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## International Murder Trial

William Renwick Riddell

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# AN INTERNATIONAL MURDER TRIAL

WILLIAM RENWICK RIDDELL<sup>1</sup>

In 1837 occurred in Upper Canada, what is generally known as Mackenzie's<sup>2</sup> Rebellion: a number of those dissatisfied with the government of the Province, took up arms to subvert it with violence. The Rebellion, although, of course, technically against the young Queen Victoria<sup>3</sup>, was in reality against the oligarchy<sup>4</sup> which ruled Upper Canada with the assistance of the Lieutenant-Governor, the notorious Francis Bond Head—it took by no means so wide a range as the contemporary Rebellion in Lower Canada<sup>5</sup>.

Somewhat ignominiously defeated in December, 1837, at Gallows Hill near Toronto, Mackenzie made his way to Buffalo. There he was received with enthusiasm by crowds: many Americans joined his banner and with Canadian "Patriots"<sup>6</sup> forming a force of some hundreds

<sup>1</sup>L.L.D., F. R. S. Can., Sc.; Justice of the Supreme Court of Ontario.

<sup>2</sup>William Lyon Mackenzie was a Scotsman born at Springfield, Dundee, Scotland, in 1795; he came to Canada in 1820 and shortly thereafter went into business at Dundas and Queenstown, Upper Canada. In 1824 he began the publication of a newspaper, "The Colonial Advocate," and almost immediately became one of the most important and influential leaders of the Reform or Radical Party. The opposition to the Government became more and more bitter until at length in December, 1837, it broke out in open rebellion. This was put down without delay by the loyal Upper Canadians, but the embers smouldered for nearly two years.

Mackenzie was a "reformer ahead of his time"; but his views have received full recognition. Canada is now in government almost what he wished it to be.

He went to the United States where he suffered imprisonment in the County Goal of Munroe County for 18 months; after the troubles of the Rebellion were over he came back to Upper Canada in 1849 under the general amnesty of that year. He again entered Parliament and was a useful member, but by no means the outstanding leader of former days. He died at Toronto, August 28, 1861.

A full and impartial account of his life and work will be found in his Life, written by his son-in-law, Charles Lindsey—a new edition by George G. S. Lindsey, K. C., Mackenzie's grandson, was published at Toronto, 1909, by Morang & Company.

<sup>3</sup>Queen Victoria came to the throne June 20, 1837, at the age of 18.

<sup>4</sup>Generally called the "Family Compact" from the close family and social relationship of many of its members.

<sup>5</sup>The contemporary Rebellion in Lower Canada arose in great measure from the difference in race, creed and language of the British conqueror and the French-Canadian mass of the population. No such complication existed in Upper Canada; the movement there was wholly political.

<sup>6</sup>All rebels are "Patriots" in their own estimation; it is only when they are victorious that they cease to be traitors.

"Treason doth never prosper. What's the reason?  
Why, if it is proper, none dare call it treason."

of men, they took possession of Navy Island on the Canadian side of the middle line of the Niagara River. There they camped; Mackenzie got a Van Rensselaer<sup>7</sup> to act as Commander; Navy Island was fortified and preparations were made to invade Canada.

While the Washington authorities wholly discountenanced the movement, those of the State of New York were more than lax; arms and munitions of the State came into the possession of the "Patriots" whether stolen from the Batavia Arsenal or by other means we need not here enquire. Navy Island being within cannon shot of the Canadian shore—indeed, only some 600 to 700 yards distant—the "Patriots" subjected it to a desultory bombardment, which caused damage to property and later to life.

The Lieutenant-Governor, Head, complained to Governor Marcy of New York State, but without much satisfaction; he also took prompt measures to meet and defeat the threatened invasion; he sent Col. Allan Napier MacNab<sup>8</sup> to take command of the Niagara Frontier defenses, and MacNab gathered a volunteer and militia force for that purpose.

