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CRIMINAL COURTS AND LAW IN EARLY (UPPER) CANADA

WILLIAM RENWICK RIDDELL¹

After the conquest of Canada in 1759-60 and its formal cession in 1763 a Province of Quebec was established by the royal proclamation of October 7, 1763.² The western boundary of this province was a line drawn from the point at which the present international line meets the River St. Lawrence to the south end of Lake Nipissing. The western boundary was in 1774 removed much further west by the Quebec Act;³ the southern boundary ran along the Great Lakes, down the side of Pennsylvania and along the Ohio River to the Mississippi, and the western boundary ran "northward"⁴ from that point to the Hudson's Bay Company's territories. This brought into the province all the territory now the Province of Ontario, Michigan, Wisconsin, etc.

By the Treaty of Paris, 1783, all to the right of the Great Lakes was allotted to the United States; but Britain retained for some years possession of some territory on Lake Huron and the connecting straits (including Detroit),⁵ and did not surrender this to the United

¹ LL. D., F. R. S. C., &c., Justice of the Supreme Court of Ontario.

² This Proclamation will be found in the Report of the Ontario Archives for 1906, pp. 2 sqq.; also in Shortt & Doughty, Constitutional Documents, 1759-1791, Canadian Archives Reports, 1907 (Sessional Paper No. 18), pp. 119 sqq.

³ (1774) 14 George III, c. 85 (Imp.).

⁴ The word "Northward" gave rise long after to a dispute between the Dominion of Canada and the Province of Ontario. The Dominion created a Province (Manitoba) with its eastern boundary the western boundary of Ontario. Ontario had succeeded to all the territory of the Province of Quebec as constituted by the Act of 1774 north of the United States, and claimed that "Northward" meant "Northward along the Mississippi." The Dominion claimed that "Northward" meant "due North." On the matter being referred to arbitration, the arbitrators (1878) found in favor of Ontario. The Judicial Committee of the Privy Council agreed with this finding, and on petition of the Parliament of Canada the question was placed beyond controversy by the Act (1889) 52, 53, Vic, c. 28 (Imp.).

⁵ Without discussing the merits of the controversy, it will be sufficient here to state the facts. The Treaty of Paris, September 3, 1783, by Art. IV, expressly provided that "creditors on either side shall meet no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted." Some of the States passed legislation (declared valid by the local courts) which prevented British creditors from recovering from American debtors. The offending States refused to repeal these laws, and the United States could not compel them to do so. To the many representations made by the United States concerning the retention by Britain of the border posts (Michillimackinac, Detroit, Buffalo, Niagara, Oswego, Oswegatchie, Point au Fer and Dutchman's Point), the answer was returned that Britain

States till 1796. In 1788 Lord Dorchester formed four Districts, Luneburg, Mecklenburg, Nassau and Hesse, out of the western portion of the Province of Quebec.⁶ Those Districts included all of what is now the Province of Ontario and also de facto some of Michigan and Wisconsin and that territory I call upper Canada.⁷

The English law, criminal as well as civil, was introduced by the royal proclamation of 1763 above mentioned; and while by the Quebec Act of 1774 the ancient French Canadian law was reintroduced in civil matters, the English criminal law remained in full force except as modified by provincial legislation.

In each of the four Districts there was erected a Court of Common Pleas, with full civil jurisdiction; each District had also a Prerogative Court for probate of wills, etc., the judges of the one court being also judges of the other. In criminal matters the courts were modeled on the English system, as in civil matters (except as to probate and administration) they were not.

In each District there was a Commission of the Peace;⁸ by the law of England the justices of the peace named in the commission were empowered to sit as a Court of General Quarter Sessions of the Peace, a criminal court with extensive jurisdiction, at which cases

would remain in possession of the territory until redress should be given to British subjects. At length John Jay went to England and succeeded in obtaining a treaty, November 19, 1794 (commonly known as Jay's Treaty), by which the United States agreed to pay these debts and Britain to give up the retained territory. Britain carried out her part August, 1796, and the United States in 1802 paid £600,000 in full.

⁶ The Proclamation (or Patent) will be found in the Ont. Arch. Report (1906), pp. 157, 158; Shortt & Doughty, p. 650. It may be added that these German names were changed to Eastern, Midland, Home and Western by the First Parliament of Upper Canada in 1792. 32 Geo. III, c. 8 (U. C.). They included the settlements around Cornwall, Kingston, Niagara and Detroit.

⁷ In 1791 the former Province of Quebec was divided into the Provinces of Lower Canada and Upper Canada, the latter being the same territory as what I call "upper Canada," but this appellation I employ to indicate the territory as well before as after Upper Canada came into existence.

