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THE ANCASTER "BLOODY ASSIZE" OF 1814*

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The war of 1812-15 produced in the Province of Upper Canada many interesting results; one of the most interesting from a legal point of view was the Session of the Court of Special Oyer and Terminer and Gaol Delivery holden at Ancaster in May and June, 1814, for the trial of certain inhabitants of the province for the highest crime known to the law, High Treason.[1]

We Canadians are rather given to vaunting the loyalty of our people; but it must be admitted that while the vast majority of Canadians in 1812, on the declaration of war and invasion of the province, took their stand unflinchingly under the Old Flag, there were some in almost every section of the province who were traitors—some openly joined the invading forces, some made their way across the lakes or boundary rivers to the United States.

It is not intended in this paper to discuss the question generally, but rather to deal with the prisoners who were called to stand at the Bar for trial at the Ancaster Special Court of Oyer and Terminer, sometimes in later days called the "Bloody Assize."

Abraham Marcle[2] was at the general election of 1812 elected to the House of Assembly to represent Haldimand County and Saltfleet, Ancaster, etc., in the Sixth Parliament of Upper Canada. He was one of those settlers in the province who had been attracted from the United States by the offer of freeland: notwithstanding his protestations it is reasonably certain that he was never loyal to British connection and that he was one of the original "hyphenates." On the outbreak of hostilities, he was suspected of disloyalty by reason of his previous conduct in word and deed: he was arrested on suspicion and the British squadron cruising on Lake Erie in June and July, 1813, took him a prisoner to Kingston, whence he was sent to Sir George Prevost, the Governor-General in Lower Canada. There, protesting his loyalty, he was, after a few days detention, given his freedom to return to his farm, but only on the assurance that he would demean himself as a loyal and peaceable subject, that he would appear before the Chief Justice and other members of the Executive Council at York and enter into such recognizances

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as should be required for his good behaviour.[3]

The next heard of him was late on in the same year, when, it is said, he joined himself with some other Canadians to a small detachment of the enemy's forces under the command of Lieutenant Larwell, which was proceeding from near the Thames to Long Point, Lake Erie. He acted as their guide, if not their instigator;[4] and, as the Norfolk Militia had been disbanded, the marauder had an easy prey.

But Henry Medcalf, a lieutenant of the Norfolk militia, got together three sergeants and seven men of his old regiment, marched in the depth of winter (December 16) to Port Talbot, sixty-five miles away, where he was joined by two officers, one sergeant and seven men of the Middlesex militia, and a sergeant and six troopers of Coleman's Dragoons. The little army marched to Chatham, increasing there the force by a lieutenant and eight men of the Kent militia; and, hearing that the enemy's detachment and rebels were fortifying themselves in the house of one Macrae, they left behind their sick and exhausted, and the remaining twenty-eight proceeded against the improvised fort. Sergeant McQueen of the 2nd Norfolk Militia smashed in the door with the butt end of his musket, and in a short struggle the loyal Canadians killed two and captured forty, two making their escape, one of them being the traitor Marcle.[5] Among the prisoners were about fifteen inhabitants of the province.

All the prisoners who were inhabitants of Canada were sent down to York Gaol by Lieutenant Medcalf and Colonel Bostwick,[6] his superior officer. Bostwick also sent down others charged with treason. Of course those from the United States were held as prisoners of war; they were not traitors. Some of these prisoners, on February 7, 1814, made a representation to the Governor that they had been taken by militia squads under command of Colonel Henry Baustwick about December 1, that they had been confined ever since, that they had families of small children in the County of Norfolk, and they asked for a trial if they were charged with crime, offering to furnish bail if the alleged offences were bailable.[7] The appeal was in vain.

The responsible law officers of the Crown at that time were John Beverley Robinson. Acting Attorney-General, and D'Arcy Boulton, Solicitor-General:[8] but Boulton was a prisoner in France, and the whole burden of the prosecution of the criminal law fell upon the shoulders of the young Attorney-General.

The representation of these prisoners was submitted to Robinson, then, be it remembered, not yet twenty-three years of age. Against one man[9] he had, indeed, no charge; but, thought that he was "a person by no means proper to be set at large"—he was an

alien taken under very suspicious circumstances and sent down in December, 1813, by Colonel Bostwick with some others from the District of London under a military guard to Major Glegg at Burlington; and by Gleggsent to York, where he was committed to gaol under General Procter's orders. He was to be kept a prisoner of war. The rest were under charge of treason, a non-bailable offence, and would be tried at the proper time. The Court of King's Bench was busy in term and no other court could, without a commission, try treason.[10] That court might have a trial at bar with all the judges present on the bench, but that practice had its disadvantages, and the usual course was to issue a commission to certain persons, including a judge or judges of the King's Bench, authorizing those named in the commission to try criminal cases. The two kinds of commission were technically known as Commissions of Oyer and Terminer, and Commissions of Gaol Delivery. The former enabled the commissioners to try all cases in which the indictments were found before themselves, the latter to try every one found in the prison they were to deliver, and each kind had its two varieties, general and special-special for offences or offenders named, and general for all offenders. While originally the two commissions were distinct, by this time they were in practice contained in one document[11] and the judge "going Circuit" carried it and held the "Criminal Assizes." The practice of issuing such commissions has ceased for nearly three quarters of a century in this province, but the power still exists in the Crown to issue one in case of need.

It was thought best to issue a Special Commission of Oyer and Terminer to the three justices of the Court of King's Bench: Chief Justice Thomas Scott, and Puisne Justices, William Dummer Powell and William Campbell. Other names were added in the commission, but they were merely formal. Some of them might sit on the bench, but they took no real part in the trial, as the judges conducted the proceedings without reference to their "Associates."[12]

Then as to the place of trial. At the Common Law all persons, charged with crime, must be tried in the shire or county where the alleged crime was committed, but the Statute of (1541) 33 Henry VIII, c. 23, enabled a trial for high treason to be had in any county. And the Parliament of Upper Canada supplemented this measure by one still more simple, drastic and effective in the month of March, 1814, so as to put beyond all doubt the right of a Court of Oyer and Terminer sitting anywhere to try such offences committed anywhere in the province. It was decided to have the trials at Ancaster[13] then a place of considerable importance, but now lost in the shadow of its near neighbour: Hamilton.

Robinson consulted the judges and they agreed that after the close of their Easter Term, they would take the cases whenever he was ready; and he quickened his movements, "for I shall enjoy very little rest or comfort until these prosecutions are ended"; he sent a competent junior, a member of the bar, to Niagara, to make all necessary research at that place.[14] Then he made enquiry for a court house, and at length "the large house at Ancaster (the Union Hotel)" was secured. It was at the time in the possession of the military as a hospital, but the General agreed to give it up temporarily as a court house.[15] Provision was made for food, etc., for the jurymen, witnesses, etc.; that the military could see to from their adjoining posts on Burlington Heights; but Robinson had troubles which the military could not relieve him of. The regular clerk at Niagara, Ralfe Clench, had been taken prisoner, and John Small was appointed Clerk of the Court. He was not a lawyer, and while he could, and did, perform well enough his regular duties a Clerk of the Executive Council, he was out of his depth as clerk of a Court of Oyer and Terminer. Robinson writes

> Are Small's Subpoenas printed yet? I have more trouble looking after other peoples' business than my own. You have no idea of the difficulty of carrying on a public prosecution here. At home, everyone has his particular branch of duty assigned him, and he is able and willing to do it. Here every person stands in his place like a chessman waiting to be shoved. I have to look into every step of the proceedings in every department, for if anybody commit an error, the effect as it regards the prosecution may be fatal.[16]

All being ready,[17] the "Commission Day," i.e., the first day of the sittings upon which the commission was opened and read, was fixed for Monday, May 23, 1814: and special precautions were taken against the escape of any prisoner in case the enemy were to make an attack upon the place.