The "Patriots" derived all their food, munitions, etc., from the United States; these had been carried by rowboats, but on December 28, it was noticed by MacNab and his officers that a steamboat was in the service. This was the "Caroline," a steamboat about 75 feet long with a registered tonnage of 46 tons, the property of William Wells of Buffalo, and worth about \$800. Secured by the bond of a number of substantial Buffalo<sup>9</sup> citizens, Wells had been induced to

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<sup>7</sup>Not the General Van Rensselaer who had led with credit the American invasion of Canada at Queenstown Heights in 1812, but his son, Rensselaer Van Rensselaer who had no merits except personal bravery. He was a confirmed drunkard; and with a kind of drunken cunning he kept all his plans to himself and refused to act or even to explain his intentions to his followers.

<sup>8</sup>Afterward Sir Allan Napier MacNab, Prime Minister of Canada. His name is spelled in various ways—McNab, Mac Nab, Macnab, McNabb, Mac Nabb, Macnabb.

<sup>9</sup>The Americans who supported the cause of the Canadian Rebels were called "Sympathizers"—a secret society called "Hunters' Lodges" was formed in the United States composed of "Sympathizers," which did not die out for several years and which was as great a nuisance to both countries as the Fenians of later date.

There were several invasions of Canada—three principal invasions of Upper Canada alone by these enthusiasts, all resulting in defeat, and two in the ignominious death by hanging of several of the raiders.

All of these raids purported to be to free Canadians from the "yoke of England"—every invasion of Canada from the south has been ostensibly for that purpose, from that of Benedict Arnold and Montgomery in 1775 through those of Hull, Van Rensselaer, Wierkin and Hampton in the War of 1812, those of the Sympathizers in 1837 and 1838 down to the Fenian Raid of 1866. In every case Canadian troops drove the invaders back—in most cases without the assistance of the regular forces of the empire. Canadians could

use his boat in the work of conveying recruits, goods and arms to Navy Island. She was cut out from the ice at Buffalo and brought down to Fort Schlosser: she plied between the American shore and the Island—at least one cannon, a six pounder, being part of her freight.

Two of the Canadian force, Captain Andrew Drew, a former officer of the Royal Navy, and Alexander McLeod, a Scotsman, Deputy Sheriff of the District of Niagara, rowed round Navy Island under heavy fire, and successfully accomplished the task of determining the movements of the steamer.

All day of the 29th December, her activities were continued: MacNab determined to capture or destroy the *Caroline* and Drew assuring him that he could do this after dark, MacNab gave him orders to do so.

Volunteers were called for “for special service”; more than a sufficient number met at Chippewa Creek about 9 P. M.; seven boats<sup>10</sup> were picked out, each with seven or eight men in addition to the officer in command: information was given of the object of the expedition and the men given a chance to withdraw—not a man flinched.

Captain Drew in advance with a port fire over the stern of his boat to guide the others, the flotilla rowed in silence first up the River a little above Whiskey Point and then across between Navy Island and Grand Island. It had been thought that the *Caroline* would be found anchored on the east side of Navy Island in Canadian waters, but it was soon found that she was moored to the wharf at Fort Schlosser on the American side. But the Canadians continued; fired at by the sentry on the boat, they escaped serious injury and at once boarded the steamer. After some fighting whereby one Canadian<sup>11</sup> was crip-

not be got to understand that they were not free or that they were under any yoke. To the cry,

“Hereditary bondsmen, know ye not,

Who would be free themselves, must strike the blow?”

they answered by striking a blow at the self-styled liberator.

<sup>10</sup>Two of these boats seem to have lost their way; only five participated in the attack.

<sup>11</sup>Lieutenant Shepherd McCormick was shot in several places and received two ugly wounds from a cutlass; he was disabled for life. In the succeeding session by 1 Vic., C. 46, the Upper Canadian Parliament gave him a pension of £100 (400) for life. Richard Arnold who survived in Toronto till 1884 (a ticket agent on the Grand Trunk Railway) was wounded in the arm; and Captain Warren, formerly of the 66th Regiment of Foot, received a trifling injury, not sufficient to keep him from duty next day.