⁸ It may be interesting to give the Commission in full for the District of Hesse (including Detroit, Michillimackinac, etc.):

(Signed)
DORCHESTER, G.

General Commission of the Peace
for the District of Hesse.

FIAT
Recorded in the Office of Enrollment
at Quebec the 28th day July, 1788, in
the third Reg. of Letters patent and
Commissions. Folio 257.

G. POWNALL.

GEORGE the third by the grace of God of Great Britain, France and Ireland, King, Defender of the faith, &c. TO OUR trusty and Well-beloved Henry Hope, Lieut. Governor, William Smith, Chief Justice, Hugh Finlay, Thomas Dunn, Edward Harrison, John Collins, Adam Mabane, Joseph Gaspard Chaussegros Delery, George Pownall, Picotte de Bellestre, John Fraser, Henry Caldwell, William Grant, Paul Rock St. Ours, Francois Baby, Joseph

de Longueuil, Samuel Holland, George Davison, Sir John Johnson, Bart: Charles de Lanaudiere, Rene Amable Boucherville and Le Comte Dupre, Members of Our Council for Our Province of Quebec, and to Our loving subjects, Alexander Grant William Lamotte, St. Martin Adhemar, William Macomb of Detroit, Joincaire de Chabot, Alexander Maisonville of the opposite side of the River at Detroit, William Caldwell, Mathew Elliot of the new Settlement at the mouth of the River Detroit & Benac Porlier of River Raisin Esquires.

GREETING. KNOW YE that WE have assigned you jointly and severally and every one of you Our Justices to keep Our Peace in Our District of Hesse in Our said Province of Quebec, and to keep and cause to be kept, all Ordinances Statutes and Laws for the good of the peace and for preservation of the same; and for the quiet rule and Government of Our People, made in all and singular their articles in Our said District of Hesse, (as well within liberties as without) according to the force form & effect of the same; And to chastise and punish all persons that offend against the form of those Ordinances Statutes and Laws, or any of them in the District aforesaid, as it ought to be done according to the form and purport of those Laws, Ordinances & Statutes; and to cause to come before you or any of you, all those who to anyone or more of Our People concerning their bodies or the Firing of their Houses have used threats to find sufficient security for the Peace or their good behaviour towards US and Our people and if they shall refuse to find such security then to cause them to be safely kept in Our prisons until they shall find such security. We have also assigned you and every two or more of you, of whom any one of you the aforesaid Henry Hope, William Smith, Hugh Findlay, Thomas Dunn, Edward Harrison, John Collins, Adam Mabane, Joseph Gaspard Chaussegros Delery, George Pownall, Picotté de Bellestre, John Fraser, Henry Caldwell, William Grant, Paul Rock Saint Ours, Francois Baby, Joseph de Longueuil, Samuel Holland, George Davison, Sir. John Johnson, Bart: Charles de Lanaudiere, René Amable Boucherville and Le Comte Dupre, Members of Our Council for Our said Province, Alexander Grant Guillaume Lamotte and St. Martin Adhemar of Detroit—We will shall be one, Our Justices to enquire the truth more fully by the oath of good and lawful men of the District aforesaid by whom the truth of the matter may be the better known of all, and all manner of Felonies, poisonings, Enchantments, Sorceries, Art Magick, Trespass, forestallings, regratings, engrossings, and extortions whatsoever and of all singular other crimes and offences, of which the Justices of Our Peace may or ought lawfully to enquire by whomsoever & after what manner soever in the said District done or perpetrated or which, or which shall happen to be there done or attempted; and also of all those who in the aforesaid district in Companies against Our Peace in disturbance of Our People with armed force have gone or rode or hereafter shall presume to go or ride. And also of all those who have there lain in wait or hereafter shall presume to lie in wait to maim or cut or kill Our people, and also of all victuallers and all and singular other persons who in the abuse of weights or measures, or in selling victuals against the form of the Ordinances, Statutes and Laws, of Our said Province, or any one of them in that behalf made for the Common Benefit of Our said province, and Our people thereof, have offended or attempted, or hereafter shall presume in the said District to offend or attempt And also of all Sheriffs, Bailiffs, Stewards, Constables, Keepers of Gaols and other Officers who in the execution of their Offices, about the premises, or any of them have unduly behaved themselves or hereafter shall presume to behave themselves unduly or have been or shall happen hereafter to be careless, remiss or negligent, in Our District aforesaid, and of all and singular articles and circumstances and all other things whatsoever that concern the premises or any of them by whomsoever and after what manner soever in Our aforesaid District done or perpetrated, or which hereafter shall there happen to be done or attempted in what manner soever; And to inspect all Indictments, whatsoever, so before you, or any of you taken or to be taken or before others late Our Justices of the Peace in the aforesaid District made or taken and not yet determined, and to make and continue processes thereupon against all and singular the persons so indicted, or whom before you hereafter shall happen to be indicted, until they can be taken, surrender themselves or be out-lawed, and

