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CRIMINAL LAW IN UPPER CANADA A CENTURY AGO

WILLIAM RENWICK RIDDELL¹

When examining for another purpose the original manuscripts in the Archives at Ottawa of the dates shortly before and at the time of the War of 1812-14, I perused many original reports from assize judges² and other documents of an interesting character from the point of view of criminal law.

¹LL.D., F.R.S. Can., etc., Justice of the Supreme Court of Ontario.

²While after the formation of the province there seems to have been no statutory or other obligation of a legal nature upon them so to do, it was the custom from the beginning of the separate provincial life of Upper Canada in 1792, as before, for the trial judges to make a report to the lieutenant governor upon every capital case in which a conviction was made and the prisoner sentenced to death.

In 1841 by the Act (1841) 4, 5, Vic., C. 24 (Can.), it was enacted, sec. 32, that from and after January 1, 1842, it should not be necessary that reports should be made to the governor in the case of a prisoner convicted and sentenced to death, "any law, usage or custom to the contrary notwithstanding." Thereafter it was not the custom to report unless a report was called for by the government.

Two years after the formation of the Dominion of Canada, the Act (1869), 32, 33 Vic., C. 29 (Dom.), by sec. 107, continued the provision of the Act of 1841, but added that if the judge thought that executive clemency should be extended to the prisoner, or if there were a point of law reserved in the case still undecided, or "from any other cause it becomes necessary to delay the execution," the prisoner might be reprieved for a sufficient time.

Four years thereafter, by the Act (1873), 36 Vic., C. 3 (Dom.), it was enacted that "the judge before whom such prisoner has been convicted shall forthwith make a report of the case to the secretary of state of Canada for the information of the governor; and the day to be appointed for carrying the sentence into execution shall be such as in the opinion of the judge will allow sufficient time for the signification of the governor's pleasure before such day. . . ." This was carried into the Consolidated Statutes of Canada (1886), C. 181, sec. 8, into the Code of 1892, 55, 56 Vic., C. 29, sec. 937, and now appears in the Criminal Code (1906), C. 146, sec. 1063. In quoting statutes, our custom is to refer them to the year of the reign of the sovereign, thus: "30 Geo. III" means in the 30th year of the reign of King George the third. Sometimes a parliamentary session takes up part of two years of the reign, in which case, terminology, such as "35, 36 Vic." is used. This means in the session of Parliament holden in the 35th and 36th year of the reign of Queen Victoria. For practical purposes, the lawyer need remember only the dates of the accession of George III, George IV, William IV, Victoria, Edward VII, and George V, all of whom, except Queen Victoria, had the prudence to come to the throne in a decimal year; the dates are, therefore, easily remembered, 1760, 1820, 1830, 1837, 1900, and 1910.

As the Imperial Parliament continued to pass legislation affecting Canada, it is often necessary to distinguish the different legislative bodies; for that reason the contraction (Imp.) is generally added to Imperial legislation; (U. C.) indicates legislation by the Parliament of Upper Canada; (L. C.) that of Lower Canada, both of which continued from 1792 to 1841; (Can.) that of the Province of Canada, which consisted of a union of the two provinces of Upper and

and criminal cases sat is remarkable; notwithstanding the invasions at the Detroit, Niagara and St. Lawrence Rivers, the taking of the capital, York (now Toronto) with the wanton destruction of the Parliament and other buildings, the burning of Fort George, Port Dover, etc., no trace of actual warfare appears in the courts except an occasional reference to the necessity, actual or probable, of the court sitting at some place other than the usual one and the necessity of removing prisoners from a goal likely to be taken by the enemy to one more safe.

But the present paper is intended to deal with the state of the criminal law as appearing from proceedings in court.

The criminal law of England was introduced into the old "Government of Quebec," which contained the eastern part of what was afterwards Upper Canada, by the royal proclamation of October 7, 1763³; and the Quebec Act of 1774⁴ extended it to all the territory of that province and much more. To make it the more abundantly clear that this was the law of Upper Canada, the Parliament of the young province which had by its very first statute in 1792 introduced the English civil law, eight years later by the statute of (1800) 40 Geo. III, c. 1. (U. C.) expressly provided that the criminal law of England as it stood on September 17, 1792, should be the criminal law of the province, subject to any ordinance of the former Province of Quebec made after the Quebec Act of 1774.

The first class of case to be noticed is the most common in our English speaking countries—larceny. At the common law of England in 1792 and later there were petty (petit) larceny and grand larceny, the former being of property of value not more than twelve pence, the latter of property of value more than twelve pence—the punishment for grand larceny being death by hanging. "It is true," as Blackstone sententiously says, "that the mercy of juries will often make them strain a point and bring in larceny to be under the value

Lower Canada, and continued from 1841 till the formation of the Dominion of Canada in 1867; the legislation of the Dominion of Canada is indicated by the contraction (Dom.).

³This proclamation will be found in convenient form in Short and Doughty, Constitutional Documents, 1759-1791, published by the Dominion Archives, pp. 119, sqq. Also in the fourth report of the Ontario Bureau of Archives (1906), pp. 2, sqq. The original western boundary of the Government of Quebec was a straight line drawn from the south end of Lake Nipissing to where the present international boundary crosses the St. Lawrence.

⁴(1774) 14 Geo. II, C. 83 (Imp.). A copy will be found in Short and Doughty, *ut supra*, pp. 401, sqq. By this act, Quebec included all the territory now the Provinces of Quebec and Ontario and also the British territory west of Pennsylvania to the Mississippi and south to the Ohio.

of twelve pence when it is really of much greater value; but this is . . . a kind of pious perjury."⁵

Before Upper Canada was formed an ordinance had been passed by the Governor and Legislative Council⁶ at Quebec, April 30, 1789, whereby petty larceny was extended to the value of twenty shillings sterling, and corporal punishment might be adjudged against the petty larcener.⁷

The extraordinary severity of the common law in cases of grand larceny had been modified in England by the practice of the courts and by legislative provisions. One such modification was the well-known "benefit of clergy," which was originally the privilege allowed to a clerk in holy orders upon being accused of crime in a civil court to be turned over to his ecclesiastical superior. This privilege was in course of time extended to all who could read and many a rascal escaped hanging because he was said to be able to read a verse in the Bible, "his neck verse" as it was sometimes called. Then the invidious distinction between the criminal who could and him who could not read was abolished and all men were put on the same pleasant footing—even women were allowed to claim the "benefit of the statute" as men the "benefit of clergy."⁸ The law then was that no larceners,

⁵Blackstone's Commentaries, Bk. 4, p. 238.

