ideological platform of the proceedings to considerably embarrass the authorities in his trials for seditious libel. These counter-hegemonic struggles, however, cannot be construed in too positive a light. As Gourlay's plight also demonstrates, the executive's prosecutorial monopoly and judicial control, as well the uncertainties surrounding the jury, meant that the struggles were defensive reactions involving fragile claims which in the end could not withstand the tide of unprecedentedly repressive legislation and procedures.

The Upper Canadian cases are particularly rich illustrations of contested legality. A systematic examination of the discourse of contested legality found in them not only reveals the legal sophistication of those prosecuted, but also suggests the prominence of law in popular consciousness. The rule of law and rights arguments articulated, while not entailing the modern notion of the rule of law (as expounded by Dicey) or modern legally enforceable rights (as those in the Charter),

<sup>147</sup>Thompson, *Whigs and Hunters*, 462-3. In the Canadian context, see G. Marquis, "Doing Justice to British Justice," in Pue and Wright, eds., *Canadian Perspective on Law and Society: Issues in Legal History* (Ottawa 1988), 43-70. See also H. Hartog, "Pigs and Positivism," *Wisconsin Law Review*, (1985), 899-936.

nonetheless powerfully called into question the legality and constitutionality of the repression. They largely derived from libertarian understandings of the Revolution Settlement, understandings which had some popular engagement as reflected in Gourlay's many appeals to the rights of British subjects. The nature of sedition laws and the procedural implications of the colonial structure of government posed issues about prosecutorial authority, the jury, and judiciary in particularly clear relief.

The fact that the government in Upper Canada controlled the initiation of criminal proceedings was a controversial departure from English constitutional practice. The *de facto* monopoly over criminal prosecutions by the Attorney General flew in the face of English Whig constitutional concerns which celebrated private prosecutions as an important guarantee of civil liberties and a check on an oppressive state. Until well into the 19th century and the emergence of the professional police, the invocation of English criminal law relied on the victim or victim's agent in the vast majority of cases. Public prosecutions were very rare and were associated with the Star Chamber. The wide exercise of the Crown's prerogative powers on prosecutions was seen as a violation of the Revolution Settlement.<sup>148</sup> These powers included *ex officio* informations, and the limitation of *nolle prosequi* (used to stay private prosecutions embarrassing to authorities, a more subtle measure because the political reasons for terminating the case were easily obscured).

The application of this constitutional thinking to contesting prosecutorial authority was a central theme in the Collins affair, and the resort to the rare expedient of *ex officio* informations was frequent in provincial cases until the 1820s.<sup>149</sup> As illustrated by the Ferguson case, this exceptional Crown prerogative offered numerous procedural advantages for the authorities, such as the "hanging threat" of an indefinite trial date and place — powers that facilitated jury packing and increased influence in sentencing.<sup>150</sup> Even in the seditious libel trials proceeded on regular indictment (such as Gourlay's), the monopoly worked in the Crown's favour, since all cases conducted personally by the Attorney General and the Solicitor General provided the Crown the right to make the strategically-important

<sup>148</sup>The English system continued to rely heavily on the initiative of private individuals until the professional police became established in the mid-19th century. The 18th-century notion of the private prosecution as a safeguard against arbitrary state action and the political overtones of public prosecutions continued to have currency in England. See D. Hay, "Controlling the English Prosecutor"; P. Stenning, *Appearing for the Crown* (Cowansville 1986), 17-8; J.L.I.J. Edwards, *The Law Officers of the Crown* (London 1964).

<sup>149</sup>Riddell, "The Information Ex Officio," 87. In England a surprised William Cobbett, when prosecuted this way, declared: "The people of England, strange as it may seem, know little more about INFORMATIONS EX OFFICIO than they do of what is passing in Russia, Turkey or Algiers." Quoted in Emsley, "Aspect of Pitt's Terror," 168.