were tried by a jury. By both English and Canadian legislation these courts were to sit four times in each year.⁹ While their com-

to hear and determine all and singular the Felonies, Poisonings, Inchantments, Sorceries, Art Magick, Trespasses, Forestallings, Reagratings, engrossings, extortions, unlawful assemblies, indictments aforesaid and all and singular other the premises according to the Laws and Statutes of England and the Laws of Our said Province, as in the like cases it has been accustomed or ought to be done:—

AND the same offenders and every of them for their Offences by Fines, Ransome, Amerciaments, Forfeitures and other means, as according to the Law and Custom of England or form of the Ordinances and Statutes aforesaid and the laws of the said Province, it has been accustomed or ought to be done to Chastise and punish. PROVIDED Always that if a case of difficulty upon the determination of any the premises before you or any two or more of you shall happen to arise; then let Judgment in nowise be given thereon before you or any two or more of you unless in the presence of Our Chief Justice of Our Court of Kings Bench of Our Province aforesaid or of one, or more of Our Justices specially appointed to hold the assizes in the aforesaid District, and therefore WE command you & every of you that to keeping the Peace Ordinances, Statutes and all and singular other the premises you diligently apply yourselves, and at certain days & places which you or any such two or more of you as is aforesaid, shall for these purposes appoint into the—Ye make enquiries and all and singular the Premises hear and determine and perform and fulfil them in the aforesaid form doing therein what to Justice appertains according to the Law and Customs of England and the Ordinances as above mentioned.

SAVING TO us the Amerciaments and other things to Us therefrom belonging; And WE Command by the tenor of these Present OUR Sheriff of the said District of Hesse that at certain days and places which you or any such two or more or you as is aforesaid shall make known to him, he cause to come before you, or such two or more of you as aforesaid, so many and such good and Lawful men of this District and Bailiwick (as well within liberties as without) by whom the truth of the matter in the premises shall be the better known and enquired into; And lastly We Command the Keeper of the Rolls of Our Peace of the said District, that he bring before you and your said Fellows at the days and places aforesaid, the writs, precepts, processes, and Indictments aforesaid, that they may be inspected and by a due course determined as is aforesaid.

IN TESTIMONY whereof WE have caused these OUR Letters to be made patent and the Great Seal of Our said Province to be thereunto affixed, and the same to be recorded in one of the Books of Patents in our Register's Office of Enrollments of Our said Province Remaining.

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 twenty-fourth day of July in the year of Our Lord One Thousand seven hundred and eight eight and of Our Reign the Twenty eighth.

Dedimus potestatem

to Duperon Baby

Alexander McKee and

William Robertson Esquires

Justices of the Court

of Common Pleas for the

District of Hesse in Our

Province of Quebec to administer

Oaths. Tested at the Castle

of St. Lewis in Quebec 24th July

28 GEO III.

Signed D. G.

(Signed) GEO. POWNALL, Secy.

⁹ 36 Edw. III, c. 12; 12 Ric. II, c. 10; 2 Hen. V, St. 1, c. 4. The Quebec Ordinances are (1777) 17 Geo. III. c. 5; (1789) 29 Geo. III, c. 3.

mission gave them power to inquire of all manner of felonies and trespasses, they had, before the conquest of Canada, ceased to try capital cases,¹⁰ and the custom was to remit such cases for a more solemn trial at the Assizes before the Commissioners of Oyer and Terminer and General Gaol Delivery.¹¹

In England at this time and for centuries before a criminal case could be tried before the Court of King's Bench itself; but in the vast majority of cases the trial was before Commissioners of Oyer and Terminer and General Gaol Delivery, and such commissions were granted to the judges of assize so that they might try criminal cases on their circuits.¹²

In the Province of Quebec there was erected in 1777 a court of criminal jurisdiction, the Court of King's Bench, held before the chief justice of the province (or commissioners appointed for execut-

¹⁰ That previously, e. g. in the Tudor times, the Quarter Sessions had tried thousands of capital crimes and caused the hanging of thousands of thieves, etc., there can be no doubt. There is a tradition that the Quarter Sessions of the District of Mecklenberg (at Kingston) tried and sentenced to death a supposed thief, which sentence was duly carried out, and the very tree where the innocent man was hanged was long pointed out. But this is certainly a myth.

¹¹ See Blackstone's Commentaries, Book IV, pp. 268, 269.