⁶From the Royal Proclamation of 1763 until the formation of the two Provinces of Upper Canada and Lower Canada, 1792, the country was governed by a governor at Quebec, assisted by a legislative council nominated by the Crown. The proclamation contemplated and provided for an elective house of assembly, but the scheme was not carried out; and the Quebec Act of 1774 provided for a legislative council only. After the country was divided into two provinces, the Canada or Constitutional Act (1791), 31 Geo. III, C. 31 (Imp.), provided for two houses, the legislative council, nominated by the Crown, and the house of assembly, elected by the people in each province.

⁷The ordinance (1789), 29 Geo. III, C. 3, published in the Quebec Gazette, May 7, 1789. These ordinances are published in thin quarto volumes, are very rare, and met with as a rule only in law libraries; the Canadian Archives Department has published them in convenient form as Sessional Papers, 1914, No. 29b, and 1916, No. 29a; the ordinance referred to in the text will be found in Session Papers, 1916, No. 29a, pp. 225, sqq.

⁸Originally the tonsured clerk was delivered over by the civil judge to the bishop to be dealt with. This was generally, but not always, after conviction, and it was notorious that seldom was there any severe punishment meted out to the erring clerk. Gradually, by the practice of the civil courts, everyone who could read, whether or not he was tonsured or in holy orders, had the same privilege. But in 1487, by 4 Hen. VII, C. 13, the layman was prevented from pleading his clergy effectively more than once, and when he did plead his clergy he was branded on the left thumb (in later times on the left cheek). After some other legislation, it was in 1576 enacted, by 18 Eliz., C. 7, that after conviction and burning the convict should not be delivered to the bishop, but either after or without imprisonment, not exceeding one year, he should be discharged. Women obtained a similar privilege, but they might be imprisoned, whipped, or put in the stocks. In 1706, the statute, 5 Ann, C. 6, gave everyone, illiterate, as well as literate, the right to the benefit of clergy, and lengthened the term of imprisonment which might be imposed; and it was, by

grand or petty, could on a first conviction be put to death, but could be transported, whipped, fined and imprisoned.

It was, however, manifest that transportation was in Upper Canada practically impossible, and consequently in 1800 by the Provincial Act of 40 Geo. III, c. 1. sec. 5 (U. C.), it was provided that banishment from the province should take its place.

We find at one assizes one larcener to be imprisoned for three months, another to be imprisoned for one month and publicly whipped twice, thirty-nine lashes each time.⁹

There were, however, certain larcenies which had a higher degree of guilt than ordinary larceny, and in the case of which Parliament penalized the offender by denying him the benefit of clergy—among such was stealing in a dwelling house to the value of forty shillings.¹⁰ In these non-clergyable offenses the penalty of death was imposed.¹¹

At York (now Toronto) an unfortunate man was convicted of stealing a sum of money in a dwelling house and was sentenced to death, but the chief justice was so impressed with the circumstances of the case that he granted a reprieve and reported in favor of a pardon.¹² There was necessity for a reprieve by the judges, as normally without such respite the culprit would be hanged the next day but one after his sentence.¹³

(1717) 4 Geo. I, C. 11, and (1719) 6 Geo. I, C. 23, enacted that larceners, grand or petit, instead of being branded, might be transported to America; in 1779 the Act 19 Geo. III, provided that instead of branding, the court might impose a fine and might order the offender to be whipped. This last act, however, was after the Quebec Act, and consequently was not introduced into Upper Canada by the general words of (1800) 40 Geo. III, C. 1, sec. 1 (U. C.), already referred to; but this act, by sec. 3, made similar provisions as the Imperial Act of 1779.

⁹Assizes at Kingston, August 30, 1813, before Mr. Justice (afterwards Chief Justice Sir William) Campbell—the Report of John Small, Clerk of the Crown, Can. Arch. Sundries, U. C., 1813. John B. Soucier escaped the lash, but Benjamin McCallister was not so fortunate.

¹⁰At the common law there seems not to have been any distinction in larcenies between simple and mixed larcenies (such as stealing in a dwelling house) in their effect; but a long and curious series of enactments had been effective in that sense—the only one to be referred to here is (1713) 12 Ann St. 1, c. 7, which contains the provision mentioned in the text.

¹¹"Benefit of Clergy" was abolished in England in 1827 by sec. 6 of the Criminal Act of that year and in Upper Canada in 1833 by 3 Will. IV, C. 3, sec. 25 (U. C.).

¹²Lewis Lyons was convicted at York (now Toronto) in November, 1814, before Chief Justice Thomas Scott, of stealing a sum of money in the dwelling house of Harklan Lyons, but pardoned on the recommendation of the trial judge. Can. Arch., Sundries, U. C., Sept.-Dec., 1814.

¹³At the common law the sheriff was to execute the condemned within a convenient time, but in 1742, the statute 25 Geo. II, C. 37, directed that the judge should direct execution the next day but one after the sentence.

In 1841 the Parliament of the Province of Canada enabled the judge to

Unconditional pardons were seldom granted—the course ordinarily pursued was to grant a pardon conditional upon the offender removing himself out of the province and all other British possessions for the term of his natural life.¹⁴

In England one suing out a pardon was chargeable with fees; but when the Provincial Secretary in Upper Canada made a claim for such fees the Lieutenant Governor peremptorily forbade the payment of any but the nominal fee of six shillings (\$1.20).

