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## A CRIMINAL CIRCUIT IN UPPER CANADA A CENTURY AGO

WILLIAM RENWICK RIDDELL<sup>1</sup>

More than a century ago the province of Upper Canada was divided by the judges of the Court of King's Bench into three circuits, each of a number of district towns; and the three judges of that court took each one circuit twice a year by an arrangement made by themselves and publicly announced. The Court of King's Bench was the only Superior Court in the province, but it very seldom tried a criminal case; most of the charges of crime were tried before a Court of Oyer and Terminer and General Gaol Delivery, presided over by one of the judges of the Court of King's Bench who received a commission for that purpose—and the same judge received a commission of assize and nisi prius empowering him to try civil cases. These commissions the judge of assize held "on circuit" and together they enabled him to try all cases, civil and criminal. The Courts of Quarter Sessions of the Peace tried and disposed of many minor offenses, but all of real importance came to the assizes.<sup>2</sup>

After each circuit, spring and fall, a century ago there was an established practice for the assize judge to make a formal report in writing to the Lieutenant-Governor of the capital cases on his circuit. Sometimes a full report of all the criminal cases tried before him was made by the judge.<sup>3</sup> From these reports a good idea of the state of crime in the province can be formed.<sup>4</sup>

<sup>1</sup>Justice of the Supreme Court of Ontario, Toronto, Can.

<sup>2</sup>Nominally the Courts of Quarter Sessions had jurisdiction over all felonies and misdemeanors, and many thousands of thieves, etc., were hanged by such courts in Tudor and Stewart times. But by the end of the eighteenth century, and for some time before, in practice, all capital charges went to the Assizes. There is no record of a Court of Quarter Sessions trying a capital felony in Canada.

<sup>3</sup>The Ordinance of the Province of Quebec (1789), 29 Geo. III, c. 3, passed April 30, 1789, by sec. 4, provided, "That on All trials to be had in either of the new Districts (Lunenburg, Mecklenburg, Nassau, Hesse, and Gaspé) before Commissioners of Oyer and Terminer of General Gaol Delivery, when the Chief Justice of the Province (of Quebec) 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. . . ." And sec. 5 provides for a full report of indictment, evidence, etc., where the sentence extended to life or limb or more than twenty-five pounds sterling.

While 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

In the fall of 1820, Chief Justice Powell took the Eastern Circuit, i. e., the Midland, Johnstown and Eastern Districts.

In the Midland District the court sat at Kingston and there were three convictions of capital felony. The first was for a crime continually recurring, a charge of which is "easy to make, hard to prove, but harder still to disprove," the hideous crime of rape. John McIntyre, a sapper and miner, with three others went to the house of his comrade, Alexander Dick, where they found Dick's wife, Nancy, alone. The brutes overpowered her, and three of them, including McIntyre, violated her.<sup>5</sup> The chief justice recommended that the law should take its course.<sup>6</sup> A subsequent petition from Alexander Dick and his wife in favor of McIntyre received no consideration at the hands of the chief justice. He said: "I cannot consistently, with my sense of duty, second the application of the injured party. . . . Example is necessary for the protection of females, whose occupation retains them

1792 (as before) for the trial judges to make a report to the Lieutenant Governor upon every capital sentence 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, custom or usage 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 the 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.

<sup>4</sup>Many of these are preserved in the Archives at Ottawa in the Sundries, Upper Canada. The information in this article is from the Sundries, Upper Canada Series unless otherwise stated. In the Term Book the Assizes are fixed to begin as follows: Cornwall, August 14; Brockville, August 21; Kingston, August 31. I have given these three in the reverse order, as that is the order in the Chief Justice's Reports.

<sup>5</sup>About thirty years ago I defended four men from Campbellford who were all found guilty of an offense on all fours with this—the fourth as principal in the second degree. Mr. Justice Rose sentenced them all to the penitentiary for life.