¹² A Commission of Oyer and Terminer authorized the Commissioner to try criminal cases on which the True Bill was found in his own Court; that of General Gaol Delivery to try all persons in the Gaol by whomsoever the True Bill was found. In practice they were united. An actual Commission is here copied.

FIAT

(Signed)
DORCHESTER, Gov.

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

GEO. POWNALL.

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 whereby 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, Misprisions, Confederacies, False Allegations, Trespasses, Riots, Routs, Retentions, Escapes, Contempts, Falseties, Negligencies, Concealments, Maintenances, Oppressions, Champarties, Deceits, and all other Misdemeanors, 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 concern-

ing the office of chief justice) at Quebec and Montreal,¹³ but the same ordinance reserved the power of granting commissions of oyer and terminer and general gaol delivery. Such commissions were not necessary so long as the Province of Quebec had its original boundaries, but when it was enlarged by the Quebec Act of 1774 it was obvious that the time would come when it would not be feasible to try all important criminal cases in Quebec or Montreal.

ing, 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 Bailiwicj (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 Goal 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 GOAL 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 WE 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 Goal 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.

(The Commission of Special Goal Delivery to try special cases only was very rare in either England or Canada and needs no comment.) The history of these Commissions is touched on in my article, "New Trial at the Common Law," Yale Law Journal, Nov., 1916, pp. 57, 58.

¹³ Ordinance of March 17, 1777; 17 Geo. III, c. 5. There had been a Court of King's Bench of both civil and criminal jurisdiction erected by Governor Murray in 1764, September 17, but this was abolished by the Quebec Act of 1774.

In Detroit, indeed, the justice of peace, Philip Dejean, was permitted to try capital cases with a jury; he had been commissioned in 1767 before Detroit became part of the province, and was allowed to continue his office, but he went too far, for we find him trying capital cases and sentencing at least one convict to death.¹⁴

When the independence of the United States was acknowledged in 1783 a large number of loyalists—the Cavaliers of the eighteenth

¹⁴ As to Detroit and this Justice of the Peace, I have said in "The First Judge at Detroit and His Court," an address before the Michigan Bar Association:

"Turning now to the state of affairs at Detroit. From the surrender of Detroit by the French for a few years the occupation by the British was by force of arms and conquest; but the Treaty of 1763 made legal what had previously been by force.

"During this period of two or three years, there does not seem to have been anything in the way of civil courts, the British commandants following the examples of their French predecessors.

"They took it upon themselves after the formal cession to commission Justices of the Peace. It is said that Gabriel Le Grand acted under some commission of the kind as early as 1763.

"In the "Pontiac Manuscript," under date May 20th, 1763, mention is made of "Mr. Le Grand, who has been substituted as judge in the place of Mr. St. Cosme," and he seems to have been acting as judge in 1765.

"Two years later Philip Dejean received a similar commission. In the same year, 1767, the Commandant Major Bayard gave Dejean another commission as "Second Judge" to hold a "Tempory Court of Justice to be held twice in every month at Detroit, to Decide on all actions of Debt, Bond, Bills, Contracts and Trespasses above the value of £5 New York Currency." (In the New York Currency, a shilling was 12 1-2 cents—a York shilling or "Yorker," still in vogue on the north shore of Lake Ontario in my boyhood, fifty years ago; £1 equals 20s. equals \$2.50).

"When Henry Hamilton was sent as Lieutenant Governor in 1775, he allowed Dejean to continue in his Court as Justice of the Peace, and Dejean went far beyond the limits of the authority of a Justice of the Peace. We are told that a man and woman were tried in 1776 by Dejean with a jury, six English and six French, on a charge of arson and larceny, but the jury "doubted of the arson." The man was executed, it is said, by the hands of the woman, who thus bought her freedom. The attention of the authorities at Quebec was drawn to the state of matters in Detroit by the extraordinary proceedings, and warrants were issued for Governor and Justice. The Grand Jury at the Court of King's Bench at Montreal on Monday, September 7th, 1778, presented Dejean for "divers unjust & illegal Terranical & felonious Acts" during 1775, 1776 and 1777 at Detroit; and Henry Hamilton the Governor for that he "tolerated, suffered and permitted the same under the Government, guidance and direction"—hence the warrant.

"The stirring times following the American invasion of Quebec were on, and the offenders escaped immediate punishment.