A crime not unlike larceny sometimes was committed in the province during war times owing to the great demand for beef—that of killing cattle with the intent of stealing the carcass. This at the common law was a civil trespass only; but in 1741, the Act of 14 Geo. II, c. 6, made killing sheep or other cattle with intent to steal the carcass a felony punishable with death without benefit of clergy. In 1812 a man who had conspired with two soldiers to kill cattle and sell the beef to the army was convicted of an offense under this act. The trial judge reprieved the convict and recommended a conditional pardon, which was granted.¹⁵

The same act made it a felony without benefit of clergy to steal cattle: a young man convicted in 1811 of stealing a "heiffer" was under this act sentenced to death, but on the recommendation of the

have the sentence recorded instead of being pronounced in open court (1841), 4, 5 Vic. C. 24, sec. 33 (Can.); by the Dominion acts (1869), 32, 33 Vic., C. 29, and (1873), 36 Vic., C. 3, a change was made whereby the trial judge was directed to fix a day for the execution sufficiently remote to allow the signification of the governor's pleasure to be made—that is substantially the present law.

¹⁴Banishment for crime came to an end in Canada in 1842 on the passing of the statute 6 Vic., C. 5 (Can.), which, by sec. 4, enacted that instead of transportation or banishment there should be imprisonment in the provincial penitentiary or other prison.

¹⁵In 1809, Roger Conat, convicted of perjury at the Newcastle Assizes, and John Silverthorne, convicted at Niagara of some crime (which is not explicitly mentioned, but which was apparently a crime against the person), were to receive pardons. William Jarvis, the provincial secretary, shamefully ill-paid, wrote, October 20, 1809, to William Stanton, secretary to Lieutenant-Governor Gore, that before Lieutenant-Governor Hunter had remitted them, the fees on a patent or charter of pardon were £3.10.0 to the lieutenant-governor, £2.0.0 to the attorney general, and £1.3.0 to the provincial secretary, but that Hunter had remitted all the fees except 6 shillings to the secretary. Jarvis pointed out that both Conat and Silverthorne were wealthy farmers and could well afford to pay the patent fees; Gore, however, made the curt memorandum "to be refused any fee." Can. Arch., Sundries, U. C., 1809.

¹⁶James Moody was the culprit, and he was convicted before Mr. (afterwards Chief) Justice Powell at the Sandwich Assizes in the fall of 1813. The trial judge reported, September 23, 1813, that this was the first case of the kind in the province, that this country did not seem to require the security of such a severe statute, that the soldier conspirators had been removed from the cognizance of the civil authority and had remained unpunished. He left a reprieve and recommended a pardon, which was granted, Can. Arch., Sundries, U. C., 1813, July-December.

trial judge received a pardon conditional on perpetual exile from the province and all other British territory.¹⁷

It may be said generally that the punishment of death was not inflicted in cases of theft or the like—even horse-stealing, unless accompanied by circumstances of aggravation, was not visited capitally.¹⁸

But the case was different with arson. This crime was always looked upon with abhorrence by the law—even the ancient Saxon law made it punishable with death; legislation in the time of Henry VI made it high treason, and the benefit of clergy was taken away in 1531 by 23 Henry VIII, c. 1, and this denial, though revoked in 1547, was made effective again by implication in 1557, and expressly in 1723 by 9 Geo. I, c. 22, the well-known Waltham Black Act. Arson, so far as I can discover at and before the times now under consideration, was always punished with death; and while the executive became more merciful it was not until 1841 that arson became punishable only with imprisonment.¹⁹

In 1813 at the fall assizes for the London District an unfortunate man was convicted of arson and "left for execution"—"his crime being fully proved and confessed . . . rendered him a fit subject for example."²⁰

Burglary also was punishable with death. The second reported criminal trial in the Province of Upper Canada took place at L'Assomption (now Sandwich) in September, 1792, when a negro was convicted of burglary in a house at Detroit and condemned by William Dummer Powell to be hanged.²¹ The death penalty continued

¹⁷George Windeker was at the Niagara Falls Assizes, 1811, convicted before Mr. Justice Powell of stealing a "heiffer," but recommended to mercy by the jury. The judge pointed out in his report that he had before this offense borne a good character and that his connection was reputable—he advised commutation of the sentence to perpetual banishment, "which may be done by a conditional pardon." Can. Arch., Sundries, U. C., 1811.

¹⁸The attorney general of Upper Canada, John Beverley Robinson (afterwards Sir John Beverley Robinson, Bart., Chief Justice), when the troubles arose concerning the removal of Mr. Justice Willis in 1828 was able to say officially that there had been no executions for simple horse-stealing during his time.

¹⁹By the Act of (1841) 4, 5 Vic., C. 26, sec. 3 (Can.), arson became punishable by imprisonment for the natural life; but even by that act, sec. 1, if any person were within the house, the punishment was death; and it was not till 1869 that arson under such circumstances was relieved from the death penalty (1869), 32, 33 Vic., C. 22, sec. 2 (Dom.).

²⁰The words quoted are taken from the report of Mr. Justice Powell; the name of the convict was David Micken; date of the report, September 23, 1813, Can. Arch., Sundries, U. C., 1813, July-December.

²¹The court at which the negro burglar, Josiah Cutan, was condemned, was a Court of Oyer and Terminer and General Gaol Delivery for the District of Hesse, sitting at L'Assomption. At that time, and until 1796, Detroit and

to be inflicted or at least directed for burglary until 1842, and if the burglary were with intent to murder or wound any person until 1869.²²

I find no record of a conviction for burglary, but a very serious instance of this crime accompanied with robbery by violence once came under investigation—the offenders were not arrested, however.²³ Had the burglars been arrested and convicted they would undoubtedly have been hanged.

One case of perjury has already been referred to in note 15 *supra*—it seemed to Chief Justice Scott, however, that the accused had simply made a mistake and he recommended an unconditional

Michilimackinac, with certain portions of the present Michigan, were *de facto* part of the Province of Upper Canada, although *de jure* United States territory under the Treaty of 1783. By sec. 4 of the ordinance of April 30, 1789, 29 Geo. III, C. 3 (still in force), it was enacted that "In all trials to be had in either of the new districts (i. e., the Districts of Lunenburg, Macklenburg, Nassau, and Hesse, afterwards in Upper Canada, and Gaspé, afterwards in Lower Canada) before Commissioners of Oyer and Terminer or General Gaol Delivery when the Chief Justice . . . may happen not to be one the execution of the sentence or judgment of the court shall be suspended until the pleasure of the governor . . . shall be signified therein by warrant."