<sup>150</sup>See Hay, "Controlling," 168; See also earlier discussion of Pitt's use of these prosecutions.

last address to the jury.<sup>151</sup> By the 1820s, controversies surrounding Attorney General Robinson's partisan exercise of prosecutorial authority placed the issue at centre stage, not only deterring resort to the *ex officio* informations, but also calling into question other aspects of public prosecutorial monopoly such as the prerogative limitation of *nolle prosequi* put into issue by the destruction of Mackenzie's press. English constitutional rhetoric to contest the organization of provincial prosecutorial authority is more generally reflected in the Assembly Committee Inquiry into the exercise of prosecutorial power and the other remarkable events surrounding the trials of Collins. In the end, there was little public confidence in the nonpartisan exercise of public prosecutions, which not only precluded the use of *ex officio* informations against Collins, but also more broadly may have discouraged further sedition prosecutions in the courts after 1828.

On the other side, it appears that legal representation was a well-established practice in criminal cases in the province, perhaps reflecting a balance to the public prosecutorial monopoly.<sup>152</sup> Although defence lawyers played a prominent role during the Collins affair, lawyers generally appear to have been popularly regarded as "pettyfoggers" and "little attorneys," and associated with the privileges of the Family Compact. Robert Gourlay's insistence on representing himself reflects an exploitation of popular anti-lawyer sentiment and a lack of confidence in counsel's ability to properly exploit the platform of the proceedings.<sup>153</sup>

<sup>151</sup>In English practice, the defence was given the tactical advantage of the right to the last word to the jury, unless the Crown prerogative was claimed by Attorney General or Solicitor General *personally* conducted the prosecution (or through an *ex officio* information). This was rarely the case, even in sedition prosecutions, which were usually undertaken by agents acting on behalf of the Crown.

<sup>152</sup>The right to defence counsel was not fully recognized until 1836. The accused only had the right to be represented by legal counsel in treason prosecutions. As victims increasingly resorted to lawyers to act as agents in private prosecutions defence counsel began to be regularly admitted on the basis of judicial discretion in mid 18th century England. Beattie suggests that one reason for this was a concern about "imbalance." See J.M. Beattie, *Crime and the Courts in England, 1600-1800* (Princeton 1986), 340-62.

<sup>153</sup>The most prominent and possibly only radical lawyer in the early years of the province was William Weekes. His admission to the provincial bar (the first by the provincial Law Society) was likely an oversight (he was a member of the United Irishmen and had articulated in New York with anglophobe Aaron Burr). The Law Society became a co-optive training corporation for the official elite, carefully controlling admissions and expulsions. Barnabas Bidwell (former Massachusetts Attorney General and a Supreme Court nominee until a Congressional hearing found financial irregularities, prompting his immigration), who helped Gourlay in Kingston, was refused admission. Samuel Washburn, after some involvement with Gourlay was charged with a criminal offence and was disbarred. Reform lawyers such as Rolph, the Baldwins, Small, and Gowan helped to defend opposition political positions by articulating them in legal language, but they do not appear to have been anxious to exploit the platform of the proceedings. Although politically opposed to the Compact, they tended to be in an ambivalent relation with the real radical leadership and popular movements of discontent.

The jury was an even greater basis for contestation than the issue of prosecutorial authority.<sup>154</sup> Jury rights were a prominent part of Revolution Settlement rhetoric and figured largely in the popular consciousness. For the authorities, however, the jury was the unpredictable "loose cannon" in the process which required careful management. As far as the trial jury was concerned, two issues were prominent: the process of jury selection, and the jury's freedom to give a verdict according to conscience.

The Crown's ability to pack juries through the district sheriff's selection of jurors was a matter of strong public contention. In 1811 and 1812, Willcocks initiated what was to be a long series of defeated bills to change selection processes where juries were appointed by the executive-appointed and controlled sheriff. Gourlay repeatedly claimed that the sheriff received instructions from superiors in exercising his discretion to selecting jurors from among eligible householders. In the 1820s, along with the repeal of Sedition Act, reforming the provincial jury-selection process dominated criminal law concerns in the Assembly, with majority bills repeatedly thrown out in Council.<sup>155</sup> Jury-packing was also an issue when cases were prosecuted by *ex officio* informations where the Crown could call special juries, switch trial venues to more "sympathetic" districts, and enjoy enhanced powers to challenge selected jurors.