At first, it had been intended that only fifteen prisoners should be tried,[18] but four more names were added to the list; jurors and witnesses were subpoenaed and everything made ready for May 23. In addition to those in custody it was intended that indictments for treason should be found against many others in order that they might be outlawed and their property forfeited to the Crown.

Most of those in custody had been taken by Medcalf on the occasion already mentioned.

On May 23, the court opened at Ancaster, the commission was opened and read, and, as was the custom then and for some decades thereafter, the court then adjourned. On the following days, bills for high treason were found in rapid succession against the nineteen accused persons in custody, and also against about fifty who had not been apprehended. A copy of the indictment against

him with a list of the witnesses to be produced and of the jurors impanelled, was then delivered to each of the accused in custody, in the presence of two witnesses; and the court adjourned until Monday, June 7. The reason of this proceeding is historical. All right-thinking England had been disgusted and horrified at the brutality and unfairness shown in trials for high treason in the Stewart period. Anyone accused of high treason was considered as a kind of mad dog to be hunted down and destroyed by fair means or by foul.[19] In 1695, a statute was passed by the Parliament of England, that of 7 Will. III, c. 3, which provided that one accused of high treason should, at least five days before his trial, (this was interpreted as meaning five days before his arraignment), have a copy of the indictment against him (but not the names of the witnesses). After the union of England and Scotland, the British Parliament passed an Act, (1708), 7 Anne, c. 21, which provided that ten days before trial the accused must have delivered to him in the presence of two witnesses, a copy of the indictment with a list of the witnesses to be produced, and of the jurors impanelled with their professions and places of abode. This provision was not changed so far as cases of high treason in taking up arms against the Crown are concerned by the Amending Act of 1766 (6 Geo. III, c. 53).

These provisions were scrupulously observed, hence the necessity of the court adjourning for a time. The judges of the Court of King's Bench arranged to preside over the Court of Oyer and Terminer in rotation, and on Monday, June 7, Chief Justice Thomas Scott took his place on the bench. The first to be arraigned was Luther McNeal, whose trial occupied the whole court day; he was acquitted, and the court rose.

On Tuesday morning, the bench was occupied by the Senior Puisne Justice, William Dummer Powell. Powell was of a different stamp from Scott. Scott was an amiable mediocrity without political ambition, and desirous only of being let alone; he imposed his personality on no one. Powell was of great learning, ambitious of power and he dominated everyone he could, resenting the opposition of those who resisted. He was the real "power behind the throne" at this time and at other periods of our history.

Jacob Overholtzer (or Overholser) was placed to the bar, an elderly man, who had but a few years ago come from the United States. He had foolishly or heedlessly joined the enemy in arms, and could not possibly escape the verdict of guilty.

Then Mr. Justice Campbell, the Junior Puisne Justice, replaced Powell, and Robert Loundsberry was arraigned; he was acquitted, and the court adjourned for that day. Campbell was not a strong judge; he seldom pressed for a conviction, but when a conviction

had been secured, he was generally ruthless and seldom recommended commutation.

Wednesday, June 9, the Chief Justice again presided. Aaron Stevens was called upon to plead: Stevens was a man of good reputation and standing in the community, and had actually been in the service of the Crown in the Indian Department. He confessed to acting as a spy for the enemy and was promptly convicted.

Then Mr. Justice Powell replaced the Chief Justice, and Garrett (or Garrat) Neill was arraigned. He also was a recent immigrant from the United States; he had made "prisoners of the King's subjects in the London District to give them to the enemy" and he was found guilty.

Thursday, June 10, brought Mr. Justice Campbell to the bench, and John Johnston (or Johnson) to the prisoners' dock. He had been one of those in open and active rebellion in the London District, was one of Medcalf's prisoners and could not escape conviction.

On the same day before the Chief Justice, Samuel Hartwell and Stephen Hartwell were tried. They were young men lately from the United States, who had on the outbreak of the war gone back to their native land, joined General Hull at Detroit, and were taken prisoner by Brock at that place; brought back to Canada, they were paroled by mistake. The overt acts in their case were attempts to take prisoner His Majesty's loyal subjects to deliver them over to the enemy. Guilty.

The next day, Friday, June 11, before Mr. Justice Powell came Dayton (or Daton) Lindsey (Lyndsay, Lindsay, Linsey). He was a ringleader; he had openly joined the forces of the invader and had seduced others from their allegiance. He was convicted. Mr. Justice Powell finished out the day, and George Peacock, Jr., whose case was in almost every particular the same as Lindsey's, shared Lindsey's fate.

On Wednesday, June 15, Mr. Justice Campbell took his seat on the bench, and Isaiah (Campbell calls him Jonah) Brink was set to the bar. He had been in open rebellion, had joined the marauding party of the enemy, and had acted in a most atrocious way toward the loyal subjects. He was found guilty in a very short time. The same day Benjamin Simmons (or Simmonds) faced the Chief Justice and a jury. He had also been one of those who joined the enemy and helped to ravage their neighbours: he had been taken by Medcalf and had no chance of acquittal. Guilty.

The evening and the morning session exhausted that day; and Thursday, June 16, Mr. Justice Powell again presided. Robert Troup was tried; he seems to have been innocent, and, though some of his conduct had been suspicious if not equivocal, he was acquitted after a short trial.

In the afternoon, Campbell re-

lieved Powell, and Adam Crysler (Chrystler) was brought before the court. He was also one of Medcalf's prisoners; his conduct was even worse than that of his comrades and he was convicted.

Friday, June 17, Isaac Petit (Pettit) was placed in the dock before the Chief Justice. It was made to appear from the evidence that Petit had taken some part with the marauders, but he had refused to accompany them and had been branded as a coward: the case, however, was clear, and he was justly found guilty. The same day, Jesse Holly was tried before Mr. Justice Powell and acquitted. The court sat on Saturday, June 18, when, before Mr. Justice Campbell, Cornelius Howey pleaded guilty.

Monday, June 20, saw Mr. Justice Campbell again on the bench; John Dunham was arraigned and the evidence proved. him a ringleader. Guilty. The following day, June 21, Noah Pyne Hopkins was proved before the Chief Justice and the jury, to have been the enemy's commissary and to have taken flour for their troops. He was found guilty.

The list of prisoners was now exhausted; fourteen had been convicted on evidence, one had pleaded guilty, and four had been acquitted. For the unhappy fourteen, the law provided only one penalty;[20] the hideous execution for high treason had not been modified by legislation from the earliest times; that sentence was pronounced upon all on Tuesday, June 21. It then became the duty of the Sheriff to carry out the sentence on Thursday, unless the judges should grant a respite.[21] The judges had already met and had agreed that the sentences should be respited until July 20, to give all an equal opportunity of supplicating the royal mercy, and that a report should be made to the President by the Chief Justice.[22]

The report is extant[23]: of those tried before the Chief Justice, the Hartwells who had surrendered voluntarily for trial, were recommended to mercy; for the time being, none of those tried before Powell was so recommended; and of those tried before Campbell, the Chief Justice says "Mr. Justice Campbell sees no circumstances of mitigation in the cases of those convicted before him unless the reluctance to continue with the party which Johnson appeared latterly to show and the wish expressed of leaving them, and the confession and apparent penitence of Howey may be considered." The Chief Justice, however, suggested that the opinion of the Executive Council should be taken.

