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William Renwick Riddell

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## THE DUEL IN EARLY UPPER CANADA.

WILLIAM RENWICK RIDDELL.<sup>1</sup>

That part of British America which was to become Upper Canada was, before the termination of the American Revolutionary War, almost uninhabited. At the close of that War, a considerable immigration took place<sup>2</sup> of those who had taken the part of the Crown in that conflict, United Empire Loyalists as they were called, driven out with what they considered in justice and what was certainly cruelty by their quondam brethren.

These settlers brought with them their English law and their customs; and although in theory French Canadian law was in force till 1792, the practice was in many cases far different.

Along with other customs imported, was duelling; and this was not at all diminished by the circumstance that many of those placed in positions of authority, when in 1792 the Province was incorporated, were Englishmen who had come from across the Atlantic to make a new home in the wilds of Upper Canada.

The civil law of England was formally introduced into Upper Canada in 1792; the criminal law of England had always been in force in all Canada from the time of the Conquest in 1759-60.

By the law of England and therefore of Canada a deliberate duel was unlawful—as Blackstone sententiously puts it: “where both parties meet avowedly with an intent to murder, thinking it their duty as gentlemen, and claiming as their right to wanton with their own lives and those of their fellow creatures, without any warrant or authority from any power either divine or human, but in direct contradiction to the laws of God and man \*\*\* the law has justly fixed the crime and punishment of murder on them and on their

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<sup>1</sup>LL. D., F. R. Hist. Society and Justice of the Supreme Court of Ontario, Canada.

<sup>2</sup>Nearly all the immigrants settled near the banks of the international rivers—on the left bank of the St. Lawrence were three main nuclei, at what are now Cornwall, Brockville and Kingston, on the Niagara was Newark now Niagara-on-the-Lake. On the Detroit River the loyalist remained to a great extent at Detroit until it passed out of British hands in 1796: then many, but by no means all, crossed the river.

seconds also.”<sup>3</sup> And such was the law laid down by Sir Matthew Hale, “as correct, as learned and as humane a judge as ever graced a bench of justice.”<sup>4</sup>

While this was undoubtedly the law, it was in our early days not applied very vigorously. There was the “unwritten law” that if the duel was fair in all respects, the survivor and the seconds should not be convicted. Accordingly, although the law was always laid down accurately by the presiding Judge, the Crown Counsel, if the duel was a fair one, never pressed for a conviction; and the jury knew what was expected of them.

There were three—or perhaps four—duels which made considerable noise in their day and are not yet quite forgotten.

In 1800, January 3, John White the first Attorney General of the Province, and John Small the Clerk of the Executive Council, met behind the Government Buildings,<sup>5</sup> in a grove on Palace (now Front) Street at the foot of what is now Berkeley Street, Toronto;<sup>6</sup> and White received a wound above the right hip which proved fatal in a very short time.

White was an English Barrister who, being appointed Attorney General of the new Province, came to Upper Canada with the first Chief Justice, Osgoode. He was elected member of the first House of Assembly, representing the Riding of Leeds and Frontenac, but was not re-elected. He was a diligent, painstaking official, but apparently was unable to keep out of trouble: e.g., in 1799, he had to apply to the Court of King’s Bench for protection against Captain William Fitzgerald of the Queen’s Rangers who had threatened him and challenged him to a duel.<sup>7</sup> But he was not always to be so fortunate; he spoke slightingly of the wife of Major John Small, Clerk of the Executive Council; and, failing to withdraw his imputations, he was challenged and shot by Small.

Major Small was an Englishman from Cirencester who came to Canada as Clerk of the Crown and Pleas and Clerk of the Executive Council. He survived till 1832, filling his official position with much credit.

<sup>3</sup>Blackstone’s Commentaries, Vol. IV, P. 199.

<sup>4</sup>Hale’s Pleas of the Crown, Vol. 1, P. 452.

<sup>5</sup>These were the original Public Buildings, destroyed by the American troops in 1813. It was in retaliation for this and similar acts, of gratuitous vandalism that the American Capitol was destroyed (in part) by the British troops.

<sup>6</sup>The Streets running South toward the Bay at that time went to the edge of the water; it was not till the Grand Trunk Railway came through, in the 50’s, that the Esplanade was constructed.