McCormick's name, Christian and surname, is spelled in different ways. I give the orthography of the Pension Statute (1837-8) 1 Vic., C. 46, which has the recital: “Whereas Sheppard McCormick, Esquire, a retired Lieutenant of the Royal Navy, received several severe wounds in action at the capture and destruction of the Piratical Steamer “*Caroline*” in an attempt to invade this province by a lawless Banditti, by which he is disabled, and it is just

pled for life and two others less seriously wounded the Caroline was captured. It was then determined to set fire to her and set her adrift; this was done<sup>12</sup>; and the expedition returned to the Canadian shore. One American, Amos Durfee, of Buffalo, was left dead upon the wharf at Fort Schlosser, a bullet fired at close range having gone through his head from back to front.

They who set the Caroline on fire, nearly set the continent on fire. There arose a controversy which only by the common sense of the two peoples concerned, was prevented from being a conflagration—hot words were uttered on both sides, and war was in the air. Happily the dispute was amicably settled and the peace between the English-speaking peoples was not broken.

The morning after the expedition (as it was subsequently alleged) Alexander McLeod was loud in his boasting of his deeds of prowess the previous night—it was said that he showed a pistol with which he had slain a man and a sword dyed with blood of a “damned Yankee”<sup>13</sup> to more than one admiring auditor.

Long after the Rebellion had failed, November 12, 1840, McLeod went to Lewiston, N. Y., and was there arrested on the charge of murder and arson. He was committed to jail to answer to the charge and February 6, 1841, a true Bill of Indictment for the Murder<sup>14</sup> of Durfee was found against him at the Court of General Sessions of the Peace for the County of Niagara and sent to the Court of Oyer and Terminer for that County. As soon as McLeod’s imprisonment became known to the Canadian authorities, the British Minister at Washington, H. S. Fox, demanded his release in the name of the British

and right that he should receive a Pension during such period as he shall be disabled by said wounds.”

“Pirates” was the gentlest term applied by Loyalist Canadians to the “Sympathizers”—they were the same kind of “Pirates” as William of Orange and Lafayette, but being unsuccessful, they met the same fate when captured as that other “Pirate,” the Duke of Monmouth.

“Let no one gird at ‘a banditti’”—for *Rex super grammaticam*.

<sup>12</sup>The common story is that the steamer went over the Falls; this seems to be an error. Those interested should consult “The Story of the Upper Canadian Rebellion,” by John Charles Dent, Toronto, 1885, which contains in the second volume a reasonably full and accurate account of the episode.

<sup>13</sup>I give this (following the shorthand report of the trial) as two words: every one has heard of the highborn, delicately nurtured Southern lady who never knew till she was grown up that “Damy Yankee” is not one word. In Canada the Southern pronunciation was universal.

<sup>14</sup>The form of this indictment will appear later in the text. My account of the arrest and trial of McLeod is almost wholly taken from Gould’s Stenographic Reporter, Vol. 2, Nos. 1-5, 1841, Washington, D. C. This contains a full stenographic report of the trial and contains other information bearing upon the case. It seems to be accurate and impartial and I follow it in almost every instance.

Government—this course was approved by the British Government and in March, 1841, Fox made a renewed demand for McLeod's immediate release, as his act was of a public character planned by the responsible authorities of His Majesty's territories: Webster refused to accede to the demand.

A motion was made on behalf of the prisoner; he was brought before the Supreme Court on a writ of Habeas Corpus, but after a full consideration of his case, he was demanded for trial<sup>15</sup>.

The Indictment was traversed and came on for trial at Utica, Oneida County, N. Y., October 4, 1841. It had been expected that there would be a large crowd at the trial on account of the notoriety of the case; and most elaborate and careful arrangements had been made to avoid tumult or confusion; but nothing of the kind appeared. All who desired to be present were comfortably seated and as the reported says, "Persons at a distance who have been wrought up to a feverish excitement on this subject will be astonished at the apparent apathy felt here." Indeed it is noted that on the third day there was not a single spectator present at the opening of Court.