The second element concerning the jury involved the freedom of the jury's verdict; its power to give a general verdict to indirectly voice popular protest against arbitrary laws and oppressive prosecutions. The jury's freedom of verdict to decide without fear of punishment was well-established in *Bushell's Case*, 1670. The rights of the jury on its verdict and the basic right to a jury trial (the abolition of the Court of Star Chamber) were celebrated parts of constitutional thinking

<sup>154</sup>See generally, Romney, "From Constitutionalism to Legalism."

<sup>155</sup>As Mackenzie noted, "High sheriffs are not appointed here as in England ... They are in Canada mere dependents on the Government, receive a salary from the Crown, and, in many cases, their offices are mere sinecures. They are continued in place at the pleasure of the person at the head of the civil Government ... The mode by which petty juries are selected is as follows: 'He may pick out a particular township, and from that township he may select such names as will answer any purpose — there is no check.'" — "To the Fairness of Upper Canada Trial by Jury — a Convention," *Colonial Advocate*, 1 July 1924. In addition to Willcocks's bills in 1811 and 1812 ("bill to restrain sheriffs from packing juries in this province"), see also *Journals*, House of Assembly: 16-22 November 1825 (defeated); 8 December 1826 to 7 February 1827 (passed in House by majority of 15); 18-28 January 1828 (passed in house by majority of 20); 23 February to 17 March 1828 where the Council defeat of another majority bill along with a bill to repeal the Sedition Act triggered a constitutional crisis and the formation of a Select Committee to deal with administration of justice; 25 March 1828 a further bill passed the Assembly and was again defeated by the Legislative Council. Reform of jury selection was only achieved after responsible government.



following from the Revolution Settlement.<sup>156</sup> As noted earlier, these rights were central in the debates around the development of seditious libel in England. In Upper Canada the right to a trial by jury was denied by the summary proceedings set out in the Sedition Act.<sup>157</sup> And as seen in Gourlay's trials for seditious libel, Erksine's famous arguments on the right to deliver a general verdict according to conscience were resurrected and a provincial version of Fox's Libel Act was advocated.<sup>158</sup>

Another highly contested issue related to judges and their independence from the influence of the provincial executive. Formal judicial independence has two facets; security of tenure and the separation of powers. The constitutional evolution of these matters can be traced to the battles between Coke and Bacon concerning the balance to be struck between deference to the executive and preservation of the law's integrity. The Revolution Settlement appeared to valorize independence by inducing the shift of security of judicial tenure from "royal pleasure" to "good behaviour." The matter was far from resolved in the 18th century as symbolized by Lord Mansfield's role in the English sedition cases and his presence as a leading member of cabinet while Chief Justice. Limiting this executive activity through the formal separation of powers was only achieved after the controversial inclusion of Lord Ellenborough in the short-lived Ministry of All the Talents in 1806-07.<sup>159</sup>

The dominance over the colonial structure of government by the executive again resulted in Upper Canada's divergence from these principles and the resulting controversies were amply played out in the sedition proceedings. Although the constitutional principle of the "independence of the judiciary" was widely toasted

<sup>156</sup>The vindication of the jury's freedom of verdict in Bushell's Case followed from a controversy that had been ranging from 1653 when Leveller John Lilbourne declared that the jurors, as keepers of the liberties of England, were judges of the law as well as of the facts. These debates were picked up by libertarian interpretations of the Revolution Settlement in the 18th century. See E.P. Thompson, "Subduing the Jury."

<sup>157</sup>See, for instance, a report of Rolph's attempts to repeal the Act with reference to the right to trial by jury in accordance with the Constitution in *Colonial Advocate*, 8 December 1825.

<sup>158</sup>See *Address to the Jury*, 18-24. The role of grand juries in preliminary proceedings came into question as well. They were a potential obstacle which could be bypassed by the *ex officio* information. Their dangers were illustrated by how they were extraparliamentary forum for the articulation of popular local grievances during the time of Thorpe. But they also proved to be local extensions of the Compact's power as seen in the prosecutions of Gourlay and Collins. A bill "for the better selection of persons to serve on Grand Juries," was defeated (*Journals*, House of Assembly, 6 February 1829).