The Attorney General, in his report, feared that Aaron Stevens, Dayton Lindsey, Benjamin Simmons, George Peacock, Jr., Adam Crysler, Isaiah Brink and John Dunham must be executed. John Johnson, he thought an ignorant man who had been deluded by others and who had been humane to prisoners; the Hartwells, he said, were enemies and not British sub-

jects. They had, on the outbreak of the war, gone to the United States, and had been taken prisoner by Brock at Detroit. They had been paroled by mistake, and the wise young Attorney General thought that though as residents of Upper Canada they were in law guilty of high treason, it would be "better not to strain the law to its utmost rigor."[24] Of the rest he would say nothing, but he suggested that the President should direct the judges to order the immediate execution of one or two of the offenders, and that in any case no unconditional pardon should be granted.

Petitions had already begun to pour in. Jacob Overholzer was described as "an unfortunate but honest old man" by many loyal inhabitants of the Township of Bertie as early as June 11. On June 20, many inhabitants of the District of Niagara pleaded for the Hartwells, who had been led to act as they did through ignorance and levity, and later on in July they were joined by many more. Poor Polly Hopkins, wife of Noah Payne Hopkins, on June 29, pleaded her eleven years of marriage and her four children; and, July 8, a large number of the inhabitants of the Niagara District joined in her prayer; for John Johnson and Aaron Stevens, Samuel Hatt and Richard Beasley, J.P's., and George Chisholm spoke. The Executive Council conferred with the judges and the Attorney General, and after anxious consideration and careful weighing of all the facts, it was determined that seven might be saved from death; these seven, the Hartwells, Cornelius Howey, Isaac Pitt, Jacob Overholzer, Garrett Neill and John Johnson were respited till July 28, to enable proper enquiry to be made and proper terms fixed for commutation.[25] But Aaron Stevens, Dayton Lindsey, Noah Payne Hopkins, George Peacock, Jr., Isaiah Brink, Benjamin Simmons, Adam Crysler and John Dunham must die the death of a traitor. The Chief Justice refused to advise whom to execute but he recommended that as the convicted men were all from the Niagara and London Districts, one at least from each district should be executed; at the same time he pointed out that the President had no power to pardon fortreason.[26] The Executive Council asked the opinion of the judges as to where the executions should take place. The judges agreed that executions in the respective districts where the overt acts had been committed would be of most salutary effect; but the majority were of opinion that this could not be legally ordered out of Niagara District in which the convictions were had except by bringing up the convictions into the Court of King's Bench,[27] and that was an unusual proceeding, and should be avoided, if possible. They therefore advised that the Sheriff of the Niagara District should be directed to execute some on the boundary line between Niagara and London Districts, but that was not done[28] ; the unfortunates suffered the prescribed pun-

ishment[29], July 20, 1814, at Burlington Heights, and so ended the Ancaster "Bloody Assize."

What was to be done with the other seven? The Royal Instructions did not authorize the President or any Governor to pardon for treason[30], but gave "power upon extraordinary occasions to grant Reprieves to the offenders, until and to the intent that our Royal pleasure may be known therein." Accordingly a reprieve was granted, and the matter submitted to the Home Government.[31]

The gaol at York was crowded, and it was decided that these prisoners with others in like case offending should, pending removal to Quebec, be placed in the District Gaol at Kingston. And the seven were given by the Sheriff of the Home District at York, John Beikie, to a deputy sheriff, to be delivered by him to the sheriff of the Midland District at Kingston; with them went Calvin Wood, generally known as Dr. Wood, not quite in the same condition as themselves, but only committed on a charge of high treason, making a cortege of eight prisoners under guard. They travelled by the Danforth Road, built by Asa Danforth fifteen years before from York to Kingston, and the melancholy cavalcade had got as far as Smith's Creek (now Port Hope) on the evening of July 31. Sergeant Montgomery and his small detachment of militia locked the door of the little hut in which the eight prisoners were confined about a quarter of an hour after midnight; but in the morning they found that four had escaped—Calvin Wood, who seems to have been an expert at breaking out of confinement, Cornelius Howey, the penitent, and the two Hartwells, U.S. citizens. Immediate pursuit was made, and all but Stephen Hartwell were speedily retaken. The seven remaining prisoners were safely delivered to the sheriff at Kingston, and duly incarcerated in the gaol there. The reward of $100 offered by Beikie was ineffective. Stephen Hartwell was never recaptured, he almost certainly was assisted to cross the lake by those secretly sympathizing with the enemy's cause, of whom there was, unfortunately, no lack in the Newcastle District.[32]

Communication with England was slow, and no instructions were to be expected until the arrival of the spring fleet at Quebec, as the war had put an end to the more speedy communication by post, *via* New York.

In the latter part of the winter there broke out in Kingston Gaol, the dreaded jail-fever which, under that name, or that of ship-fever, spotted-fever, etc., was the scourge of crowded gaols, ships and other confined places. It was a virulent type of typhus fever, then and for long after believed to be "generated out of filth and overcrowding, bad diet and close, foul air,"[33] but now known to be due to the activity of the busy "cootie," as malaria to the mosquito, and the plague to the rat-flea.

Some of the unhappy prisoners were seized with the disease, and three died of it, Garrett Neill, March 6, Jacob Overholzer, March 14, and Isaac Petit, March 16, 1815.[34] The other four received a pardon conditioned on their abandoning the province and all other British possessions for life,[35] (which meant going to the United States). Their comrade, "Dr." Calvin Wood, did not wait for formal permission to take shelter across the international boundary; he had been accused by James McCarthy, of East Gwillimbury, of saying that if he could get a few hands he would go to Newmarket and disarm and seize the whole sentry guard, and he had also been accused by William Huff, Yeoman, of East Gwillimbury, of giving the enemy information of where the guns and other arms were lodged at York, for which he got seven barrels of flour; also that at an earlier date he was given a bag of ball and cartridge by Major Forsyth, of the U.S. army. He judged it wise not to wait for trial; and so with two others, he made an escape from the Kingston Gaol, June 9, 1815; that was the third time he had escaped, and as Sir Frederick Robinson, the Administrator of the Government, complains "his being apprehended on the former occasions was not owing to any activity on the part of either the Gaoler or the Sheriff."[36] No good fairy assisted the authorities this time; and Wood also went to "the land of the free and the home of the brave."

After all the convicts had been disposed of, the next step was to proceed against those who had not been apprehended, but against whom indictments had been found for high treason by the Grand Jury at Ancaster.

Robinson had gone to England to study for and be called to the bar there, but D'Arcy Boulton returned from his prison in France, and became Attorney General on the last day of 1814. He did not delay, but he had the proper proclamations made under the Provincial Act of 1815; and, May 27, 1817, he had the satisfaction to have entered up judgments of outlawry against nearly thirty persons, amongst them the leader in treason, Abraham Marcle[37]; and many of these had lands which were forfeited to the Crown.

ENDNOTES

[1] As every lawyer knows, this crime was called high treason to distinguish it from petit treason, which, according to the Statute of 1350, 25 Edward III, c 2, renewed by (1399) 1 Henry IV, c. 10, may happen in three ways: by a servant killing his master, a wife her husband, or an ecclesiastic his prelate to whom he owes faith and obedience. The crime of petit treason was abolished and the offence made murder in England in 1828 by 9 Geo. IV, c. 31, s. 2, renewed by 24, 25 Vic. c. 100, s. 8: in Canada in 1841 by 4,5 Vic. c. 27, s. 2.

[2] Spelled also, even in official papers "Markle" and "Maracle." He was a member of the firm of Biggars, Markle & Co., who owned the Union Mills, with 109 acres, at

Ancaster. Can. Arch. Sundries, U.C., August 10, 1816: Sundries, U.C., 1817. He is not to be confused with Henry Marcle (or Markle) who represented Dundas in the House of Assembly in the Fifth Parliament, 1808-1812. Henry Marcle's name is misprinted "Maule" in the Ontario Archives Reprint of the Proceedings of the House of Assembly for Upper Canada for 1810, at p. 284—but the correct form is given at page 285—the Index repeats the error. Ont. Arch., 8th Report (for 1911), 284, 285, 493.