No record is to be found that mercy was extended to Cutan, and, apparently, he was executed.

This is the first sittings of a superior criminal court in Upper Canada of which we have any record—the original is in the Ontario Archives.

²²See (1841) 4, 5 Vic., C. 24, secs. 14, 15 (Can.), and (1869) 32, 33 Vic., C. 21, secs. 38, sqq. (Can.).

²³This made a great sensation at the time and subsequently came up in Parliament. Mr. Isaac Swazey, a member of the House of Assembly, who was Inspector of Licenses, and therefore Collector of License Fees for the District of Niagara, and who was also Collector of Municipal Taxes of his township, being in his house on Saturday night, January 21, 1806, heard, about 11 p. m., his door broken open, and was at once assaulted and severely injured by the burglar who entered with two companions—they took away three bags of money containing £178.5.8¼ of public money and some of Swazey's own. This was Swazey's story; but it must be said that there was some incredulity expressed both by his neighbors and by certain members when the matter afterwards came up in Parliament. The magistrates met, searched all suspicious places and examined suspicious characters without success. In the Parliament which met the following month, nothing was said concerning the loss; but in the next session, beginning February, 1807, Swazey petitioned to be relieved. The bill passed its second reading, but after the committee of the whole had reported recommending that the consideration be postponed until the next ensuing session and the report had been adopted by a vote of 10 to 5, Swazey obtained leave to withdraw his petition, which he did. He petitioned the new Parliament (of which he was not a member) in 1811 for relief, but leave was refused to bring in a bill for that purpose and the matter dropped. See Hamilton's letter to the Administrator of the Government, Grant, January 28th, 1806, Can. Arch., Sundries, U. C., 1806; the proceedings in the Parliament of Upper Canada will be found in Eighth Report of the Ontario Archives (1911), pp. 152, 154, 159, 160 (where the division list appears), 434.

For some account of Swazey, see my article in 33 Canadian Law Times (1913), pp. 22, 96, 180—he had been a noted scout or spy on the loyalist side during the revolutionary war, and came to Niagara after its close. He frequently claimed to have taken part in the abduction of Morgan, who had disclosed Masonic secrets, but this was admitted by him to be untrue when proceedings were about to be taken against him.

pardon which was granted.²⁴ At that time perjury (being only a misdemeanor and not a felony) was punishable by fine, imprisonment, banishment and pillory—the pillory was abolished in 1841 by 4, 5, Vic. c. 24, s. 31 (Can.), and banishment in 1842 by 6 Vic., c. 5, s. 4 (Can.). Forgery also was not a felony at the common law, but many statutes had made certain forms of it felonies punishable with death—the only one of the English statutes I refer to here is that of 1729, 2 Geo. II, c. 25, which made the forgery of a bill of exchange, promissory note, etc., a felony, and the penalty death without benefit of clergy. The punishment, as is well known, was almost invariably, pitilessly inflicted so long as the statute book was thus disfigured. And so the fate of one poor unfortunate at York was sealed.

Leaving this class of forgery which presents nothing of peculiar interest, another kind may be noted. In 1809 a number of forged ten-dollar notes of the Columbia Bank, an American institution, were in circulation near the Niagara frontier. The bank, through its attorney, brought the matter to the attention of the Attorney General of Upper Canada, William Firth. He at once made investigation, June 22, 1809, and evidence was discovered that some at least of the forgers were resident in the Niagara District; the Attorney General himself went to Niagara to conduct the prosecution, and the first question was as to the form of the indictment. The Act of 1697, 8, 9 Wm. III, c. 20, covered only Bank of England notes, while that of 1729, 2 Geo. II, c. 25, broad as it was and general in its terms, was considered not to apply to these notes. Accordingly the five accused persons were charged with conspiracy to defraud; they were found guilty and sentenced to six months' imprisonment, the "pillory," a fine of £20 each and imprisonment until the fine was paid, and until they found securities for good behavior for two years.²⁵

²⁴The name is given throughout the proceedings as Roger Conat—I have reason to believe that the real name was Conant—Chief Justice Scott's report and the proceedings concerning the pardon are in Can. Arch., Sundries, U. C., 1809, July-December.

²⁵Charles Norton, alias Philander Noble, William Smith Crane, Levi Kemble Roberts, Samuel Spring, and Joseph Harris, tried before Mr. Justice Powell at the Niagara Falls Assizes, 1809, and sentenced as stated in the text. They afterwards petitioned the governor, representing their inability to pay the fine, and said that the sentence, if enforced, meant imprisonment for life. The governor "in complaisance to a foreign government (i. e., the United States) declined to remit any part of the direct punishments"; but when the prisoners had put in the six months' imprisonment and stood in the pillory, the magistrates of the district urging on the governor that there was great fear of an attempt at escape, especially as the commandant at the neighboring Fort George had removed the military guard from the gaol, and Mr. Justice Powell recommending that course, the governor without remitting the fine of £20 each, remitted the imprisonment, May 2, 1810. Can. Arch., Sundries, U. C., 1809, January-June. Do. do., 1810, January-June.

It was not until the Forgery Act of 1847, 10, 11 Vic., c. 9 (Can.), that forgery of foreign bank notes, etc., was put on the same footing as forgery of domestic notes—by the same act imprisonment was substituted for the death penalty.

A class of offenses not unlike the last in some respects called for the interposition of the legislature. The expense of the war had to be paid almost wholly by "army bills," payable by the paymaster of the forces in Lower Canada. These bills were always at a discount—sometimes a considerable discount—in Upper Canada for obvious reasons.²⁶ The legislature in 1813 by the Act 53 Geo. III, c. 1. (U. C.), made them legal tender in payment of duties, taxes, etc., and by the same Act s. 2, enacted that the forging of an army bill or uttering a forged army bill should be a felony punishable with death without benefit of clergy. The act was to continue in force only one year and then until the end of the next session of Parliament.