<sup>159</sup>Murray Greenwood examines the tension between Baconian and Cokean notions of the judiciary as it was played out in Lower Canada. See Greenwood, *Legacies of Fear*. The Revolution Settlement and subsequent legislation (1701) 12 & 13 Wm.III c.2; (1760) 1 Geo.III c.23, appeared to uphold Coke's view of the bench's independence from the executive. See also D. Hay, "Contempt by Scandalizing the Court: A Political History of the First Hundred Years," *Osgoode Hall Law Journal*, 25 (1987), 431-63.

after Gourlay's acquittal for seditious libel in Kingston, provincial realities bore little relation to it. The Court of King's Bench heard all sedition cases and its judges not only held tenure at executive pleasure ("royal pleasure" rather than "good behaviour"), they were often themselves executive councillors and legislative councillors. This ensured unity of action between the executive and senior judges. The implications of all this were thrown into clearest relief by the Gourlay affair, when the Crown collaborated with the judiciary over the applicability of the Sedition Act and Gourlay's application for *habeas corpus*. On the other hand, this executive control of the judiciary facilitated the removal of judges sympathetic to the reform cause (Thorpe and Willis) in the Willcocks and Collins prosecutions. Judge Powell's doubts were easily kept in line, and manipulation of the judiciary ultimately secured the conviction of Collins. When Robinson became Chief Justice shortly after the Collins affair, he remained an executive councillor and Speaker in the Legislative Council. By 1830, amid the fall-out from the Collins trials and Assembly petitions, James Stephen of the Colonial Office moved to prohibit the provincial practice of appointing judges to the councils. Robinson blatantly disregarded the spirit of the Colonial Office directive by remaining Speaker of the Legislative Council. Indeed, Robinson drafted the oppressive legislation that he and his colleagues would interpret during the treason proceedings of 1838.<sup>160</sup>

The sedition proceedings raised constitutional issues that went beyond the courts of law to the legislative process. The celebrated Wilkes prosecutions figured prominently in the minds of provincial opposition figures and the abuse of this precedent, and the Burdett precedent regarding defamatory comments on Parliament, highlighted constitutional differences. More important, the difficulties in repealing the Sedition Act and reforming the jury selection processes, with bills passed by majorities in the elected Assembly terminated by appointed councils, helped to fuel the push toward responsible government. The bill that finally resulted in the repeal of the Sedition Act was opposed by only one member of the Assembly, the Attorney General, and only became law after the intervention of the British government.<sup>161</sup> Responsible government did not prevent the passage of subsequent

<sup>160</sup>This resulted in extreme conflict between provincial authorities and the Colonial Office, which is examined in detail in Wright, "Ideological Dimensions." As noted, Robinson orchestrated government strategy with the judges while Attorney General.

<sup>161</sup>The first repeal bill was brought in the Assembly in June 1819 and from March 1821 repeal bills were passed by majorities in the Assembly and repeatedly defeated by the upper House. See *Journals*, House of Assembly, 8-17 June 1819; 26 February to 8 March 1820; 3 February to 8 March 1821; 28 November to 4 December 1821; 15-21 January 1823; 17 November to 3 December 1823; 10-21 November 1825; 19-27 December 1826 (Legislative Council returned this bill 9 February 1827 with extensive amendments which essentially preserved the Sedition Act); 21-23 January 1828. After the Legislative Council voted the 1828 bill down, the Assembly noted that the rejection of this and the jury reform bills, passed by clear majorities with the concurrence of select committees, had provoked a constitutional crisis. On 17 March the repeal bill was sent up again. Another bill passed 15-16 January 1829 was petitioned to Britain.

repressive legislation dealing with "sedition," "aliens," and emergency executive-enabling powers on a permanent basis, perhaps reflecting the Canadian tendency to defer overly-much to authority.