[3] See letter from Lieut.-Colonel E. B. Brenton to Captain Loring, the governor's secretary, from Montreal, June 21, 1814. Can. Arch., Sundries, U.C. 1814.

[4] See letter from Captain Loring to Lieut-Colonel Brenton from York, U.C., June 18, 1814. Can. Arch. Sundries U.C. 1814. "Abraham Markle, the principal instigator and conductor of the late burning and plundering expedition of the enemy to Long Point... he followed the example of the celebrated Joe Wilcocks (see note 5 post) and went over to the enemy." See also letter from Sir Gordon Drummond to Earl Bathurst, July 10, 1814 (note 31 post).

[5] An unusually accurate account of this little battle is given in Kingsford's *History of Canada*, Volume VIII, 444, 445.

Marcle in his petition to Sir Roger Sheaffe, Administrator of the Government of Upper Canada after the death of Sir Isaac Brock, October, 1812, till June 18, 1813, the petition being dated Kingston, June 18, 1813, said that he was loyal, that he was one of four brothers who had left home and come to Upper Canada and served in the Butler's Rangers during the Revolutionary War; that his only son old enough to bear arms was in the Dragoons, and that his arrest and detention as a traitor was wholly unjust. Can. Arch., Sundries, U.C., 1812. Sheaffe sent him on to Lower Canada to the Governor General, Sir George Prevost, who gave him his liberty as stated in the text. Marcle's subsequent fate, so far as this province is concerned, appears from the Proceedings of the House of Assembly for 1814. Ont. Arch., Ninth Report (for 1912), 111. Saturday, February 19, 1814.

On motion of Mr. Nichol (Robert Nichol, Member for Norfolk and living at Stamford, who afterwards broke his neck falling down the mountain) seconded by Mr. Burwell (Mr. Mahlon Burwell, Member for Oxford and Middlesex), sufficient evidence having been offered to this House of Abraham Marcle, one of its members having traitorously deserted to the enemy, and of his having actually borne arms against His Majesty's Government, That this House, entertaining the utmost abhorrence of such disloyal and infamous conduct which has rendered him incapable and unworthy to sit and vote in this House, do declare his seat vacant, and that he shall no longer be considered a member thereof." Carried *nem.contradic.*

The same day, Joseph Willcocks, Member for the First Riding of Lincoln, was expelled for the same cause. Willcocks was afterwards killed at Fort Erie in the uniform of a Colonel in the U.S. army. He was the "Joe Willcocks" of Capt. Loring's letter. (See note 4 *ante).*

See also letter from Allan MacLean, the Speaker of the House of Assembly, to Sir Gordon Drummond, the Administrator, York, U.C., March 12, 18:14. Can. Arch., Sundries, U.C., 1814.

[6] Sometimes spelled "Baustwick."

[7] These were Joseph Fowler, Adam Chrystler, Griffis Collver, Isaac Pettit, William Carpenter, Datis Linsey and Wadsworth Philips. We shall meet again Chrystler, Pettit and Linsey. William Carpenter was released in April, there being no evidence against him. See letter of John Beverley Robinson to Captain Loring, York, April 22, 1814, Can. Arch., Sundries, U.C., 1814.

[8] D'Arcy Boulton, an Englishman, who had received a licence to practise under the Act of 1803, 43 Geo. III, c. 3, and had been called to the bar, Easter Term of that year; he

was appointed Solicitor General in 1805 on the death in the "Speedy" disaster of the first Solicitor General, Robert Isaac Dey Gray. On his way to England he was taken prisoner, 1810, by a French Privateer and taken as a prisoner to France, where he remained until the temporary peace of 1814. (There are several certificates of his being alive and a prisoner, given in this interval to enable him to receive his salary). On his return late in 1814 to the province he became, December 31, 1814, Attorney General, and Robinson, Solicitor General five weeks afterwards. When Boulton became a justice of the Court of King's Bench, 1818, in succession to the notorious Mr. Justice Thorpe, Robinson became Attorney General, and Boulton's son, Henry John Boulton, became Solicitor General—the "deal" whereby this was effected is delectable reading which few have been privileged to see but which can be seen in the Canadian Archives at Ottawa.

John Beverley Robinson was admitted on the rolls of the Law Society, Hilary Term, 1808. He was born July 26, 1791, and was still a student-at-law when John Macdonell, the fourth Attorney General, received his death wound on Queenston Heights, October, 1812. Mr. Justice Powell, notwithstanding that Robinson had not yet been called to the bar, persuaded his old friend, Sir Roger Sheaffe, to appoint him Acting Attorney General in the absence of D'Arcy Boulton, the Solicitor General, who was entitled to the promotion. Robinson proved in every way equal to the trust. He was not called until Hilary Term, 1815, but the Law Society, Act (17~7') 37 Geo. III, c. 13, s. 2, made him a Bencher of the Society, *ex officio*—so much so that the Chief Justice, Thomas Scott and Mr. Justice William Dummer Powell, September 25, 1813 united in a recommendation to the Governor General, Sir George Prevost, to appoint him Attorney General (Can. Arch., Sundries, U.C., 1813). On Boulton's return, as we have seen, he became Solicitor General, then Attorney General, and at length Chief Justice of the Province, 1829-1862.

[9] Wadsworth Philips. See Robinson's Report, York, February 18, 1814-Can. Arch., Sundries, U.C., 1814.

[10] Technically the General Quarter Sessions could try all felonies and misdemeanours, and during the times of the Tudor and Stewart Kings, thousands were hanged by these courts, but by the time Canada became British, the Quarter Sessions (in practice) sent all capital cases to the "Assizes."

[11] I subjoin a copy of an actual Commission of Oyer and Terminer and General Gaol Delivery issued to William Dummer Powell "and his Fellows," Powell being "of the Quorum." (See at the end of the notes).

[12] The Ontario lawyer will be reminded of the Court of General Sessions of the Peace in which every Justice of the Peace is entitled by law to sit, and some have been known to sit on the bench, but the "Chairman," the County Judge, is not interfered with.

[13] Ancaster was near the Military Post on Burlington Heights, and this was one reason for choosing it as the "Assize Town." The Secretary in drawing up the Commission made the mistake of calling the place Burlington; but John Beverley Robinson drew attention to the fact that there was no place of the name of Burlington in the province. "The little Lake has received the name of Burlington Bay, and from it the military posts on the Heights are usually called Burlington, but there is neither Town or Township of this name within the province. Ancaster and Barton are the Townships in that neighbourhood, in one of which I presume the Court will be held." Robinson asked for and received consent to change the name from Burlington to such place as the judges should appoint, unless the Governor should choose to name it himself. It is not probable that the Statute of (1541) 33 Henry VIII, c. 23 was applied; that required certain formalities to be complied with, including an examination before the Council, and there is no record of such proceeding being had. It seems probable that the overt acts relied upon to prove treason were alleged to have been committed in the Niagara

District. This district was informed by the Act of (1798). 38 Geo. III, c. 5, the same Act as gave authority to break off Northumberland and Durham from the Home District to form the Newcastle District, so that by 1802, the old Home District was broken up into three districts, Niagara, Home and Newcastle: the Home District was originally the same as Dorchester's Nassau District of the Proclamation of 1788, the name being changed to Home by the First Parliament of Upper Canada (1792) 32Geo. III, c. 8. Gore District was not formed until 1816 by 56 Geo. III, c. 19. As to the Act of 1541 in Canada, see my article "Extra Provincial Jurisdiction of Canadian Courts"40 *Canada Law Times*, June, 1920, 491, sqq. Moreover the Parliament of Upper Canada itself passed a more comprehensive Act which enabled a Court of Oyer and Terminer in any district to try treason, misprison of treason, or treasonable practice committed in any district whatsoever in the province (1814) 54 Geo. III, c. 11 (U.C.).