In the fall of 1813 it came to the knowledge of the government that forged army bills were being circulated in the eastern district. Mr. (afterwards Mr. Justice) Jonas Jones, then a barrister at Elizabethtown, was retained to collect evidence, and at the fall assizes of the following year, 1814, a young man was tried at Brockville before Mr. Justice Campbell for uttering a forged army bill for \$25 in a shop in that town. Being convicted, he was sentenced to death; but in the end he escaped this punishment.²⁷

²⁶For example, when the justices of the Court of King's Bench presented their memorial, January 10, 1814, to the governor, they pointed out that there was a discount of 20% on the army bills. The memorial is interesting at the present time, as it shows that during and by reason of the war—the necessities of life doubled in price—they give the following table:

	Before the War	Now
Bread	1 shilling (20 cts.)	2 shillings
Beef	6 pence (10 cts.)	1 shilling
Wood	7s. 6d. (\$1.50)	15 shillings

They also point out that of every £100 of their nominal salary, they receive in cash only £52.13.0, thus:

Nominal salary, payable in England.....	£100. 0.0
Income tax, 10%.....	10. 0.0
	£ 90. 0.0
Commission on £90 at 2½%.....	2. 5.0
	£ 87.15.0
Discount on exchange, 25%.....	21.18.9
	£ 65.16.3
Depreciation on army bills, 20%.....	13. 3.3

Net receipts £ 52.13.0

Can. Arch., Sundries, U. C., 1814, January-June.

²⁷Duncan Campbell, the son of a major in the army and of respectable family, tendered a forged \$25 army bill to Henry Jones in his shop at Brock-

Another statutory crime of a less heinous nature may be mentioned here, i. e., performing the marriage ceremony without having legal qualifications for that function.

Until the Act of 1793, 33 Geo. III, c. 5 (U. C.), marriages in this province could be validly celebrated only by clergymen of the Church of England (except possibly between Roman Catholics by a priest of their church); that act enabled every justice of the peace to perform the ceremony until there should be five clergymen of the Church of England in his district; in 1798 the Act 38 Geo. III, c. 4 (U. C.), enabled the Church of Scotland, Lutheran and Calvinist ministers to marry members of their own congregation or communion after having obtained a qualifying certificate from the Court of Quarter Sessions. There is a record of a Baptist minister being prosecuted for acting as celebrant minister at a marriage and there are traditions of Methodists having the same fate.²⁸

The only instance brought to light in the times now under consideration was that of a "preacher to the Low Dutch" in the Township of Fredericksburg, complained of in 1811 by the Anglican cler-

ville. On being arrested, he said he got the bill from one Hamblin, who was thereupon at once arrested, but later escaped to the United States, where he remained permanently.

True patriot he, for be it understood,
He left his country for his country's good.

Hamblin, when under arrest, said he had got a number at a large discount from a man in Ogdensburgh, who represented that they had been taken by the American army on its capture of York in 1813.

The trial judge, Mr. Justice Campbell, submitted the convict's case without comment or recommendation. Enormous petitions poured in from the eastern district, and the acting attorney general, Mr. (afterwards Sir) John Beverley Robinson, represented to the governor that he did not think Campbell knew that the offense was capital, that the evil had ceased, and that he hoped executive clemency would be extended to the culprit. A pardon was prepared, but before it had been completed, Campbell escaped from the gaol, and made his way to the United States. *Can. Arch., Sundries, U. C., 1813, 1814.*

The gaols of the province were, at that time, insufficient and insecure, and escapes were very common; prisoners were chained for the sake of security, and shocking dungeons were to be found in some gaols, e. g., that of the Newcastle District, which Mr. Justice Powell in vain endeavored to get the grand jury to present in the fall of 1814, "a cell . . . is the only secure place in the building and if so without fire"—the grand jury in place of finding a presentment against their district found a bill against the gaoler for a negligent escape.

²⁸John Wilson, June 7, 1801, pretended to solemnize marriage between Paul Marin of York, baker, and Jane Butterfield of the same place, spinster (otherwise called Jane Burke); on July 14, 1802, an information was filed against him in the Court of King's Bench; the Methodist ministers alluded to were Rev. Isaac B. Smith, Rev. Henry Ryan, and Rev. Joseph Sawyer. See my articles in the 33 *Can. L. Times*, already referred to. What I have called the Statute of 1798 was really passed in 1797, but reserved for the King's pleasure; the proclamation bringing it into force was promulgated December 29, 1798, and the act is always cited as 38 Geo. III, C. 4 (U. C.).

gyman nearest to him as being "again at his old practice of marrying unlawfully." It does not appear that proceedings were taken on this occasion against the offender, but two years before the same minister and another had been prosecuted under the statute.²⁹ Marrying without legal qualification was a misdemeanor punishable with fine and imprisonment.

In 1830 by the Act of 11 Geo. IV, c. 36 (U. C.), the power of celebrating marriages was further extended to Presbyterians, Methodists, Congregationalists, Baptists, Independents, Menonists, Tunkers and Moravians, the minister to take out a certificate from the Quarter Sessions; in 1857 the Act 20 Vic., c. 66 (Can.), gave the power to ministers of every denomination; in 1896 the Act 59 Vic., c. 39 (Ont.), gave the power to the elders, etc., of the Disciples and the Salvation Army, while Quakers are specially provided for.³⁰

Offenses against the person were very common in Upper Canada, due in some degree to the prevailing habits of intemperance. Probably in no country in the world was drunkenness more prevalent until well after the middle of the nineteenth century.³¹ Whisky was cheap and abundant and the use of it even to excess was considered an amiable eccentricity. Indeed in most circles the teetotaler was looked upon with pity, not unmingled with contempt as a weakling