<sup>7</sup>This appears from the Manuscript Term Books of the Court of King’s Bench (commencing in 1794) still preserved at Osgoode Hall, Toronto.

White was buried in his garden on his own lot in York (Toronto) east of Sherbourne Street and near Bloor Street. In 1871 his bones were turned up by laborers digging out building sand and were reverently deposited in St. James' Cemetery by Mr. Clarke Gamble, Q. C.

Small was the ancestor of the well-known and highly esteemed Toronto family of that name. He seems to have acted in all respects in the manner the rules of honor of his times demanded of a gentleman.

He was tried for murder, January 20th, 1800, at York (Toronto) before Mr. Justice Allcock and a jury; and the duel being a fair one he was promptly acquitted. The foreman of the jury was William Jarvis, father of Samuel Peters Jarvis whom we shall meet later on.

Early on the morning of October 10th, 1806, William Weekes and William Dickson, both prominent lawyers, met behind a bastion of old Fort Niagara on the American side, and Weekes received a pistol wound so severe that he died the same evening.

Weekes was an Irishman who late in the eighteenth century came to New York where he was a follower of the notorious Aaron Burr. Making his way to York, Upper Canada, he was called to the Bar in 1799<sup>8</sup> and at once obtained a good practice. He joined the well-known Judge, Thorpe,<sup>9</sup> in his opposition to the Government of the day and was elected a member of the House of Assembly. Mr. Justice Thorpe presiding at the Court of Assize and Nisi Prius at Niagara, (Newark) Weekes in an address as Counsel made a vicious attack on the Government without objection from the Bench—indeed it seems to have been expected by the Judge that such an inflammatory address would be made. Weekes was followed by Dickson who made as virulent an attack on Weekes as Weekes had made on the Government.<sup>10</sup> Nothing came of this for a few days, but one night spent by Weekes and the Judge together in a neighboring tavern seems to have developed a plan for the humiliation of Dickson. Weekes was a bachelor without encumbrances; Dickson had a wife and a large

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<sup>8</sup>Weekes was the first to be called to the Bar by the Law Society of Upper Canada, not having been in practice when the act creating the Law Society came in force.

<sup>9</sup>As to Mr. Justice Thorpe, see *The Journal of the American Inst. of Criminal Law and Criminology*, Vol. 4, P. 12, May 1913, where a fairly full account is given of him.

<sup>10</sup>Curiously enough Weekes and Dickson were great friends: in the early part of this year. March 5, 1806, Dickson was made a "Bencher" or Governor of the Law Society on the motion of Weekes. They were, moreover, of the same stripe of potatoes, Weekes being by far the more outspoken.

family of small children; he was moreover a canny Scot; and the conspirators thought he would decline a challenge. Accordingly a challenge was sent; and somewhat to Weekes' dismay it was promptly accepted, with the result we have seen.

Weekes was buried at Niagara. The administration of his very considerable estate was one of the scandals of that early time and was the occasion of one of the earliest private Acts in our Provincial history.

Dickson became a member of the Council and a man of considerable influence in public affairs; he is best known from the part he played in the prosecution—and persecution—of Gourlay.<sup>11</sup> Of course Dickson was not prosecuted for his part in the duel the crime (?) not being committed in Upper Canada.

The next duel probably caused more stir at the time and afterwards than any other similar event in our early history.

In 1815, Mr. Samuel Peters Jarvis went from York to Quebec with his youngest sister to place her in a Boarding School there. At the request of Mrs. Thomas Ridout her mother, he also took along Miss Ridout who was to be placed at the same school. On arriving at Quebec he called upon Miss Ridout's brother, Mr. Thomas G. Ridout, an officer in the Commissariat Department who took the young girls under his protection. Ridout was to pay Miss Jarvis' accounts and draw upon her brother for the amount.<sup>12</sup> The following year Mrs. Ridout visited Quebec, and through some misunderstanding got the idea that her son had been obliged to pay for Miss Jarvis' support without reimbursement by Jarvis. She told this to some people and it came to Jarvis' ears. Jarvis wrote to her husband, who was Surveyor General of the Province, demanding a contradiction of the story; he handed the letter to his son George (afterwards Treasurer of the Law Society) who at once wrote Jarvis, saying, "for any imaginary injury received from any part of my family, I am ready to answer". Jarvis demanded an apology or "meet me with your friend Saturday morning next seven o'clock at the Five Mile Meadow opposite Brown's Point". Ridout accepted "of the terms contained in the latter part of your letter if it be possible to reach

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<sup>11</sup>Robert (Fleming) Gourlay, the "Banished Briton" who was banished from Upper Canada in 1819 largely through the instrumentality of Dickson. His offense was in the main his criticism and defiance of the authorities, the proceedings though frequent attacked as improper and unlawful were in my judgment wholly regular and authorized by the Statute law, however unwise they may have been, and, *me justice*, were.