[14] See letter Robinson to Loring, York, April 22, 1814, referred to in note 7 *ante:* the junior seems to have been Henry John Boulton.

[15] See letter Robinson to Loring, York, April 29, 1814. Can. Arch., Sundries, U.C. 1814.

[16] do. do. do. Robinson was often charged in times a little later with pressing the charges too strongly; that he was the mainspring of the prosecutions is beyond question, but there is no evidence that he acted more vindictively than he was supposed at that time to be the duty of a Crown Counsel. His political enemies did not scruple to call this assize the "Bloody Assize" and to compare it, very unjustly, to the Bloody Assize of the infamous Jeffreys.

[17] The judges in an official communication to "John Robinson, Esquire," dated 3 May (probably 12 May). 1814, say that proceedings are to be taken without further delay; and they add "should it happen from the difficulty of subsistence, or any other cause, that the Court cannot proceed to the trial of the indictments which may be found, it will exercise its discretion in adjourning." Can. Arch., Sundries, U.C., 1814.

[18] See letter Robinson to Loring, York, May 12, 1814. Can. Arch., Sundries. U.C., 1814. He adds: "If there be any unfortunate confusion the Court may be adjourned" and "If indictments are found and prisoners escape, I will pursue them to outlawry." The former of these extracts refers to the possibility of an invasion and attack by the enemy, no remote possibility, be it said. Neil MacLean, the sheriff of the Eastern District, writing from Charlottenburg, November 19, 1813, with the information of the landing of the troops of General Wilkinson in the Township of Matilda, says that the gaol became unsafe and he ordered a guard to take the prisoners to Coteau du Lac to Colonel Scott—Reuben Ainsworth and Richard Boyer, committed for crime, Alexander Hoover, a debtor, and John Fulton, both dangerous and disaffected persons; 'Ainsworth jumped out of the window guarded by two men the day before they were to leave; the others were delivered to Col. Scott.' Can. Arch., Sundries, U.C., 1813. See my article, "The Green Goods Game in 1815," 40 *Can. Law Times* (for March, 1920) p. 187, n. 10.

There were frequent instances of removal of prisoners from gaols and other places of confinement in exposed areas. One of interest to Ontario lawyers is detailed by Thomas Taylor, our first Law Reporter, who, June 19, 1814, writes from York to Lieut.-Colonel Foster with a list of prisoners sent from Burlington to York, twenty-three in all; "they could not be brought for trial at Ancaster; all except Daniel Whitman for the murder of his wife, Lewis Lyons for robbery and Joshua Thompson for robbing a store are sent for safe-keeping." Can. Arch., Sundries, U.C., 1814.

The second of the two extracts refers to the old practice, now no longer in force. When an indictment was found for a petty misdemeanour or on a penal statute, a writ of *venire facias* issued, being in effect a summons to appear. If the accused appeared and pleaded to the indictment his trial proceeded; if he appeared and refused to plead,

the *peine forte et dare* was applied and he was placed under a heavy weight in dungeon low until he pleaded or died. If he did not appear and had lands in the county, a distress infinite issued from time to time until his property was all seined or he appeared. If he had no lands, or if his property was all under seizure, a writ of *capias* issued to the Sheriff to take his person and have him at the next Assizes; if that failed a second, an *alias capias* issued, and that failing a third, a *pluries capias*; that failing, the accused (in England) was put to the exigent, i.e., a writ of *exegi facias* was issued to the Sheriff under which he was proclaimed and required to surrender at five County Courts, and if he should be returned *quinto exactus*, five times required, he was adjudged to be outlawed or put out of the protection of the law.

In indictments for treason or felony, a *capias* was the first process, no *venire jacias* or distress being allowed; and in treason or homicide only one *capias* was allowed issue; then on a return of *non est inventus* by the Sheriff, the accused was put to the exegent as in minor offences.

The results of outlawry have been absurdly misunderstood; it did not give to anyone the right to kill the outlaw except where the outlaw was resisting arrest, and every one had the right to arrest an outlaw. If he should be captured, the justices sent him to the gallows, out of hand, without trial, on the mere proof of outlawry unless the offence was a mere trespass for which "minor outlawry" had been provided. In other respects, too, the consequences of outlawry were serious enough to the outlaw. His property was forfeited and escheated and he could not appeal to the courts. There was a practice of outlawry in civil matters very similar to that in criminal matters, but that subject is outside the purview of the present enquiry.

There were no County Counts or Sheriff's Courts in Upper Canada formally established, although it was considered that there was incident to the office of sheriff, a court of exclusive jurisdiction, wherein all persons named in the legal writ of exigent should be demanded and required to appear; the fact, however, that each district, the bailiwick of a sheriff, contained several counties caused what was called the "Legal County Court," to fall into disuse in the province. The legality of such courts was at least doubtful. On the opening of Parliament in February, 1814, the President, Sir Gordon Drummond, in his address to the House, said,

A due regard to the interest of the loyal subject requires that means should be adopted to punish such traitors as adhere to the enemy by confiscation of their estates. It may often happen, as in the case of the two Representatives (Marcie and Willcocks) of the people that they may withdraw from the process necessary for legal conviction. To obviate this an Act of Attainder by the Legislature may subvene to the usual process of outlawry. [Ninth Rep. Ont. Arch. (for 1912), 104].

A proper reply was made by the House of Assembly (do. do., p. 107): "We... shall endeavour to frame such regulations as in our opinion may best answer for the confiscation of the property of such traitors as may have joined the enemy and who may not be within the reach of legal conviction." They did not find it necessary to pass an Act of Attainder, always an odious measure; but they did declare to be aliens those who having been residents of the United States had claimed to be British subjects and renewing their allegiance by oath had solicited and received grants of land or obtained land in some other way, and then withdrawn from their allegiance. These were declared incapable of holding land, and a commission was authorized to enquire so that the lands would revert to the Crown subject to the claim of any creditor, Lienor, etc., (1814) 54 Geo. III, c. 9 (U.C.).

An Act was also passed repealing, so far as the province was concerned, the English Act of 7 Anne, c. 21, which abolished Forfeiture of Inheritance upon Attainder of Treason after the death of the 'Pretender and his sons (1814) 54 Geo. III, c. 14, (U.C.).

And the process of outlawry was provided for (1814) 54 Geo. III, c. 13 (U.C.), making the Court of Quarter Sessions of the Peace the court for the sheriff to make his demands under the writ of exigens; and authorizing the Court of King's Bench on the usual return of *non est inventus* in the alias and *pluries capias*, to issue a writ of exigent requiring the Sheriff to demand the party at three successive Courts of Quarter Sessions of the Peace, and to affix a copy of his proclamation at the door of the court house, and upon the third demand (instead of the fifth as in England) if the party did not appear, Judgment of Outlawry was to be pronounced by the coroner and returned by the sheriff.

This process of outlawry was amended and simplified the next year by (1815) 55 Geo. III, c. 2 (U.C.); this statute was to be in force for two years only, but it was revived in 1833 for six years by 5, 6 Will. IV, c. 5, and made perpetual by (1839) 2 Vic., c. 7, after the Mackenzie Rebellion. This came forward in the Consolidation of 1859 as C. S., U.C., c. 17, 52; and while it was recommended for repeal, it was not in fact repealed: R.SD. (1877), c. 44, s. 3; R.S.O. (1887), c. 48, s. 3; R.S.O. (1897), c. 56, s. 3; and the provision did not disappear from our Ontario Statutes until 1909, 9 Edw. VII, c. 30. Outlawry in criminal matters was abolished in Canada by the Act of (1892), 55, 56, Vic., c. 29, s. 962; in civil matters it disappeared on the passing of the Common Law Procedure Act of 1856, 19 Vic., c. 43, which by sec. 35 made a substitute.