The Presiding Judge was the Hon. Philo Gridley; with him on the Bench, but taking no part and having no voice, were the Local Judges, White, Kimball and Jones; Counsel for the State were Willis Hall (Attorney General), Jonathan L. Woods (District Attorney for Niagara County), Timothy Jenkins (District Attorney for Oneida County) and Seth C. Hawley of Buffalo. For the Prisoner were Joshua A. Spencer (U. S. District Attorney) with Hiram Gardiner and Alvin C. Bradley, both of Lockport. The prisoner sat with his Counsel not at all moved by the strongest evidence against him. The trial lasted eight days and resulted in a speedy verdict of "Not Guilty."

The Indictment was on seventeen counts in the old Common Law form—the first count charging McLeod on a day and at a place named with a certain gun of the value of five dollars then and there loaded and charged with gunpowder and one leaden bullet (which the said Alexander McLeod in his right hand then and there had and held) to, against and upon the said Amos Durfee then and there feloniously and wilfully and of his malice aforethought and with a premeditated design to effect the death of the said Amos Durfee did shoot and discharge, etc., etc., etc.<sup>16</sup> The second count said it was a pistol (instead of a gun); the third that John Mosier killed Durfee with a pistol; the

<sup>15</sup>The arguments, long and learned, are given in Gould. See also the *People v. McLeod* (1841), 25 Wendell, N. Y. 483, S. C., 1 Hill, 377, for the official correspondence, the arguments and judgment.

fourth that persons unknown killed him with a pistol; the fifth that it was Thomas McCormick who killed Durfee with a gun; the sixth that it was persons unknown who used the gun; the seventh charged Rolland McDonald with killing him with a pistol; the eighth, John Mosier with a gun; the ninth, persons unknown with a pistol; the tenth, persons unknown with a gun; the eleventh, persons unknown with certain instruments and deadly weapons to the Jurors unknown; the twelfth, that McLeod and divers persons unknown conspired to injure Wells, seized his steamer Caroline in a manner dangerous to the lives of persons, etc., and the deed was done with deadly weapons; the thirteenth, the same but with a gun; the fourteenth, that McLeod in destroying the Caroline caused the death of Durfee with a gun; the fifteenth, the same with a pistol; the sixteenth, with "divers instruments, tools and deadly weapons unknown to the Jurors" and the seventeenth, that McLeod conspiring with others unknown to commit arson did commit the crime of murder by killing Durfee "with divers instruments, tools and deadly weapons unknown to the Jurors."

McLeod was charged with being accessory before the fact in counts 3, 4, 5 and 6, with being present aiding and abetting in counts 7, 8, 9, 10 and 11.

So that in the result, McLeod killed Durfee with a gun, a pistol or unknown deadly weapon; Durfee was killed by McDonald with a gun, by Mosier or unknown persons with a pistol or by unknown persons with a gun or deadly weapons, McLeod being present aiding and therefore "principal in the second degree"; or he was killed by Mosier or unknown persons with a pistol, or McCormick or unknown persons with a gun, McLeod being an accessory before the fact.

A jury was obtained without delay, the Attorney General asking<sup>17</sup> each juror as called if he had formed any opinion of the guilt or innocence of the prisoner and if he had conscientious scruples in the subject of giving a verdict involving life. The right of the prosecution to direct a juror to "stand aside" without challenge, always allowed

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<sup>16</sup>The voluminous "Common Law Form" of indictment is now in Canada a curiosity; we simply say: "The jurors for the King present that James Smith murdered John Jones at Toronto on May 17, 1919," and let it go at that. We no longer quash indictments for irregularity, etc. We have no time for technicalities.

<sup>17</sup>A practice wholly unknown in Canada. Four days before the sitting of the court, the prisoner may obtain a copy of the jury panel and make inquiry as to those on the jury. I have never but once in 36 years' somewhat active experience known a juror asked a question, and that was by a very young barrister who never repeated the offense.

in Canada, was refused by the Court.<sup>18</sup> Only 23 jurors were called, 10 were peremptorily challenged by the prisoner, two were challenged for conscientious scruples as to capital punishment, and one was excused for the same cause—the whole proceeding could not have taken more than an hour.<sup>19</sup>