<sup>12</sup>These accounts, or some of them, are still preserved in the Public Library, Toronto, and form interesting reading.

the appointed place within the period limited." Accident prevented this duel; another meeting was arranged; but the Reverend Dr. Strachan (afterwards the first Anglican Bishop of Toronto), a friend of both parties, succeeded in bringing about an amicable settlement. On November 16, 1816, both signed a document whereby Jarvis withdrew the letter to the Surveyor General, the elder Ridout; and it was agreed that "a letter shall be immediately written to the Surveyor General requesting him to give complete contradiction to the reports circulated by Mrs. Ridout to the prejudice of Mr. Jarvis, which it is understood the Surveyor General is to give." This was done and the trouble blew over for the time.

The hard feelings between the families were not, however, abated. In the following year, John Ridout, a student in the Law Office of his brother George and not quite of age, was conducting a law suit against Jarvis' father, and Jarvis was trying to settle the action. On one occasion Jarvis ordered Ridout out of his office;<sup>13</sup> a few days thereafter the two met on the street; Ridout struck Jarvis several times with a stick and shattered the bones of his right hand. Jarvis knocked him down with a blow from his left and the fight continued until the parties were separated by Captain FitzGibbon<sup>14</sup> and Dr. Horne.<sup>15</sup> A few days after Mr. James E. Small<sup>16</sup> waited on Jarvis on behalf of Ridout. Jarvis promptly accepted the challenge, and at daylight next morning went with his second, Mr. Henry John Boulton<sup>17</sup> and met Ridout and his second, Small, at Chief Justice Elmsley's barn, not far from the north west corner of Yonge and College Streets, Toronto. Waiting at the barn until a shower was over, the principals were placed eight yards apart; it was agreed that the signal should

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<sup>13</sup>Jarvis claimed that Ridout was unbearably offensive and even insulting—there was no third party present and we have not Ridout's side of the story. No one, however, doubted Jarvis' integrity and sense of honor.

<sup>14</sup>One of the heroes of the war of 1812-14, an Irishman who died a "Poor Knight of Windsor". Many of his descendants still live in Canada.

<sup>15</sup>Robert Charles Horne, an Englishman and a Member of the Royal College of Surgeons, was an Army Surgeon in the War of 1812-14. When his regiment, the Glengarry Light Infantry, disbanded at the close of the war, he came to York (Toronto). It is not quite certain whether he engaged in general practice but he was made Surgeon to the North York Militia. He was appointed a member of the Upper Canada Medical Board to examine candidates for License to practice Medicine. At different times he was editor and publisher of the Upper Canada Gazette, Kings Printer and Cashier of the Bank of Upper Canada. A strong Tory his house was burned by the Radicals in the short lived Rebellion of 1837-8: He died in 1845.

<sup>16</sup>Son of Major John Small and afterwards Treasurer of the Law Society of Upper Canada.

<sup>17</sup>Afterwards Solicitor General of Upper Canada, and Chief Justice of Newfoundland. He was a son of Attorney General (afterward Mr. Justice) Boulton.

be "one, two, three, fire," but that on no account was either party to raise his pistol till the word "fire". Mr. Small pronounced "one," and was in the act of pronouncing "two" when Ridout raised his pistol and fired at Jarvis, he then left the ground in a direction away from Jarvis. Whether this was due to nervousness (as is likely) or not, Jarvis insisted to the end of his life that it was a deliberate attempt at foul play. Ridout was rebuked by his second and directed to take his place. He said: "Yes I will, but give me another pistol;" a loaded pistol was given him, but after a conference between the seconds, taken away later, as "Jarvis was entitled to his shot". The second pronounced the signal agreed upon and Jarvis fired, Ridout fell, was carried into Chief Justice Elmsley's barn and there died in a very short time. The pistols used on this occasion are in the possession of Aemilius Jarvis, Esq., of Toronto, grandson of the surviving principal. They are long and heavy, carry a large bullet, and are most deadly weapons.