"By letter of April 16th, 1779, Lord George Germain, Secretary of State for the Colonies (afterwards Viscount Sackville), wrote: "The presentments of the Grand Jury at Montreal against Lieut.-Gov. Hamilton and Mr. Dejean are expressive of a greater degree of jealousy than the transaction complained of in the then circumstances of the Province appear to warrant. Such stretches of authority are, however, only to be excused by unavoidable necessity and the justness and fitness of the occasion.' He therefore ordered that the Chief Justice should examine the evidence of 'The Criminal's Guilt, and if he be of the opinion that he merited the Punishment . . . tho' irregularly inflicted . . . a 'nolle prosequi' should be entered. This was done."

century—came north, and it was to meet their requirements that the new Districts were formed. Commissions of oyer and terminer and general gaol delivery were issued for all these Districts.

Except Hesse, none of the new Districts had a gaol, (the gaol at Detroit was of long standing and constantly in use). It was accordingly provided that where the Commissioners of Oyer and Terminer and General Gaol Delivery thought it unsafe to keep within their District any prisoner convicted of a capital offense, they should send him to a gaol in the old Districts. It was also provided that if the chief justice of the province should not be one of the commissioners, execution of the sentence (if extending to life or limb or any greater fine than £25 sterling) should be stayed until the pleasure of the governor should be known; and that a full report of the evidence, the rulings, the charge to the jury, etc., should be sent to the governor for his information.

The Quarter Sessions were also to send to the governor the substance of the evidence, etc., whenever they imposed a fine of £25 sterling.

The same deficiency in gaol accommodation induced the Council at Quebec to change the law as to larceny.¹⁵ In England at this time petty (or petit) larceny was the stealing of goods not above the value of one shilling,¹⁶ the punishment for which was, at the common law, whipping, or by statute¹⁷ transportation for seven years; grand larceny, the stealing of goods above the value of one shilling, was punishable with death, although by the "benefit of clergy,"¹⁸ the thief would in most cases escape for the first offense.

¹⁵ All these provisions are to be found in the Ordinances of April 30, 1789, 29 George III, c. 3.

¹⁶ Blackstone's Commentaries, Bk. IV, p. 229.

¹⁷ (1717) 4 George I, c. 11. See Blackstone's Commentaries, Bk. IV, p. 238.

¹⁸ A second conviction for grand larceny meant felony "without benefit of clergy." No lawyer is at all likely to think with some popular writers that this means "without the benefit of clerical attention and advice." Of course, it originally was the privilege allowed to a clerk in holy orders, when prosecuted in the temporal courts, of being discharged from such court and turned over to the ecclesiastical courts—in other words, to get clear almost altogether. This privilege was gradually extended to all who could read, and many a notorious rascal escaped well-merited punishment by reading his "neck verse," possibly by a recently learned accomplishment. Ultimately, in 1706, by 6 Anne, Ch. 9, the privilege was extended to all, whether they could read or not.

This privilege did not extend to all felonies, but only to capital felonies, and even of these some were "without benefit of clergy"; moreover, by an early Statute, (1488) 4 Henry VII, Ch. 13, laymen allowed their clergy were burned in the hand, and could not claim it the second time, and the practice grew up of imprisoning for life clergymen where the offense was heinous and notorious.

"Benefit of Clergy" was abolished in England by sec. 6 of the Criminal Law Act of 1827, and in Upper Canada in 1833 by 3 William IV, Ch. 3, sec

The ordinance recites that "the detention of prisoners until the sitting of the Court of King's Bench or the sitting of the Commissioners of Oyer and Terminer and General Gaol Delivery had been very burthensome to the public and is likely to be increased by the insufficiency of the Gaols in the Old Districts, and the total want of them in the New Districts, and it often happens that persons committed for simple larcenies¹⁹ are either acquitted or only found guilty of petty larceny." It was indeed notorious that the mercy of juries would often make them strain a point and bring in the article stolen to be under the value of twelve pence when it was really of much greater value; but, as Blackstone says,²⁰ this "was a kind of pious perjury."

The ordinance of April 30, 1789, made simple larceny of not more than 20 shillings sterling only petty larceny, thereby enormously reducing the number of capital offenses, for 20 shillings, about \$5.00, was a large sum in those days. Then, to relieve the gaols, whenever anyone was committed to gaol for a breach of the peace or a simple larceny, he must find bail within forty-eight hours to appear for trial at the Quarter Sessions, or three justices of the peace could call the prisoner before them and try him without a jury. In case of conviction they could sentence him to such corporal punishment (not extending to life or limb) as they thought fit. If the offender had not been a stated resident of the province for twelve months preceding his commitment and was found in the district twenty days after his punishment and discharge, he could be further punished unless he gave sureties for good behavior for seven years. Outside of this modification, the whole brutal English common law was in force. Brutal as it was, it must, however, be acknowledged that it was not so cruel as the displaced French law, which allowed torture, breaking on the wheel and arbitrary imprisonment.