²⁹July 20, 1809, instructions were given by the governor to the attorney general, William Firth, to "institute proceedings against Mr. McDowall of Earnestown for solemnizing marriages illegally, and Reuben Beagle of the same place for the same offense." Can. Arch., Sundries, U. C., 1809. The complaint of the Rev. John Langhorne to Governor Gore from Earnestown, January 4, 1811, referred to in the text, gives information that "Mr. McDonald, the preacher to the low Dutch, has been again at his old practice, marrying unlawfully"; and says that he had performed the ceremony of marriage December 11, 1810, between John Philips and Polly Defoe (daughter of Samuel Defoe), both of Fredericksburg and not of his religion. (As a preacher of the low Dutch, i. e., the Dutch originally from Holland, he was probably a "Calvinist," and might, therefore, marry those of his own religion.) The complaining clergyman gives the names of witnesses, but declines to be himself prosecutor or witness, and closes his letter, written in very beautiful script, with the enthusiastic words "God bless the protection of old England as to its clergy and the Defender of the Faith, Amen and Amen." Can. Arch., Sundries, U. C., 1811. Gore was by no means so strong a churchman as Simcoe, and he was having much trouble with Firth, the attorney general. Firth was succeeded in the same year by the young John Macdonell as acting attorney general, who was to meet a hero's death with his general, Isaac Brock, on that October day in 1812, never to be forgotten by Canadians.

³⁰But a man cannot make a church of his own and becoming its minister, celebrate marriage, *Rex v. Brown* (1908), 17 O. L. R. 197.

³¹The great temperance wave which passed over the continent of North America had a tremendous effect in this province. Lodges of Sons of Temperance, Good Templars, etc., were held in almost every school-house, and while the older generation may have been little affected, the young were brought up in the ways of total abstinence.

if not a hypocrite.³² During the war it was suggested that the distillation of all grain should be forbidden, but that was to prevent the price of grain being unduly raised by its purchase by distillers and the consequent scarcity of food, not at all to prevent the people from using whisky. Indeed, the prohibition was not brought into force lest the army should not have enough of what was thought to be an absolute necessity.³³

Most of the time of the Courts of Quarter Sessions³⁴ was taken up with cases of assault and battery; but an occasional case of the kind appeared at the assizes. Those found guilty of assault or assault

³²Readers of Charles Dickens will recognize the sentiment. To one reading the accounts of social usages in early Upper Canada, Charles Dickens' characters are at once brought to mind; many seemed to have adopted all the traditional reasons for drinking.

"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."

³³In 1813, by the Act 53 Geo. III., C. 3 (U. C.), the legislature authorized the governor or administrator of the province to prohibit the export of grain and also distillation of spirits, strong waters and low wines from grain. The administrator, General de Rottenburg, consulting Attorney General Robinson "expressed his sentiments as to the necessity of having whiskey for the troops" and wished to license a sufficient number of distillers for that purpose. The attorney general was compelled to advise "unfortunately the legislature have put it out of his power to prohibit otherwise than generally, so that he cannot license any particular person to distill for the government, neither can he do it indirectly in any particular case by remitting the penalty, because half of it belongs to the informer." A general prohibitory proclamation was issued and "not a gallon of whiskey, or rather, spirits, can be distilled and it becomes prudent to consider whether the army have other means of supply." Letter, Robinson, to the Secretary of the Administrator, York, July, 1813, Can. Arch., Sundries, U. C., 1813. The proclamation was withdrawn with the result that the price of grain increased immensely. The attorney general, November 1, 1813, writing to de Rottenburg submits "the expediency whether the state of the army will not allow a general prohibition of the distillation of grain. The demand for whiskey enables the distillers in this part of the country (he writes from York) to offer from 12 to 15 shillings, New York currency (i. e., \$1.50 to \$1.87½) per bushel for wheat, the natural effect of which will be to raise very considerably the price of flour, an indispensable article and one of greater consumption . . . it would be well consistently with the supply of the troops a remedy could be provided by a total prohibition." Can. Arch., Sundries, U. C., 1813.

The Act of 1813 being about to expire, the legislature the following year extended it for another year (1814), 54 Geo. III, C. 8, U. C.; this expired March 14, 1815, and was not continued or revived.

Nowhere was there expressed any thought that whiskey was an evil; that is quite a recent conception and not yet universally accepted.

³⁴I do not, in this paper, speak of these courts except incidentally. There was a Court of General or Quarter Sessions of the Peace in each District for the trial (*inter alia*) of minor offenses. Technically these courts had the power of trying all felonies and misdemeanors and during the Stewart and earlier periods thousand of thieves had been hanged at their command; but in the times now being investigated, these courts sent all capital cases to the "Criminal Assizes," the Court of Oyer and Terminer and General Gaol Delivery.

and battery were fined and imprisoned; but they were at that time liable to be whipped or set in the pillory as well.³⁵

Rape was still a capital crime, as indeed it continued to be until the Moss Act in 1873, by which the judge was given the power of sentencing to death or to imprisonment.³⁶ An assault with intent to commit a rape upon an infant eleven years old is reported in 1814. This was in the Newcastle District (i. e., the counties of Northumberland and Durham and the territory to the rear of these counties), and a lieutenant of the navy was the offender. Mr. Justice Powell reported that to fine and imprisonment he would have added the disgraceful punishment of the pillory had not the friends of the little girl already inflicted severe chastisement upon him.³⁷

Bestiality was still capital and so continued until 1869, 32, 33 Vic., c. 20, s. 63 (Dom.), but the extreme rigor of the proof required by the common law was relaxed by the Act of 1841, 4, 5 Vic., c. 27, s. 18 (Can.). One case of this kind is reported.³⁸

Murder was all too common, as it had been from the first settlement of the province³⁹; but this crime seems to have been less frequent during the war than at other times; and in the one instance

³⁵The assault cases appear in the report of John Small, clerk of the Crown, at the Kingston Assizes, August 30, 1813, Can. Arch., Sundries, U. C., 1813. The lash disappeared from Upper Canada as a punishment in 1841, 4, 5 Vic., c. 25, U. C., and the pillory by the same act.

³⁶The passing of this act was due to the efforts of Thomas Moss, Q. C., afterwards Chief Justice of Ontario; (1873) 36 Vic., c. 50 (Dom.).