[19] As an example of the course taken by Crown Counsel, read the report of the first Crown case prosecuted by Coke after the accession of James I, the trial of Sir Walter Raleigh (1603), 2 How. St. Tr. 1: sufficient may be seen in the account given by Lord Campbell in the most interesting (*me Plaice*) of all legal works *The Lives of the Chief Justices of England*, vol. 1, 257, s. 99. (Murray's Edition, London, 1849.)

[20] This will be discussed later (see note 29 *infra*).

[21] At the Common Law the sheriff was to execute the condemned within a convenient time, but in 1742, the statute 25 Geo. II, c. 37, directed that the judge should direct execution the next day but one after the sentence. In 1841 the Parliament of the Province of Canada enabled the judge to have the sentence recorded instead of being pronounced in open court (1841), 4, 5 Vic., c. 24, sec. 3.3 (Can.); by the Dominion Acts (1869), 32, 33 Vic., c. 29, and (1873), 36 Vic., c. 3, a change was made whereby the trial judge was directed to fix a day for the execution sufficiently remote to allow the signification of the Governor's pleasure to be made-that is substantially the present law.

[22] See letter, Robinson to Loring, from Ancaster, June 20, 1814. He says: "His Honour, the Chief Justice" will report, etc.; nor was this title an inadvertence; it was not till the Chief Justiceship of Robinson himself that the judges were spoken of and to as "Lordship;" before that time they were "Your Honour," as they were in the Lower Province until the other day. In making a report, June 29, 1814, in the name of the Chief Justice, Powell writes: "His Honour the Chief Justice"—and more than one paper in Powell's handwriting can be seen in the archives with the same terminology. Can. Arch, Sundries, 1814.

[23] In the Canadian Archives, Sundries, 1814.

[24] Can. Arch. Q. 318, 1, 129, Letter Robinson to Loring, York, June 18, 1814.

[25] Chief Justice Scott writes, York, July 14, 1814, complaining that the form of the reprieve is inaccurate; the sentence was to be "hanged by the neck but not until his Death for he must be cut down alive and his Entrails taken out and buried before his Face, his Head then to be cut off and his Body divided into four Quarters and his Head and Quarters to be at the King's Disposal." Can. Arch. Sundries, U.C., 1814. See note 29, infra.

[26] See his letters of July 3 and July 8, 1814.

[27] Every student of the history of the English constitution will remember the attempt on the part of James II to override the law by his sovereign will and to put martial law in force against military men without parliamentary authority. He caused a motion to be made before the Court of King's Bench for the execution at Plymouth of a soldier convicted at Reading of desertion. Chief Justice Herbert (who had been looked upon as a mere tool of the King) refused the motion "in some heat" as the prisoner was never before the court—then a Habeas Corpus was issued and the soldier brought before the court. But Herbert and Mr. Justice Wythens (otherwise unknown to fame) again refused the motion, saying that the prisoner being condemned in Berkshire could not be sent to another county to be executed. Three days after, a supersedeas replaced Herbert by Sir Robert Wright, "and Sir Francis Wythens had his quietus the night before," and the new Chief Justice promptly made the order desired. That judgment established the law already spoken of, that a prisoner condemned to death brought before the Court of King's Bench may be directed by that court to be executed anywhere within its jurisdiction, but it was the pyrrhic victory for the King. The story is well told by Lord Campbell, *Lives of the Lord Chief Justices*, (Thompson's edition), vol. II, 93, 94 (a trifling error as to the date of the supersession of C. J. Herbert is made). See also, Rex v. William Beal (April, 1687), 3 Modern Reports, 124.

[28] See the opinion of the Chief Justice after consulting the other judges, July 5, 1814. Can. Arch. Sundries, 1814. The Quebec Gazette of August 18, 1814, says that the execution took place at Burlington, i.e., of course, Burlington Heights, where the Hamilton Cemetery now stands.

[29] At that time the sentence for high treason was in the form presented for centuries by the Common Law:

(1) That you are to be drawn to the place of execution,

(2) Where you must be hanged by the neck, but not until you are dead, for you must be cut down alive

(3) And your bowels taken out

(4) And burned before your face (or your being still alive),

(5) Then your head must be severed from your body,

(6) Which must be divided into four parts, and

(7) Your head and quarters to be at the king's disposal.

It is probable that originally there was no interval between sentence and execution and the unhappy convict was drawn at once to the gallows; but at least as early as the sixteenth century the prisoner was ordered first to be taken to the place whence he came and thence to the place of execution.

Even in quarters usually well informed there is occasionally to be found a misunderstanding of the meaning of "drawn" in this sentence. It is supposed to be equivalent to "eviscerated," as a market woman "draws" a thicken. It really means that the convict is to be dragged to the gallows. Originally he was dragged by the heels at the horse's tail over the rough and filthy ground, which sometimes killed the victim. Sometimes, as in the case of William Longbeard in 1196, rough stones were placed in the road to make the transit more painful. But humanity was not wholly dead, and we find sometimes times a hurdle spread under the sufferer by friars or others. [A case] in 1340 forbade this in a peculiarly atrocious case of a servant master.

The "Common ox-hide" became an institution, and it later gave way to the hurdle. From contemporary woodcuts it appears that the hurdle was of wicker, flat and oblong, about seven feet by four feet. The prisoner was bound on it, feet toward the horse, which was attached to the hurdle and drew it along like a stone-boat. Later the sledge came into use, although the word "hurdle" was used to denote it, and by this time every

convict who was to be drawn to the gallows had a "hurdle" to ride on.

(1) While the express words of the sentence prohibited hanging until death, it came to be the practice to allow death to intervene before cutting down. This was not always the case, as when Townley was executed on Kensington Common in July, 1716 (see R. v. Townley, 1746, 18 St. Tr. 829), life was found in him when he was cut down and the executioner failing to kill him by blows on the chest, immediately cut his throat.

(2) While sometimes the whole of the viscera, thoracic and abdominal, were taken out, in the course of time, in most cases only a small incision was made and a small part of the viscera was burnt.

(3) A platform was placed near the gallows on which a fire was lit and the entrails burnt.

(4) "The Head of a Traitor" was always held aloft and shown to the spectators by the executioner.

(5) While originally the body was always quartered and the parts usually sent to different parts of the kingdom, the practice grew up of simply nicking the limbs at their junction with the trunk, which was taken as a symbolic quartering.

Sometimes an additional monstrosity was added, *ementulation*, e.g., William Wallace, the Scottish patriot suffered thus:

Primo per plateas Londonia ad caudas equinas tractus usque ad patibulum altissimum sibi fabricatum, quo laqueo suspensus, postea semivivus dimissus, deinde abscissis genitalibus at evisceratis intestinis ac in ignem crematis, demum abscisso capite ac trunco in quatuor partes recto, caput palo super pontem Londoniae affigitur; quadrifida vero membra ad partes Scotiae cunt transmissa." ("Flores Hist.," ed. Luard. iii, 124.)

So, too, in the "Popish Plot," Ireland, Pickering, Grove, Langhorn and others were sentenced to suffer in this way, while Stayley, Coleman, Fitzharris and Plunket were not. Coke sentenced John Owens, alias Collins, to this in 1615; there does not seem to be any explanation of why it was ordered in some cases and not in others wholly parallel. Those interested will find the whole subject discussed at length in Marks' *Tyburn Tree, Its History and Annals* [London, Brown, Langham & Co., n. d. (not earlier than September, 1908)] from which much of the above has been taken.