25. This Act provided that all crimes made by the Act itself punishable with death—murder and accessory before the fact to murder, rape, carnal knowledge of a girl under ten, sodomy, robbery of the mail, burglary, arson, riot after the reading of the Riot Act, destruction of His Majesty's dockyards, etc. (a sufficiently long list indeed)—should be so punished, but that all other felonies should be punishable by banishment or imprisonment for any term not exceeding 14 years. Thus the thief escaped the punishment of death, to the great grief of many very good and very intelligent people, who thought that a death sentence for the offender was the only safeguard for society.

¹⁹"Simple larceny" is the felonious taking and carrying away of the personal goods of another, "plain theft unaccompanied by any other atrocious circumstances," and may be grand or petty larceny. While "mixed or compound larceny includes in it the aggravation of a taking from one's house or person." Blackstone's Commentaries, Bk. IV, pp. 229, 230.

²⁰Blackstone's Commentaries, Bk. IV, pp. 229, 230.

The Courts of Oyer and Terminer and General Gaol Delivery were conducted in much the same way as those in England. It may be of interest to set out the proceedings in one of the records which are still extant.

At L'Assomption (the present Sandwich in Ontario) in September, 1792, the court opened, presided over by William Dummer Powell, then first judge of the Court of Common Pleas of the Western District and living in Detroit.²¹

After the formal proceedings, the coroner filed an inquisition held on the body of Alexander Clark; verdict, natural death. On the body of Wawanipi, an Indian man at Michillimackinac; verdict, murder by persons unknown. On the body of Frances Lalonde, taken at Saguina; verdict, death caused by Louis Roy. On the body of Pierre Grocher, taken at Detroit; verdict, willful murder by an Indian man named Guillet.

At the common law an accused can be tried on a coroner's inquisition,²² but it was always allowable to have an indictment found by the grand jury and proceed on that. The court directed an indictment to be presented in the cases of Lalonde and Grocher; in Grocher's case a true bill was found and a warrant was issued for the Indian Guillet,²³ but he was not arrested when the court rose.

A true bill was also found against Louis Roy, who was tried by a jury half French and half English. It turned out that the deceased, the prisoner and one Antoine Prevost had been "diverting themselves by throwing sticks, stones and mud at each other" at "Saguinau," and the prisoner had hit Lalonde with a stone and killed him; the jury found excusable homicide by misfortune. Nowadays the prisoner would at once receive his discharge, but not so at the end of the eighteenth century. The homicide was excusable and therefore not felonious, but it implied some fault; the delinquent had consequently to sue out a pardon. This he received as of course and right, but he had to pay the fees for suing it out. If the judge was lenient he

²¹ He was born in Boston, Mass., educated there, in England and on the Continent, practised law at Montreal, became First Judge in 1789, and afterwards (1794) Justice and (1816) Chief Justice in Upper Canada. An admirable lawyer and a man of much force of character, he played no inconsiderable part in the public and private life of Upper Canada for many years. He died in 1834.

²² Blackstone's Commentaries, Bk. IV, p. 299. This practice was abolished in Canada by the Criminal Code of 1892.

²³ A Canadian called Guillet is spoken of by Vaudreuil in 1717 as having influence over the Indians (Mich. Pioneer & Hist. Coll., Vol. 33, p. 591), and a family of that name lived at Detroit.

might allow the jury or even direct them to acquit.²⁴ In the present case the unfortunate Louis Roy was remanded to the custody of the sheriff until he should receive a pardon.

Josiah Cutan was not so fortunate. He, a negro laborer, living in Detroit, was indicted for burglary; he had broken into the store of Joseph Campau "on the north side of the River Detroit, about half a league above the Fort in a house the property of M. Jacques Campau, leased by Mr. Joseph Campau," and stolen some smoked skins, a bundle of peltry and two kegs of rum. He admitted taking the goods when asked by the owner. As some one generally slept in the store, it was considered a "mansion house," and the negro was promptly convicted and sentenced to death.²⁵

The grand jury complained that a true bill had been found at the previous sittings against Chabouguoy and Cawquochish, two Indians, for the murder of David Lynd, alias Jacquo, of the River La Tranche (now the Thames in Ontario). They were still at large and a warrant was issued for their arrest.

The murder of Albert Graverot of Michillimackinac, trader, was also inquired into,²⁶ but no bill seems to have been found.

The grand jury sat at the house of "Madame Marantate,"²⁷ the petit jury and the court at the Court House in L'Assomption.

²⁴ The absurdity of compelling the unfortunate man to sue out a pardon was introduced in 1278 by the Statute of Gloucester, 6 Edw. 1, c. 7, "the King shall take him to his Grace if it please him" (*face le Rei sa grace si lui plest*, as the delightful Norman French has it). This was abolished in England in 1825 by the Statute, 9 Geo. IV, c. 31, s. 10 (Imp.); in Canada in 1841 by 4, 5, Vic., c. 27, s. 8 (Can.).