³⁷Can. Arch., Sundries, U. C., 1814, July-December. The trial judge says further: "For this breach of the peace they were indicted and one convicted, punished by a fine of £10 (\$40.00). I thought it necessary to suppress such proceedings and vindicate the impartial administration of justice." One may be allowed to believe that the friends took the worth of the £10 out of the miserable culprit's hide.

³⁸Mr. Justice Powell reports, September 23, 1813, that at the Assizes for the Western District at Sandwich, "Thomas Cummins, a soldier of the Royal Artillery, was convicted and received sentence of death" for this offense. The judge adds: "I could not hold out any hope to one in his circumstances. Should, however, his officer give him otherwise a character as a useful soldier, being a young man, he might be a proper subject for executive clemency. The technical defect in the evidence, as the jury could only by inference find the act complete could be utilized as a reason." The convict was respited for three months by the judge, but it does not appear what, if anything, was finally done about a pardon.

³⁹La Rochefoucault writing of 1795, says: "Mr. White, attorney general of the province, informed me that there is no district (there were then four districts in Upper Canada) in which one or two persons have not already been tried for murder, that they were all acquitted by the jury though the evidence was strongly against them . . . lawsuits . . . sometimes originate . . . from quarrels and assaults, drunkenness being a very common vice in this country." See my edition of La Rochefoucault's Travels in Canada, 1795, published by the Ontario Archives (1917) as the thirteenth report, p. 40. The accounts rendered by John White, the attorney general, bear out his statements—these accounts are to be found scattered through the Simcoe papers.

specially noted the offender was reprieved from time to time and ultimately pardoned.⁴⁰

Perhaps the most startling fact disclosed by these papers is the prevalence of treason, open or concealed. Not only in the Western and London Districts, which have been considered the chief seats of disaffection, but in the middle and east of the province there was an alarming amount of sedition. We have accounts of boats built and sailing with loads of the disaffected across the lake from Whitby, Smith's Creek (now Port Hope), Jones' Creek (now Cobourg), and elsewhere; very few were retaken. Most of the traitors remained in exile—some indeed returned after the close of the war, but the number of these was almost negligible. Nearly all those who showed themselves disloyal had come from the United States⁴⁰ and obtained grants of free land—they proved as unreliable as some of the German immigrants to the United States have done during the war just over; these Americans were the original "hyphenates."

There were a few convictions for sedition, treasonable practices and harboring deserters; the first punishable by fine, imprisonment and pillory, the others by fine and imprisonment.⁴²

It remains to say a word about treason. A special commission was issued containing the names of the three judges of the Court of King's Bench to try the cases of treason. The court sat at Ancaster

⁴⁰Mr. Justice Campbell, at Cornwall, September 15, 1813, reports the conviction at the recent assizes there of Edward McSwiney for the murder of Andrew Fuller—he had postponed the execution "which regularly ought to have taken place the next day but one after his conviction," but could not recommend any mitigation. McSwiney was a sergeant at Johnstown in Captain Reuben Sherwood's company of riflemen. Fuller was a "mercenary," or substitute private in the same company, and they had a squabble over some blankets; both lost their temper and Fuller used very abusive language to the sergeant. They came to blows, but separated without much damage done to either. Fuller then took away the blankets, McSwiney snatched up a musket, put in a cartridge and called on Fuller to come back with the blankets. Fuller not obeying, McSwiney fired "to scare him" as he said, but killed him. Executive clemency was extended notwithstanding the view of Mr. Justice Campbell—technically murder as the act was, it was really committed in the heat of passion after a physical struggle.

⁴¹There were a few Irish "United Irishmen," and a very few native Canadians.

⁴²Graham Clark was convicted at the Kingston Fall Assizes for sedition and sentenced to a fine of £5, imprisonment for one month, and to stand in the pillory one hour. Dan Weldon at the same assizes was found guilty of harbouring a deserter and fined £20, on default 3 months in gaol. But most of those charged with the latter offense were tried at the Quarter Sessions, e. g., Benjamin Nicholas was convicted on his own confession at the Quarter Sessions "holden at Mr. Levi Soper's at Lansdowne 6 Jan., 1814, of harbouring a deserter, a private militia man after being enlisted." The deserter was Nicholas' own son, but he was fined £5 and costs, in all £12.13.0 (say \$50). Can. Arch., Sundries, U. C., 1814.

in June, 1814, the judges presiding over the court in rotation, and of the nineteen accused fifteen were convicted, one by confession.

Two of these were American citizens and had never become naturalized; while technically they were guilty of high treason, it was not thought wise to execute them. Reasons were found for clemency to some others and in the end only eight were actually hanged.⁴³

One matter of great interest to the lawyer-historian may be mentioned—all those who were convicted came from the Niagara and the London districts. The administrator desired that some should be hanged in the district in which the acts of treason had been committed, as the punishment would then be “of most salutary effect.” The majority of the judges of the Court of King’s Bench, however, were of opinion that the executions could not be legally ordered outside of the District of Niagara, where the convictions were had except by bringing up the convictions to the Court of King’s Bench, which had universal jurisdiction.⁴⁴

⁴³Those hanged were Aaron Stephens, Benjamin Simmonds, Noah Payne Hopkins, Dayton Lindsey, George Peacock, Jr., Isaiah Brink, Adam Crysler and John Dunham. Those whose sentence was commuted were Samuel Hartwell (not Harbitt, as Kingsford with a not unusual inaccuracy in details has the name, *Hist. Can.*, Vol. VIII, p. 471n), Stephen Hartwell—these two were brothers, young American citizens, living in the Niagara District, who had joined the traitors “through ignorance and levity” and were recommended for mercy by Chief Justice Scott. They, when being sent with six others to Kingston in charge of the deputy sheriff of the home district to be banished, effected their escape with two other prisoners, Calvin Wood and Cornelius Howey, the latter in the same condition as themselves, at Smith’s Creek (now Port Hope). All but Stephen were retaken almost at once, but he succeeded in evading the authorities, no doubt aided by some of the numerous disaffected near that place—Isaac Petit, Jacob Overholzer, “an unfortunate, but honest old man,” and apparently not too bright, Garret Neill, John Johnson, and Cornelius Howey (who had pleaded guilty).