Jarvis was arrested the same day and taken to prison, where he remained till the October Assizes at York.

He was arraigned at York before Chief Justice Powell,<sup>18</sup> the Attorney General, D'Arcy Boulton, receiving permission to retire from the case as his son had been concerned with the matter as second. The Solicitor General John Beverley Robinson was absent and the Judge himself examined the witnesses. The jury found a verdict of "not guilty" after a few minutes consideration, although the charge "was anything but indulgent to the prisoner and was so considered by most of the persons present in Court."

Small and Boulton who had been indicted as accessories were as a matter of course discharged on the verdict acquitting the principal being pronounced.

The unhappy mother whose unguarded words were the beginning of the troubles between the families—"the beginning of strife is as

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<sup>18</sup>William Dummer Powell, born in Boston, Mass., in 1755, was educated there, in England and in the Continent. He took part in the Siege of Boston on the Loyalist side but afterwards went to Highland and studied in the Middle Temple. He came to Canada in 1779, received a license to practise and did practise law in Montreal. Being created First Judge of the Court of Common Pleas for the District of Hesse he went to Detroit in 1789; when the Laws of King's Bench in Upper Canada was organized under the Statute of 1794, he was made the Senior Puisne Justice. He became Chief Justice in 1815 and resigned in 1825 on a pension, dying in 1834. Amongst other services of a public nature he served as a Commissioner to treat with the American invader when Toronto capitulated in 1813.

Jarvis afterwards married his daughter Mary who had been engaged to the young Attorney General John McDownell who met a hero's death at the Battle of Queenston Heights in 1812.

when one letteth out water"—never forgave either principal or second for her son's death; for years she used to wait after the morning service at the door of St. James' Cathedral until Boulton came out and would then solemnly curse him for his part in what she called the murder of her son.<sup>19</sup>

This duel was recalled some years later. Francis Collins, an enthusiastic Irishman of strong Radical leanings, was conducting the "Canadian Freeman," a newspaper strongly opposed to the Government. Early in 1828, he made attacks on Henry John Boulton (now become Solicitor General) in connection with the duel in 1817 in which he had acted as second. A bill of indictment for libel was found against Collins for these publications and he was arrested. Appearing in Court before Mr. Justice Willis<sup>20</sup> he made a violent attack upon the Attorney General, John Beverley Robinson, for prosecuting him while he took no proceedings against Boulton for "a crime that the law of England calls murder, committed ten or eleven years ago." The Judge sent Collins before the Grand Jury, who speedily found a bill against Boulton and Small the two seconds; they were arrested but admitted to bail. Collins applied for Robert Baldwin<sup>21</sup> to conduct the prosecution, which he did.<sup>22</sup> The trial lasted two days and resulted in an acquittal, the jury being out only ten minutes.

The other duel which I propose to speak of was fought in 1833; it is often, but I think inaccurately,<sup>22½</sup> called the last duel in Upper Canada.<sup>23</sup>

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<sup>19</sup>*Ex relatione* Sir Glenhohne Falconbridge the present Chief Justice of the King's Bench.

<sup>20</sup>John Walpole Willis, son of the Dr. Willis, in whose care King George III was put when he was insane, was a justice of our Court of King's Bench. He fell foul of the Governor and was "removed" in 1828. Afterwards he became a Judge in Demerora and in New South Wales, from the latter position he was also removed and finally he demurred until 1877. See an Article "The Court of Kings Bench in Upper Canada, 1824-1827" by the present writer. *Canada Law Journal*, Pp. 126 (1913).

<sup>21</sup>The Honorab<sup>e</sup> Robert Baldwin, an eminent lawyer, but still more eminent for his labors in the cause of responsible government in Upper Canada, the founder and exemplar of the "Baldwin Reformers."

<sup>22</sup>In those days no one could conduct a criminal prosecution but the Attorney General or Solicitor General who devised no small income from that source. Baldwin was specially retained under the circumstances of the case.

<sup>22½</sup>Since the text was written I have been informed by a gentleman, formerly a Postmaster General of Canada, that two medical men (whose names he gave me) fought a duel with pistols at Bend Head, in the County of York, Upper Canada, in the early 40's, or at least after 1837.