²⁵ The death penalty was prescribed for all kinds of burglary in Canada until 1841, although for many years before 1841 there was almost (if not quite) always a commutation. The Act (1841) 4, 5, Vic., c. 25, s. 14 (Can.), restricted the death penalty to breaking and entering a dwelling house and assaulting some person therein, while the ordinary burglary was punishable with imprisonment for life, s. 15. The death penalty was removed altogether in 1869 by 32, 33 Vic., c. 21, s. 51 (Can.).

The address to the convicted person by the Judge William Drummer Powell may be quoted. After speaking of the crime, the Judge says: "This crime is so much more atrocious and alarming to society as it is committed by night when the world is at repose and that it cannot be guarded against without the same precautions which are used against the wild beasts of the forest, who like you go prowling about by night for their prey. A member so hurtful to the peace of Society, no good laws will permit to continue in it, and the Court in obedience to the law has imposed on it the painful duty of pronouncing its sentence, which is that you be taken from hence," etc., etc.

²⁶ Graverat & Viger were a well-known trading firm in Detroit, trading to Michillimackinac; possibly the murdered man was connected with them. The name is spelled "Graverod," "Graverad," "Graverat," and "Graverot."

²⁷ Marantate, Marantete, Marantette, was a well-known name in Detroit and L'Assomption. "Francois Marantete, a Frenchman," is spoken of by Lieutenant-Governor Henry Hamilton in his report to Governor-in-Chief Haldimand, September, 1778 (Mich. Pion. Coll., Vol. 9, p. 479). This Francois Marantete

THE QUARTER SESSIONS

As has been said, the Quarter Sessions met four times a year and tried non-capital cases with a jury. The justices had also certain duties to perform themselves, e. g., laying out roads and building, preventing cattle, horses, hogs, etc., running at large, appointing constables and many other duties of the same and different nature.

But the interesting features are found on the judicial side.

When serious charges were made against any one at the Sessions, he was remanded to be tried at the sittings of Oyer and Terminer and General Gaol Delivery, e. g., murder, grand larceny,²⁸ sodomy,²⁹ rape.³⁰

By far the greatest number of cases tried at the old Quarter Sessions were cases of assault (whisky was cheap and plentiful); generally a small fine was imposed.

In some cases of petty larceny the prisoner on conviction was tied to a post and received 39 or a smaller number of lashes³¹ on the bare back. One unfortunate woman convicted with her husband, escaped the lash, the court considering her delicate situation and

was probably a merchant from Montreal, the father of Dominique Marantete. Dominique married Archange Marie Louise Navarre, the daughter of Col. Robert Navarre of the French army. They had a large family, of whom there are still a number of descendants in Michigan and Ontario. The house of "Madam Marantate" (the above named wife of Dominique Marantete) was on the banks of the Detroit River, about a quarter of a mile above the old French Church, near Sandwich, Ontario (Mich. Pion. Coll., Vol. 6, p. 497).

²⁸I intend to quote from the records for the District of Lunenburg only and from 1789 to 1794.

In Canada at this time larceny of more than 20 shillings sterling was Grand Larceny and punishable with death. In 1833, by the Act 3, Wm. IV, c. 3 (U. C.), the penalty of death was removed and banishment or transportation for not less than seven years or imprisonment for not more than 14 years was substituted in Grand Larceny. Petit Larceny was not affected.

In 1837 by the Statute 7 Wm. IV, c. 4 (U. C.) the distinction between Grand and Petty Larceny was abolished and the Quarter Sessions given power to try all simple Larceny, Grand as well as Petty—banishment which has been substituted for the English transportation in 1800 by 40 Geo. III, c. 1 (U. C.) could be awarded by the Quarter Sessions for seven years or imprisonment for two years. The Quarter Sessions were allowed by Sec. 5 of the Act of 1837 to leave difficult or important cases for the Courts of Oyer and Terminer and General Gaol Delivery. These Courts could banish or imprison as before—transportation might be substituted for banishment (1837) 7 Wm. IV, c. 7 (U. C.). In 1841, by the Act 4, 5, Vic., c. 25 (U. C.) imprisonment alone was the punishment, banishment and transportation being abolished. And so it stands today. The English Acts 7, 8 Geo. IV, c. 29; 7 Wm. IV, c. 90, may be compared.

²⁹Punishable with death till 1870, 32, 33 Vic. c. 20 (Dom.).