Legal historical research can do much to deepen our understanding of the exercise of authority and the struggle against it. Certainly, the Upper Canadian sedition cases suggest the importance of law both to the government and to the experiences of opposition figures. Sedition laws were a formidable means of regulating provincial politics, applied as a final weapon during most manifestations of dissent in the province before the 1830s. Prosecutions were designed to marginalize key opposition figures and portray criticism as disloyalty, powerfully delineating the loyal community and its enemies for popular contemplation. Yet while helping to facilitate and legitimize the repression, the law was also a limited instrument. Those subject to the proceedings could utilize the formal claims of the law to contest the repression. As we have seen, the use of sedition laws highlighted the tension between the rule of law and discretionary authority, played out in arguments about executive influence over prosecutions, the jury, and judiciary. These rule-of-law claims were not obscure legal technicalities confined to the specialist participants. They were expressions of established British constitutional principles, part and parcel of the rights and liberties of all subjects. The popular appeal of those subject to the prosecutions was that the government had deprived the public of the full benefits of the British constitution. This powerfully called into question not only the repression, but also the governance of Upper Canadian society.

The positive implications of these claims, however, should not be overemphasized. The fact that the prosecutions were always initiated by the Crown meant that the struggles in the criminal courts were purely defensive reactions, rearguard in nature, which while not precluding counter-hegemonic possibilities, certainly limited them. And it is evident that the claims, based on disputed notions of legality and constitutional rights, were very slender things in practice given the executive-dominated legal institutions and processes. The objective was to fend off the repressive initiatives by holding the authorities to account, embarrassing them in a manner which would fuel the political struggle. The opposition leadership clearly knew that the real struggles had to take place in the political sphere, in the Assembly, and if not there, in popular "constitutional meetings" of the kind organized by Gourlay. Oppressive official practices, oppressive laws and the obstacles to their repeal could not be battled effectively in the courts. Opposition legal victories in the form of acquittals, did indeed embarrass the government in a very public way, and the counter-hegemonic successes arguably discouraged resort to sedition laws after 1830. However, democratic and progressive government could only be secured through the legislative sphere by a vigilant popularly elected body and a responsible government. This ultimately was the institutional focus of struggles in Upper Canada; the legal battles in court were side-line skirmishes.

Nonetheless, legal struggles such as these figured prominently in the pre-confederation experience. The repeated defeats of bills passed by majorities in the Assembly throughout the 1820s on the jury and the repeal of the Sedition Act, played an important role in the struggles for legislative reform and cabinet accountability. The importance of these legal struggles suggests a fruitful line of inquiry for social historians and labour studies. Although one must be vigilant about the "presentist error," this historical experience is suggestive in terms of larger patterns in the exercise of authority over social movements and labour radicalism through the criminal law and national security measures: the treatment of "aliens" expansively defined (summary deportations and war-time internments); the nature of labour repression during and following the Winnipeg General Strike; the tendency to pass draconian executive enabling emergency measures on a permanent rather than temporary basis as reflected in the *War Measures Act*, and its recent replacement, the *Emergencies Act*. Sedition offences continue to exist in the *Criminal Code* as well as the *Official Secrets Act*, backed up by the more elaborate surveillance mechanisms of the state. While the contestable means available in the legal arena are now expanded with legally enforceable rights and more comprehensive and accountable legislative processes of law reform, the basic dynamics of criminal proceedings are similar and controversies over matters such as public prosecutorial authority, the jury, and judicial independence continue.<sup>162</sup> There is much contemporary debate on the progressive possibilities offered by legal struggles and deep divisions over institutional tactics. Reviewing historical experience cannot answer these questions but at the very least debate should be informed by what this experience has been.

<sup>162</sup> *Dowson v. the Queen*, (1983) 7 C.C.C. (3d) 527 where the Crown refused to commence prosecutions for some of the RCMP "dirty tricks" committed against radicals in the 1970s. Attempts at private prosecution were terminated by the Crown's stay of proceedings. In *Morgentaler, Smoling and Scott v. The Queen* (1988), 37 C.C.C. (3d) 449. Defence counsel's address to the jury included the suggestion that they could use their verdict to send a message to Parliament that the Criminal Code provision on abortion was unjust and required reform or abolition. The provision was indeed struck down on appeal (on Charter grounds) but Chief Justice Dickson went out of his way to condemn the use of general verdicts as a form of protest. In the British context, the abolition of trial by jury in Northern Ireland and other controls over British juries for political purposes are discussed in Thompson, "Subduing the Jury."

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