Robert Loundsbury, Luther McNeal, Robert Troup and Jesse Holly had been acquitted at their trial. The verdicts were given from June 7 to June 21, inclusive, eleven days in all.

⁴⁴Every student of the history of the English constitution will remember the attempt on the part of James II to override the law by his sovereign will and to put martial law in force against military men without parliamentary authority. He caused a motion to be made before the Court of King’s Bench for the execution at Plymouth of a soldier convicted at Reading of desertion. Chief Justice Herbert (who had been looked upon as a mere tool of the King) refused the motion “in some heat” as the prisoner was never before the court—then a habeas corpus was issued and the soldier brought before the court. But Herbert and Mr. Justice Wythens (otherwise unknown to fame) again refused the motion, saying that the prisoner being condemned in Berkshire could not be sent to another county to be executed. Three days after, a supersedeas replaced Herbert with Sir Robert Wright, “and Sir Francis Wythens had his *quietus* the night before,” and the new chief justice promptly made the order desired. That judgment established the law already spoken of, that a prisoner condemned to death brought before the Court of King’s Bench may be directed by that court to be executed anywhere within its jurisdiction, but it was a Pyrrhic victory for the king.

The story is well told by Lord Campbell, *Lives of the Lord Chief Justices*

The judges, however, suggested that the salutary effect desired might be attained and the law at the same time observed by directing the sheriff to execute some of the traitors close to the boundary line.⁴⁵

At that time the sentence for high treason was in the form presented for centuries by the common law:

- (1) That you are to be drawn to the place of execution,
- (2) Where you must be hanged by the neck, but not until you are dead, for you must be cut down alive
- (3) And your bowels taken out
- (4) And burned before your face (or your being still alive),
- (5) Then your head must be severed from your body,
- (6) Which must be divided into four parts, and
- (7) Your head and quarters to be at the king's disposal.

It is probable that originally there was no interval between sentence and execution and the unhappy convict was drawn at once to the gallows; but as least as early as the sixteenth century the prisoner was ordered first to be taken to the place whence he came and thence to the place of execution.⁴⁶

The punishment for high treason became simply hanging in Canada in 1868 by the Act 31 Vic., c. 69, s. 4 (Dom.), but in England

(Thompson's edition), Vol. II, pp. 93, 94 (a trifling error as to the date of the supersession of C. J. Herbert is made). See also, *Rex v. William Beal* (April, 1687), 3 Modern Reports 124.

⁴⁵As I intend to make these prosecutions for treason the subject of a separate article, I do not further pursue the matter here.

⁴⁶Even in quarters usually well informed there is occasionally to be found a misunderstanding of the meaning of 'drawn' in this sentence. It is supposed to be equivalent to 'eviscerated,' as a market woman 'draws' a chicken. It really means that the convict is to be dragged to the gallows. Originally he was dragged by the heels at the horse's tail over the rough and filthy ground, which sometimes killed the victim. Sometimes, as in the case of William Longbeard in 1196, rough stones were placed in the road to make the transit more painful.

But humanity was not wholly dead, and we find sometimes an ox-hide, sometimes a hurdle spread under the sufferer by friars or others. Mr. Justice Shaw in 1340 forbade this in a peculiarly atrocious case of a servant killing his former master.

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

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

(2) While sometimes the whole of the viscera, thoracic and abdominal,

the change was not made until 1870, 33, 34 Vic., c. 23, s. 31 (Imp.).⁴⁷

Petit treason, i. e., the murder of a husband by his wife or a master by his servant had long before been put on the same footing as murder by (1841) 4, 5 Vic., c. 27 (Can.). I do not find in all our history any instance of a woman being burned for the murder of her husband, though at least one has been hanged for that offense.

were taken out, in the course of time, in most cases only a small incision was made and a small part of the viscera was burnt.

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

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

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

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

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

So, too, in the 'Popish Plot,' Ireland, Pickering, Grove, Langhorn and others were sentenced to suffer in this way, while Stayley, Coleman, Fitzharris and Plunket were not. Coke sentenced John Owens, alias Collins, to this in 1615; there does not seem to be any explanation of why it was ordered in some cases and not in others wholly parallel.

Those interested will find the whole subject discussed at length in Marks' 'Tyburn Tree, Its History and Annals,' London, Brown, Langham & Co., n. d. (not earlier than September, 1908) from which much of the above has been taken.

The case of Rex v. Walcott (1696), Shower 127; 1 Eng. Rep. 87, may be noted. Thomas Walcott had been convicted of high treason (he took part in the Rye House Plot, 1683), and was executed at Tyburn. His sentence ran: 'Quod predictus Thomas Walcott ducatur ad Gaolam dicti domini Regis de Newgate unde venit et ibidem super Bigam ponatur et abinde usque ad furcas de Tyburn trahatur et ibidem per Collum suspendatur et vivens ad terram prosternatur, et quod secreta membra ejus amputa(n)tur et interiora sua extra ventrem suum capiantur et in ignem ponantur et ibidem comburentur, et quod caput ejus amputetur, quodque corpus ejus in quatuor partes dividatur et illae ponantur ubi Dominus Rex eas assignare voluit.'

Twelve years afterwards the attainder consequent upon this judgment was reversed on writ of error by the Court of King's Bench, and in 1696 this reversal was affirmed in Dom. Proc., the sole ground being that the words 'ipso vivente' were omitted after 'comburentur' and no words used which would be tantamount, such as 'en son view.' To the argument that it would be impossible to burn a man's bowels when he was alive it was answered, 'Tradition saith that Harrison, one of the Regicides, did mount himself and give the executioner a box on the ear 'after his body was opened.' The whole report is replete with learning on this horrible subject.

See my paper "Canadian State Trials: The King v. David McLane," Trans. Roy. Soc. Can. Series III, Vol X (1916), pp. 332, 334.

⁴⁷It was the conviction of Col. Lynch for high treason which drew the attention of the Parliament forcibly to the hideousness of the form of execution; his sentence was commuted and he was afterwards pardoned, he became a member of Parliament for an Irish constituency.