³⁰Punishable with death until 1873, 36 Vic. c. 50 (Dom.) which allowed the court to substitute imprisonment for not less than 7 years: the English Statutes are 9 Geo. IV, c. 31 and 4, 5 Vic. c. 31.

³¹The lash for petty larceny did not absolutely disappear from the law of Upper Canada until 1837.

thinking she might have been influenced by her husband. Whipping was also inflicted in cases of assault where a fine was not thought sufficient punishment; there was no gaol convenient.

Sometimes the petty larcenor was sentenced to the pillory—the stocks were the fate of those who threatened or abused a magistrate.³² “Contemptible” or “contemptuous” words concerning a magistrate were punished by a fine or imprisonment.

Through all the latter part of the eighteenth and the early part of the nineteenth century there was an influx from the Colonies to the South, which had become the United States. Not all these immigrants were United Empire Loyalists, and not all were even loyal to the Crown. During all the years now under discussion there was considerable seditious talk, much of it only talk and whisky talk at that, but a source of annoyance to the loyalist settlers who had seen what the like sentiments had brought about in their old home to the south. Prompt measures were taken with offenders in that regard; for example, at the first sitting of the “Court of General Quarter Sessions of the Peace” in and for the District of Lunenburg, which sat at Osnabrock, June 15, 1789, the third case tried was that of John Clark, who was found guilty of seditious behavior, the court finding that he was “not a Subject of this Province as not having taken the oath of allegiance to His Majesty,” ordered him to depart from the province and to remain in custody till he could be conveyed from the province.

In the following June, June 9, 1790, Powell Frederick Landerman was convicted of “Seditious Expressions and Riotous Behaviour”—righteously, we must conclude, for he came naked into a room at Phillip Crysler’s house and said “he was rebel and would stand by that.” As he could “offer nothing in support of his character to recommend him as a settler” in that district, and “his conduct was disloyal and improper he was ordered to be Immediately sent out of this District by conveying him from one Captain of Militia to another till he be out of the said District.” He was accordingly sent where being a rebel was a recommendation, although his Adamic conception of decorous attire would probably not be approved.

The magistrates seem to have been more determined to stamp out sedition than even the juries, or some of them. At the October court, 1793, Leonard Hilmer was indicted “for speaking seditious

³²The pillory was abolished in 1841 by 4, 5, Vic. c. 24, s. 31 (Can.)—the stocks disappeared at the same time. Neither had been in use for several years before. In England the use of the pillory was in 1816 limited by 56 Geo. III, c. 138 and abolished by 7 Wm. IV, c. 23 (1837).

words against the King and Country." The jury returned with a verdict of "not guilty," but the court ordered them "to reconsider of their verdict." They reconsidered and brought in the same verdict, whereupon the court required Hilmer "to take the Oaths required by law and give sufficient security for his Peaceable and good behaviour for a year and a day or else leave the Country Immediately."

That such precautions were necessary was abundantly proved by the event. The opportunity of obtaining free grants of valuable land to the north of the international boundary induced many Americans to cross over and settle. In many instances these were loyalists, or at least had not been rebels, but in many the republican and anti-British sentiment was strong, and it persisted. Generally this sentiment was quiescent, but *in vino veritas*, and not uncommonly in moments of weakness the truth came out. Perhaps the most dangerous were not detected. However that may be, many parts of Upper Canada were honeycombed with treason; and when the trying time came in 1812, many who should have defended their country were recreant and either joined the American troops or neglected their duty to serve. The German-American had his prototype in the American-Canadian. It is a matter of gratification that these were in the main thoroughly loyal, as it is to be hoped are those.

Perhaps another function of the Quarter Sessions may be mentioned, i. e., the public reading of proclamations and statutes of general importance. For example, we find the Marriage Act read. "And thereby hangs a tale."

By the French Canadian law, which was in force 1774-1792, by virtue of the Quebec Act (1774), 14 Geo. III, c. 85 (Imp.), till abolished by the statute of (1792) 32 Geo. III, c. 1 (U. C.), a marriage to be valid required the presence of a priest, by the English law the presence of a priest of the Church of England was required. But these in a new country were scarce and hard to find, and young couples were married by commanders of military posts, and even by surgeons and others acting as chaplains. The danger of such irregular unions was apparent to the Legislature of Upper Canada, and in 1793 the Act 33 Geo. III, c. 5 (U. C.), validated such marriages and provided for marriages being solemnized by the magistrates until there should be "five parsons or ministers of the Church of England" in a District. The Act by Section 7 provided that it should be read in all the Districts of the province at the opening of the first General Quarter Sessions of the Peace and then once a year for two years.

The celebrated proclamation against vice was also read—no doubt with the usual result or want of result.