<sup>23</sup>While I can not lay my hand on any report, contemporary or otherwise, of a subsequent duel, it is quite certain that at least one of our public men enjoyed the

About the time of the Jarvis-Ridout duel, there came to the Township of North Sherbrooke (in Lanark County) a number of immigrants generally called the "Radical Settlers." One of them, poor but prominent and influential, was Ebenezer Wilson, who had been a mill-superintendent in Scotland. His oldest son by a second marriage was John Wilson born in Scotland 1809, and emigrating with his father.

Young Wilson, when teaching a small school, was brought to the attention of James Boulton,<sup>24</sup> a practising attorney in Perth, who took him into his house, allowing him to pay for his board, etc., by teaching Boulton's little child. He was admitted to the Law Society, Easter Term, 11 George IV, i.e. 1830; another Student Robert Lyon who had been admitted a year sooner, "Michaelmas Term, 10 George IV, 1829," was in the office of Mr. Thomas Maybee Radenhurst, also in practice in the same town.

Bytown<sup>25</sup> (now Ottawa), at that time was small but of growing importance and had a good deal of legal business. That part of the country had not yet been set off as a District and all the Courts were held at Perth; the Perth lawyers mentioned had branch offices in Bytown and occasionally sent their older clerks to attend to them.

The two young men were together in Bytown in 1833, when one day Lyon spoke disparagingly of a young lady of most estimable qualities and high character who was a member of the household of a Mr. Ackland in Perth. Wilson informed Mr. Ackland of this statement in a letter; he mentioned it to several persons and it came at length to the ears of another young lady of whom Lyon was *epris*. This young lady on his return to Perth, treated Lyon coolly, and at length told him of what she had heard. Lyon met Wilson, demanded an explanation, and as Wilson was explaining Lyon knocked him down, calling him a lying scoundrel. On the advice of his friends and much against his own inclination, Wilson challenged Lyon. Wilson's second was Simon F. Robertson another law student and a fellow

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reputation of having fought several duels later than this. It is more or less common report that duelling continued till about the 50's.

Many myths have arisen about the Wilson-Lyon duel; the present account is largely derived from the Chief Justice's notes (still preserved at Osgood Hall), of the trial of Wilson and Robertson, has secured for murder.

Several other sources of unquestionable reliability have been made use of, and it is believed that the accuracy of the account here given, can be depended on.

<sup>24</sup>Boulton was a man of some prominence in the profession; he afterwards removed from Perth to Niagara, where he practiced for some time. He got into financial difficulties and treating client's money as his own, was struck off the rolls.

<sup>25</sup>Called after Colonel By, the British Engineer, who built the Rideau Canal from Ottawa to Kingston.

student of Lyon's (admitted Trinity Term 1 and 2 Wm. IV, 1831) and Lyon's second was a relative of his, Henry Le Lievre.

On the following day, the 13th June, 1833, the parties met in a ploughed field on the right bank of the River Tay under a large elm tree and a few feet beyond the dividing line of the Districts. It was raining hard and both missed on the first fire (though Lyon was said to be a crack shot); and Wilson was ready, indeed anxious, to allow the matter then to rest. Le Lievre, however, insisted on another shot. On the second exchange of shots Lyon fell mortally wounded and died in a few minutes on the ground. Le Lievre fled but Wilson and Robertson gave themselves up.

Le Lievre was much the eldest of the party, Lyon was not twenty and Wilson and Robertson but a few years older.

The duel had been fought in the Johnstown District, though all parties resided in the Bathurst District; the two young men were accordingly tried at the ensuing assizes at Brockville on Friday August 9th, 1833. At that time and until 1841 those accused of felony were not allowed to defend by Counsel; the young law students defended themselves and were acquitted.

The presiding Judge was Chief Justice Robinson, whose note book is preserved at Osgoode Hall. It is noteworthy that it was proposed to ask the first juror whether he had expressed or did entertain opinions unfavorable to the prisoners. The question was not allowed; our law does not permit such practice. It is very rarely that in our Court it is even suggested, though the proceeding is very common, indeed almost universal, in many of the States of the Union. In my own experience of over thirty years I heard such a question only once and that by a very young barrister who never did it again.<sup>26</sup>

The proceedings at the trial are a perfect example of the course taken in such cases; the presiding Judge allowing a mass of testimony to be given explaining the circumstances out of which the duel had arisen, what was said and done by each party, etc. etc., everything

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<sup>26</sup>The proper practice is to challenge for cause and proye prejudice, *aliunde*. See *R. v. Peter Cook*, 13 St. Tr. 334; *R. v. Edmonds* (1821), 4 B. & Ald., 471, 492.