<sup>6</sup>Rape was still a capital offense, as 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. This Act (1873), 36 Vic., c. 50 (Dom.), was due to the efforts of Thomas Moss, Q. C., afterwards chief justice of Ontario.

alone in their houses, in the absence of their husbands, fathers and brothers."<sup>7</sup> And McIntyre was hanged.

The second capital case was that of Thomas Yearn, "a visionary who spends most of his time wandering through the country in search of mines of gold and silver." He had found some horses on a remote common and brought them to his brother's. The brother at once let them loose. The chief justice thought the evidence too equivocal to justify a capital conviction and recommended a pardon, which was promptly given to the unfortunate man. It was apparent that he had no real intention to steal, and, moreover, while the sentence of death was always pronounced for grand larceny,<sup>8</sup> the practice was to commute to banishment. Indeed, John Beverley Robinson was able, when the question was raised in 1828, during the Willis controversy, to say that in his time in office, going back to 1812, there had been no executions for simple horse stealing.<sup>9</sup>

The third capital case at Kingston was that of Michael Conway (or Conoway). This man had been a very gallant soldier during the war of 1812-15 and on receiving his discharge had entered civil employment. He was otherwise without marked vicious tendency, but was given to drink, then an almost universal failing in Upper Canada. His employer sent him to town with a team of horses and a sleigh. Conway got drunk and sold the horses and sleigh, spending the proceeds in drink. The case was a perfectly plain one and he was convicted and sentenced to death. The chief justice, however, respited the execution until the pleasure of the Lieutenant-Governor should be known; he advised that the old soldier should not be hanged, but should be banished for life. Accordingly, Conway received a pardon conditioned upon his removal from his majesty's dominions for the term of his natural life.<sup>10</sup>

The chief justice went also to Brockville to hold the Assizes for the Johnstown District. Here also there were three capital convictions. The first was that of John Rees for horse-stealing. The chief justice reported that Rees was a practiced offender and added, "I submit

<sup>7</sup>Letter, September 22, 1820, from Powell to the Governor's secretary.

<sup>8</sup>The distinction between grand and petty larceny was abolished in the *Annus Mirabilis* of Canadian criminal legislation, 1841, by the statute 3, 4 Vic., c. 25, s. 52, the same statute, s. 3, made the punishment for simple larceny seven years' imprisonment or less, and by s. 29, stealing horses, cattles, etc., fourteen years or less.

<sup>9</sup>See the papers relating to the removal of Mr. Justice John Walpole Willis published by order of the House of Commons.

<sup>10</sup>Transportation was the usual punishment for such crimes in England at this time; but as transportation was practically impossible in Upper Canada, the legislature in 1800 by the Act 40 Geo. III, c. 1, s. 5 (U. C.), substituted banishment from the Province, etc. This also ceased in 1841, 4, 5 Vic., c. 24, s. 20.

his case as justifying the sacrifice of his life if any conviction of that offense can." As no record is extant of a pardon absolute or conditional it is almost certain that this practiced horse thief was hanged.

The second was a very curious case: John Ducalon, "a child, not eleven, small of that age, but of premature talent of mind and body, capable of being a dangerous instrument in the hands of others," was found guilty of horse-stealing. He had made a confession and it was read against him on the trial. The chief justice respited the execution for the consideration of the judges if the confession of such a child should be read.<sup>11</sup> There is no record in the term books of any argument. In those days such matters were considered by the judges in their private conferences, but as the chief justice recommended a pardon in any event, there can be no doubt that the child escaped punishment.

The third Brockville case was a very painful one. John Schaff was found guilty of stealing a steer for beef. At the common law the killing of an animal with intent to steal the carcass was a civil trespass only, but in 1741 the well-known Waltham Black Act made it a felony punishable with death without the benefit of clergy.<sup>12</sup> The crime became rather common in Upper Canada during the war of 1812, owing to the demand for beef, but those convicted of the offense were not executed but were banished. Concerning Schaff, the chief justice reported: "It is not usual on conviction for a first offense to execute, and the extremity of the distress of this man's family starving without this supply induced the jury who convicted him to recommend mercy in the most pressing way." He was pardoned conditionally—i. e., banished to the United States.