The case of Rex v. Walcott (1696), Shower 127; 1 Eng. Rep. 87, may be noted. Thomas Walcott had been convicted of high treason (he took part in the Rye House Plot, 1683), and was executed at Tyburn. His sentence ran:

Quod predictus Thomas Walcott ducatur ad Gaolam dicti domini Regis de Newgate unde venit et ibidem super Bigam ponatur et abinde usque ad furcas de Tyburn trahatur et ibidem per Collum suspendatur at vivens ad terram prosternatur, et quod secreta membra ejus amputa(n)tur et interiora sus extra ventrem suum capiantur, et in ignem ponantur et ibidem comburentur, et quod caput ejus amputetur, quodque corpus ejus in quatuor partes dividatur et illae ponantur ubi Dominus Rex eas assignare voluit.

Twelve years afterwards the attainder consequent upon this judgment was reversed on writ of error by the Court of King's Bench, and in 1696 this reversal was affirmed in Dom. Proc., the sole ground being that the words "*ipso vivente*" were omitted after "*consburentur*" and no words used that would be tantamount, such as "*en son view*." To the argument that it would be impossible to burn a man's bowels when he was alive it was answered, "Tradition saith that Harrison, one of the Regicides, did mount himself and give the executioner a box on the ear 'after his body was opened'." The whole report is replete with learning on this horrible subject. See my paper "Canadian State Trials: The King v. David McLane," Trans. *Roy. Soc. Can.* Series III, Vol. X (1916), 332, 334.

Chief Justice Scott, in a letter to Drummond, July 14, 1814, Can. Arch., Sundries, U.C., 1814, says: "In point of fact this sentence is never exactly executed; the execu-

tioner invariably taking care not to cut the body down until the criminal is dead, but the sentence of the law is always pronounced."

[30] See the Royal Instructions to Lord Dorchester. Fourth Ont. Arch. Rep., (for 1906), p. 168.

[31] It may be worthwhile to quote the original despatch from Sir Gordon Drummond to Lord Bathurst, Can. Arch., Q. 318, 1, 174. Writing from Kingston, U.C., July 10, 1814, he says:

A band of Rebels in the District of London under a notorious partisan leader made incursions on unprotected parts of the country, a number of loyal inhabitants, Militia, volunteered, attacked and (January, 1814) took about 15 prisoners. To make an example of these miscreants and the like a Special Commission (of Oyer and Terminer) was issued for London, Niagara and Home Districts. The Court sat from May 23 to June 21, seventeen persons were tried out of seventy indictments for High Treason-fifteen were convicted and were to be executed, July 20. Mr. Robinson, Acting Attorney-General prosecuted and his conduct was highly meritorious and praiseworthy.

The Chief Justice and Acting Attorney-General advise, and Drummond agrees, that it is not necessary to execute all, and seven have been reprieved for His Majesty's pleasure as to their execution or perpetual banishment. That they were intended to be taken to Quebec appears from a letter, Can. Arch. C. 703, E. p. 55.

[32] Robinson was very angry at the escape. He wrote to MacMahon, the Governor's secretary, from Brockville, September 10, 1814, that the escape was due to the negligence of the deputy sheriff. "It is punishable by a criminal prosecution for neglect and so frequent and inexcusable are his faults of this nature that I think the Sheriff of the Home District should be compelled to find a more efficient Deputy." Can. Arch. Sundries, 1814. I cannot find the name of the deputy sheriff, and there is no record of any criminal prosecution or other proceedings against him.

Notwithstanding the general opinion, and little flattering as it is to Canadians of that time, it must be admitted that there was undoubtedly a want of loyalty, or at least a want of willingness to fight the invaders, exhibited by the Canadian settler on more than one occasion, and at more than one place. A contemporary work published in 1813, written by Michael Smith, who was an itinerant Baptist preacher from the United States, but who had lived in Upper Canada for some time before the war and had been allowed by the Government to leave the province on the outbreak of the war, a number of statements are made which are corroborated by facts which are well known. The book is called *A Geographical View of the Province of Upper Canada*, etc.

On page 87 (3rd edition, Philadelphia, 1813), he says,

It was generally thought in Canada if Hull had marched in haste from Sandwich to Fort George, the province would then have been conquered without the loss of a man... Brock... ordered some part of the militia from the District of London, about 100 miles from Sandwich, to march there. This many refused to do of their own accord, and others were persuaded so to refuse by a Mr. Culver, a Mr. Beamer, and one more who rode among the people for six days telling them to stand back. Whenever the officer came to warn the inhabitants to meet at such a place to receive arms and orders to march against Hull, they promised to go; but instead of going, they took some provision and went to the woods, and there waited in hopes that Hull would soon accomplish his promise, but, poor things, they were deceived and had to return and obey orders.

After the surrender of Hull "the people of Canada became fearful of disobeying the government; some that fled to the wilderness returned home, and the friends of the United States were discouraged and those of the King encouraged..." In the Talbot papers will be found some account of this trouble in the London District.

On p. 93, Smith says that about twelve days after the Battle of Queenston

Heights:

Col. Graham on Yonge Street, ordered his regiment to meet in order to draft a number to send to Fort George; however, about forty did not appear but went out into Whitchurch Township, nearly a wilderness, and there joined about thirty more who had fled from different places. When the regiment met there were present some who had liberty of absence a few days from Fort George; these, with others, volunteered their services to Col. Graham to the number of 160, to go and fetch them in, to which the Colonel agreed but ordered them to take no arms, but when they found they must not take arms they would not go. At the first of December they had increased to about 300, about which time, as I was on my way to Kingston to obtain a passport to leave the province, I saw about 50 of them near Smith's Creek (now Port Hope) in Newcastle District on the main road with fife and drum, beating for volunteers, crying huzza for Madison (the President of the United States). None of the people in this district bore arms at that time, except twelve at Presqu'ile Harbour. They were universally in favour of the United States, and if ever another army is landed in Canada this would be the best place; ... many of the Canadian militia would desert... but... an army dare not rebel, not having now any faith in any offers of protection in a rebellion, as they have been deceived.

[33] The *Sydenham Society's Lexicon* published 1887. The "cootie" is the body-louse, *pediculus corporis*, its pestiferous qualities were discovered but the other day. In my time as a student of medicine it was taught that typhus, and typhoid fevers were different in their aetiology, the former being due to bad air, the latter to bad water. The description, however, of typhus is unchanged, "an acute, specific, epidemic, contagious, exanthematous fever."

[34] See the report of Charles Stuart, Sheriff of the Midland District, dated at Kingston, July 28, 1815. This report was sent to MacMahon. Can. Arch. Sundries, U.C. 1815. The overcrowding of gaols at that time was notorious and probably unavoidable. In a petition of the justices of the peace of the Eastern District at Cornwall, March 15, 1815, they say that in the gaol at Cornwall there were confined three persons charged with murder, and seven charged with felony; that the gaol had been and still was occupied as a barracks and that no part of the building was sufficient to hold prisoners in safety. They ask for a special Commission of Oyer and Terminer and General Gaol Delivery to deliver the gaol. Can. Arch. Sundries, U.C., 1815.

[35] Banishment for crime came to an end in Canada in 1842 on the passing of the Statute 6 Vic., c. 5 (Can.), which, by sec. 4, enacted that instead of transportation or banishment there should be imprisonment in the provincial penitentiary or other prison.

[36] See Sir Frederick's letter to Col. Foster, the military secretary of the Governor-General, from Kingston, June 13, 1815. Can. Arch. Sundries, U.C., 1815. For the charges against the elusive "Dr." Wood, see Can. Arch. Sundries, U.C., 1813.