The case referred to was *The Queen v. Mrs. Bell*, at the Ottawa Assizes, before Mr. Justice Robertson. I was of Counsel for the Crown and upon the prisoner's counsel desiring to examine the jurymen, I stated to the Court that although the practice was wholly irregular, yet in view of the great newspaper notoriety the case had received and the atrocious character of the crimes charged, I would not object. Mr. Justice Robertson, with great reluctance yielded to the request, upon this consent. No jurymen was rejected; the prisoner was convicted and sent to the penitentiary for life. The length of time many American Courts consume in obtaining a jury is a standing marvel to Canadians. I have never seen it take more than half an hour with us.

which would show the prisoner did not wantonly seek a duel; although he carefully notes (and no doubt said at the time) that "it is not evidence."

At the trial it was proved that Wilson detested duelling but that on being knocked down by the taller, heavier and more powerful Lyon, he felt himself bound to send a challenge in order "to maintain his standing in Society." His master, James Boulton testified that Wilson was very sensitive as to what was thought to be "his humble origin"—he was the son of a poor farmer—that consequently he "felt it the more necessary to be tenacious of his character and scrupulous about preserving it from taint \* \* \* than if he had been of a higher walk, he would have risked all this and treated it with contempt." Several witnesses swore that, had he not challenged, he would have been exposed to be contemptuously treated by his young companions and other—which gives us a vivid view of Society at that time. It seems to have been arranged that Wilson should "explain away the effect of his letter" and Lyon should apologize, but that Lyon subsequently refused to implement this agreement.

It is impossible not to recognize from the evidence that Le Lievre was the real author of the mischief. He had been very attentive to the maligned young lady<sup>27</sup>, but she had given him his congé and received the addresses of Wilson. When Lyon received the challenge, he stated that he had said what he had to Wilson only to tease him and

<sup>27</sup>She was Miss Elizabeth Hughes, the daughter of the Reverend David H. Hughes, a Unitarian Minister, at one time head master of a classical and mathematical School at Kingsbridge, Devon, England, and afterwards pastor in charge of Vicarage, St. Chapel, Yeovil, Somerset. He came with his children, Elizabeth and David John to Canada in 1832, and died of cholera at Coteau, on his way to the Perthsettlement. Mr. Gideon Ackland with whom the Hughes family were acquainted, and whose wife kept a school in Perth, took the orphans into his home in that town. Ackland was then a law-student (having entered the Law Society, Mch. Term, 2 Wia. IV, 1831), he was admitted an Attorney June 27, 1836, and called to the Bar June 14, 1837; he practiced in St. Thomas. Miss Hughes became a teacher in Mrs. Ackland's School, in Perth. The boy, who was only twelve, was adopted by Ackland, and after working for a time as "Printer's Devil" he studied law under Wilson (then became his brother-in-law). Was admitted and called August 2, 1842. After a successful practice he became judge of the County Court, of the County of Elgin at St. Thomas, in 1853: retiring in 1903, after half a century of faithful service, he lived in honor until this present month, dying April 14, 1915. According to the recollection reduced to writing some years ago, of Mr. Cromwell, a member in 1833, of the household of Ebenger Wilson, John Wilson was engaged to another young lady; however that may be, he afterward married Elizabeth Hughes, and she survived him, dying in Toronto, February 12, 1904. She treasured to the last resentment against Lyon, her traducer. I have been informed that meeting a gentleman of that name and family on the street car in Toronto toward the end of her life, she could not conceal her embittered feelings.

had not supposed that he would take it seriously. He had asked a Mr. Muir to act as his second but Muir refused and he took Le Lievre; then the meeting being postponed until the evening, Lyon refused to carry out the arrangement which had been made, and the parties met about six p. m.