The evidence for the prosecution proved the destruction of the steamer and the death of Durfee, also (if the evidence were true) the boasts next morning of McLeod and his bloody sword. Some witnesses more or less indefinitely swore to McLeod being among those who came back in the boats. Some thought they saw him in the melee at Fort Schlosser, but no one positively identified him as being there. The case for the prosecution took three days to present, 21 witnesses being called, nearly all of whom seem to have given their evidence in a fair and impartial manner. There was undoubtedly evidence sufficient to justify a conviction, and the defense was called on. Unless the evidence for the prisoner was wholly perjured, it is quite plain that he was not guilty of anything but vainglorious boasting. Sir Allan MacNab and thirteen men who were in the boats, were examined on Commission in Canada; they all swore that McLeod was not amongst the assailants—the reading of those depositions consumed two days. On the sixth day, a former officer of the 79th Highland Regiment who had served under Sir John Moore and the Duke of Wellington was called with his wife and other members of his family. They swore that McLeod had passed the night at their house at Stamford about six miles from Chippewa and that Col. Cameron brought the news of the destruction of the "Caroline" to their house in the morning while McLeod was still there,<sup>20</sup> a tavern-keeper swore that he had taken McLeod from Niagara to Stamford on that evening, and there was other corroborative evidence. After the defense had called eight witnesses to testify *viva voce*, the prosecution replied with six commission witnesses and twelve *viva voce*; their evidence was not of much value.

The seventh day was taken up with the addresses of Senior and Junior Counsel for the defence and Junior Counsel for the prosecu-

<sup>18</sup>The Crown as of right may have in Canada any juryman stand aside, i. e., excuse him until all the rest of the panel has been gone over and a jury not obtained.

<sup>19</sup>The enormous time taken in some American courts to find a jury in a serious criminal case is always a source of wonder and perplexity to Canadians. I have never seen it take more than half an hour in Ontario, even in a murder case.

<sup>20</sup>Some doubt may be cast upon this evidence: McLeod had an intrigue with a daughter of the house.



tion; on the eighth the Attorney-General addressed the Jury and the Judge delivered his charge—all of these were able, logical and fair. The Jury found a verdict of Not Guilty in about half an hour.<sup>21</sup> Thus ended what bade fair to be a most awkward if not an exceedingly dangerous complications.<sup>22</sup> *O si sic omnia.*

<sup>21</sup>The verdict was almost certainly a righteous one.

McLeod's boasting seems well established and yet he was not wholly a Thraso; he played a creditable part in the Battle of Gallows' Hill and seems to have been thought well of by his neighbors. It is not Brigadier Gerard alone who is brave, but unreliable when he comes to relate his own exploits. He was the Deputy Sheriff McLeod who, shortly before this time, in the Fall of 1837, was charged with the delivery at the Ferry to American officers of the runaway slave, Solomon Moseby, charged with stealing his master's horse in Kentucky, to assist him in his flight for freedom, and ordered to be extradited. A large number of negroes lay around the Gaol at Niagara watching for Moseby, and when he was brought forth under armed guard and shackled, they made an attack on the escort. McLeod ordered the guard to resist, two negroes were killed, but Moseby made his escape. Hubbard Holmes, the leader of the rescuing party, a colored preacher and teacher, died in the affray, a martyr as worthy the name as was John Brown, but like the mute, inglorious Milton, unknown to all but a very few. A fairly full account of the Moseby episode will be found in a paper, "The Slave in Upper Canada," read before the Royal Society of Canada, May, 1919.

McLeod seems to have been under the influence of liquor when he made his boasts—in those days of cheap and strong whiskey, drunkenness was the curse of Upper Canada; everything was an excuse for drink.

"There are five reasons why men drink,  
 Good wine, a friend, or being dry,  
 Or lest you should be by-and-by,  
 Or any other reason why."  
 (For "good wine" substitute "any kind of whiskey.")

<sup>22</sup>For more than a century the difficulties between the United States and Britain have been amicably, if not always satisfactorily to both parties, arranged by the peaceful means of diplomacy. There is no reason to doubt that had McLeod not been acquitted, means would have been found to settle the matter in such a way as to avoid war. Arbuthnot and Armbruster, Mason and Slidell, the Leopard, the Alabama, all failed to break the peace which has so blessed the English-speaking world. May it extend *in multos annos, yea in returnum.*