[37] The list given by Boulton in his report to Lieut.-Col. Cameron, the Governor's secretary, York, May 27, 1817, Can. Arch. Sundries, U.C., 1817, is as follows (the names of those known to have lands are marked "L"):—In the. District of London: Andrew Westbrook, "L" Isaiah Dean, "L" Silas Dean, William Biggar, Eleazer Daggatt, Oliver Grace Jr., "L" Barnabas Gibb et al., "L" Eliakim Crosby and "L" Benajah Mallory. In the District of Niagara: Daniel Phillips, William James, Ira Bentley, Asa Bacon, Epaphras Lord Phelps, Joseph Lovett, Ebenr. Kelly, Phineas Howell, Abraham Markle, William Merritt, Abraham Hardey, George Cain and five others. In the District of Newcastle: Abraham Winn (Sedition). The Attorney-General added that it would be necessary to issue a Commission to enquire what lands the offenders had at the time of the offence committed; and Commissions were in fact issued.

The Taw Reports contain a case with which the name of the executed traitor, Aaron

Stevens, is connected. He had considerable land, one part being 450 acres in Whitby: by his will made almost a year before his death he left all his real and personal property equally to his seven sons and five daughters. By his attainder all his lands vested in the Crown under the Statute of 33 Henry VIII, c. 20 s. 2, and the Provincial Statute of 1819, 59 Geo. III, c. 12 (U.C.) vested them in commissioners, who sold some, but apparently not the Whitby land. In 1851, Stevens' attainder was reversed and the corruption of blood' and forfeiture wrought by his attainder avoided by the Act (1851) 14, 15 Vic., c. 17o. (Can.), but nothing was to affect the title to land which the commissioners had sold.

Nicholas Stevens, the eldest son of Aaron Stevens, (there were some doubts thrown on his legitimacy as having been born before the marriage, but on this point there was no precise testimony) sold the Whitby land in 1831 to one, Clement. A great number of persons, children and grandchildren of Aaron Stevens and the husbands of some of them brought an action in ejectment against Clement after the Statute of 1851, claiming under the will already mentioned and failed at the trial. In term the Court of King's Bench, Robinson, C. J., Draper and Burns, J.J., dismissed the appeal, holding that the will had not been proven and also that the plaintiffs had not proved that the Whitby land had not been sold by the commissioners while this was in a sense negative evidence, the Forfeited Estates Act (1819) 59 Geo. III, c. 12 (U.C.) provided for making and preserving records of all estates so dealt with, and the fact was of easy proof. Doe dem Stevens et al. v. Clement (1852), 9650. This was almost certainly a miscarriage of justice. At the present day the will would have been proved without difficulty and the "Lessors of the Plaintiff" would have been allowed to supplement their proof by producing the records of the commissioners. *Tempora mutantur et nos mutamur in illis.*

More interesting is the story of the land of Ebaphrus Lord Phelps. He was a white schoolmaster who had married a Mohawk woman, Esther, who bore him three children. Captain Joseph Brant, May 1, 1804, leased to him, for 999 years, one thousand acres of land on the Grand River to provide for his Indian wife and her children. The land was forfeited to the Crown on Phelps' outlawry and Esther was allowed to contest the escheat in the Court of King's Bench. She failed; a report of the case is to be found in Taylor's King's Bench Reports (1828) at pp. 47-54; the principle argued for by Solicitor-General Boulton that "the Indians are bound by the Common Law" was approved by the court. See my article "The Sad Tale of an Indian Wife," 13 *Journal of Criminal Law and Criminology*, May, 1922, 82-89.

APPENDIX

The following is the Commission issued to Mr. Justice William Dummer Powell, referred to in Note 11, *supra*:-

SIG'D, DORCHESTER GOV:

Recorded in the Office of Enrollments at Quebec the 20th Day of January 1791, in the third Register of Letters Patent & Commissions, folio 472

Geo. Pownall.

-Fiat--GEORGE THE THIRD, by the Grace of God, of 'Great Britain, France and Ireland, KING, Defender of the Faith and so forth. TO OUR TRUSTY and Well beloved William Dummer Powell Our first Justice of OUR Court of Common Pleas of and in OUR District of Hesse in OUR Province of Quebec, and to William Lamothe, St. Martin Adhemar, William McComb, John Askin and George Meldrum, Esquires, Justices of the Peace for the said District. GREETING: KNOW YE that WE have assigned you and any three of you (of whom We will that you the said William Dummer Powell be one)

to inquire by the Oath of Good and Lawful Men of the District aforesaid by whom the truth of the matter may be the better known, and by other ways, methods and means where-by you can or may the better know, as well within liberties as without, more fully the truth of all Treasons, Misprisions of Treason, Insurrections, Rebellions, Murders, Felonies, Manslaughters, Killings, Burglaries, Rapes of Women, unlawful meetings and Conventicles, unlawful uttering of words, unlawful assemblies, misprisons, Confederacies, false allegations, Trespasses, Riots, Routs, Retentions, Escapes, Contempts, Falsities, negligencies, Concealments, Maintenances, Oppressions, Champarties, Deceits, and all other Misdeeds, Offences and injuries whatsoever, and also the accessories of the same within the District aforesaid, as well within Liberties as without, by whomsoever and howsoever, done, perpetrated and Committed, and by whom and to whom, when, how and in what manner, and of all other Articles and Circumstances whatsoever, the premises and every or any of them howsoever concerning, and the said Treasons and other the premises according to the Law and Custom of England and the Laws of this Province for this time to hear and determine. And therefore WE command you that at certain days and places which you or any three of you (whereof WE will that you the said William Dummer Powell be one) shall for this purpose appoint within and for the space of six Calendar Months from the day of the Date of these Presents, you do concerning the Premises make diligent inquiry, and all and singular the Premises hear and determine and those things do and fulfil in form aforesaid which are and ought to be done and to Justice doth appertain according to the Law and Custom of England and the Laws of OUR said Province, Saving to us OUR Amerciaments and other things to us thereupon belonging. For WE have Commanded OUR Sheriff of the said District that at certain Days and places which you or any three of you (of whom WE will that you the said William Dummer Powell be one) shall make known within and for the space of Six Calendar Months from the day of the Date of these Presents he cause to come before you or any three of you (of whom WE will that you the said William Dummer Powell be one) such and so many Good and Lawful Men of his Bailiwick (as well within liberties as without) by whom the truth of the Premises may be the better inquired of and known.

AND KNOW YE further that WE have also Constituted and assigned you or any three of you (of whom WE will that you the said William Dummer Powell be one) OUR Justices the Gaol of OUR said District of the Prisoners in the same being for this time to deliver. AND therefore WE command you that at a certain Day which you or any three of you (of whom WE will that you the said William Dummer Powell be one) shall appoint you do meet at Detroit, OUR GAOL of OUR said District to deliver, and to do thereupon what to Justice may appertain, according to the Law and Custom of England and the Laws of OUR said Province, SAVING TO US OUR Amerciaments and other things to us thereupon belonging. For W E have Commanded and hereby Command OUR Sheriff of OUR District of Hesse that at a certain Day which you or any three of you (of whom WE will that you the said William Dummer Powell be one) to him shall make known, all the Prisoners of the said Gaol and their attachments before you or any three of you (of whom WE will that you the said William Dummer Powell be one) there he cause to come. IN TESTIMONY whereof WE have caused these OUR Letters to be made Patent and the Great Seal of OUR said Province of Quebec to be hereunto affixed. WITNESS OUR Trusty and Well beloved GUY LORD DORCHESTER OUR Captain General and Governor in Chief of OUR said Province. AT OUR CASTLE of Saint Lewis in OUR City of Quebec this Twentieth Day of January in the year of OUR LORD One thousand seven hundred and ninety one and of OUR REIGN the Thirty-first.

(Signed) D.G.

(Signed) Geo: Pownall, Sec'y