After the first exchange of shots, Dr. Hamilton went forward to the seconds and desired to bring about a reconciliation. Le Lievre at once said a reconciliation was impossible.<sup>28</sup> Dr. Hamilton then desired to speak with Lyon, but Le Lievre said he could not until the pistols were loaded. Notwithstanding this, he spoke to both principals. Wilson seemed very desirous of settling, but Lyon said it was impossible.

The Chief Justice has written out his charge which to a lawyer at least is of extraordinary interest. He begins with the serious nature of the duty of Judge and Jury and warns the jury against being led away by their feelings. He then defines with perfect legal accuracy the nature of the offence charged and the criminality of the duel, but he inserts the significant sentences: "The practice of private combat has its immediate origin in high example, even of Kings. Juries have not been known to convict when all was fair,<sup>29</sup> yielding to the practices of Society \* \* \* that sometimes no one being present the fact could not be proved at whose hands the party fell, \* \* \* at other (times) they may have felt it difficult to infer

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<sup>28</sup>While it is reasonably certain that the fatal result of this duel was due to Le Lievre, he acted *secundum artem*.

In the Code settled by the Gentlemen Delegates of Tipperary, Galway, Mayo, Sligo and Roscommon at the Clonmell Summer Assizes, 1775, generally agreed to and followed throughout Ireland and in substance elsewhere. Rule 5 reads as follows:

"As a blow is strictly prohibited under any circumstances amongst gentlemen, no verbal apology can be received for such an insult: the alternators therefore are—first the offender handing a cane to the injured party, to be used on his own person, at the same time begging pardon; second, firing on until one or both are disabled; or thirdly, exchanging three shots, and then asking pardon, without the proffer of the cane."

If you had not, of course, taken the first alternative and the firing must necessarily proceed, if the Code was to be adhered to.

See "Personal Sketches of His Own Times," by Sir Jonah Barrington, 1830, Vol. II, pp. 16, 17.

<sup>29</sup>This reminds one of the charge of Chief Justice Fletcher of the Court of Common Pleas of Ireland, when in the second decade of the 19th Century, he presided over the trial of one Fenton for the murder of Major Hillas, whom he had killed in a duel: "Gentlemen, it is my business to lay down the law to you, and I will. The law says the killing a man in a duel is murder, and I am bound to tell you it is murder; therefore in the discharge of my duty, I tell you so; but I tell you at the same time, a fairer duel than this I never heard of in the whole *coorse* of my life."

that malice aforethought essential to murder." He deals with the facts of the duel and then with the antecedent facts "not as legal evidence but as the only palliative the Prisoners could offer and was usually heard." After congratulating the prisoners on being "so capable of defending themselves" when they were prevented by law from addressing the jury by counsel, he adds, "Wilson was of humble origin and saw his prospects blasted if he submitted to the degradation and was impelled by the usages of Society and the slights he had partially felt or foresaw to adopt the only alternative which men of honour thought open to him \* \* \* he to the last relied upon an amicable adjustment and went out determined not to fire at deceased and did so at last in a state of nervousness." It is no great wonder that the jury took the very broad hint and followed the example of other juries who, finding "all was fair," refused to convict. The Chief Justice notes that "the jury was but a short time in consultation."

Wilson subsequently married the young lady, who was amiable and accomplished; not the faintest suspicion was ever breathed against her except the jesting remark of young Lyon made to tease his comrade and not expected or intended to be taken seriously.

Wilson was called to the Bar in 1835 and was at once sent by Boulton to conduct a branch office in Niagara; but in a very short time he removed to London where he obtained a very large practice. After serving in the Rebellion as Captain of Militia he became a Member of the House of Assembly and afterwards in 1863 was elected to the Legislative Council. He did not take his seat in the Council as he was in that year appointed to the Bench of the Court of Common Pleas as a Puisne Justice. He survived until 1869, never it is said ceasing to deplore the unhappy fate of his boyhood's friend Lyon,<sup>30</sup> or his own part in it.

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<sup>30</sup>Lyon was of the prominent and well-known family of that name in Eastern Ontario. George Bryon Lyon Fellowes (a nephew) and the Judge Lyon of Ottawa, were relatives.

Robert Lyon was a cousin of the wife of his master. Mr. Thomas Maybee Radenhurst (called and admitted April 21, 1824), and lies buried in the Radenhurst plot in the old Anglican burying ground, at Perth, Ontario. A headstone placed there by his friends commemorates his fall "in mortal combat."