The chief justice also went to Cornwall to hold the Assizes for the Eastern District. There were no capital convictions at that place, but a very interesting case is reported, that of a Methodist teacher convicted of solemnizing a marriage contrary to law. The report dis-

<sup>11</sup>The practice had grown up in England for the judge presiding over a Court of Oyer and Terminer and Gaol Delivery, if he had doubts as to the sufficiency of an indictment, evidence, etc., to reserve a case for the opinion of the judges. If the judges were of opinion that the prisoner should not have been convicted, they recommended commutation or a pardon. This practice, which was without statutory warrant was regularized in 1848 by the Crown Cases, Act II, 12 Vic., c. 78.

In Upper Canada the first Act was (1851) 14, 15 Vic., c. 13 (Can.), a further Act was passed in 1857, 20 Vic., c. 61 (Can.).

See my article, "New Trial at the Common Law," 26 Yale Law Journal (November, 1916), pp. 49, sqq. esp., p. 60; "New Trial in Present Practice," 27 Yale Law Journal (January, 1918), pp. 353, sqq. esp., p. 359.

<sup>12</sup>See my article "Criminal Law in Upper Canada a Century Ago," 10 Journal of Criminal Law and Criminology (February, 1920), pp. 516, sqq.

closes a curious state of affairs in the District of Johnstown. The chief justice says: "A great proportion of the magistracy of the District of Johnstown stand indicted for similar offense under circumstances which induced me to bail them in the expectation of a rescission of the law." He recommends the Lieutenant-Governor to hold the conviction of the Methodist teacher "more in terrorem and to caution others." We shall leave the consideration of this case until another case of a similar kind is to be discussed.

Mr. Justice Campbell took the Home Circuit at Niagara for the Niagara District, August 14, and at Hamilton (now Cobourg) for the District of Newcastle,<sup>13</sup> September 18. At the Newcastle Assizes was tried an Indian lad, Negaunausing, ten years old, who had shot "a European boy, John Donaldson, of nearly the same age." He was a bright and intelligent lad; he quite understood what he was doing and his non-age did not save him from conviction—*Malitia supplet ætatem*. He was sentenced to death.

Mr. Justice Campbell made a formal report, the case of the young Indian was taken up by Charles Fothergill<sup>14</sup> of Rice Lake and Port Hope,<sup>15</sup> and the matter again submitted to the trial judge for his opinion. He advised clemency, although the boy undoubtedly understood the act and intended the result. There were three reasons for mercy—his youth, his ignorance of the consequences to himself of the crime, and the absence of any previous quarrel or ill-will.

<sup>13</sup>Called after the township in which it is situated, for sometime after the foundation of the present City of Hamilton there was a distinction made between Hamilton and Hamilton in the Gore District. The name Cobourg was well established by 1821, when the sheriff received a charter for a fair "in the Town of Cobourg in the Township of Hamilton," August 2.

For a provision for sale of the old site after construction of the new court house, see the statute (1836), 6 Wm. IV, c. 23 (U. C.). But that is another story.

<sup>14</sup>Charles Fothergill, J. P., was an Englishman of superior education. He had an elegant cottage at Port Hope and a residence on Rice Lake. He spoke against Robert Gourlay at the memorable meeting of the inhabitants of the township of Hope and Hamilton in 1818, which ended Gourlay's hope of success in the District of Newcastle. He became King's Printer in 1821, published the *Gazette* and the *York Almanac*. He, however, lost that situation in 1826 on account of his conduct in the House of Assembly, in which he was member for Durham. He was an accomplished naturalist and wrote several volumes of manuscript on the animals and birds of the continent. He supplied the celebrated artist, Bewick, with a horned owl, stuffed for illustration, and took an active part in an abortive scheme for a museum and institute of natural history and philosophy with botanical and zoological gardens attached. See my "Life of Robert (Fleming) Gourlay," *Ont. Hist., Soc., Papers and Records*, Vol. 14 (1916), pp. 37, 60.

<sup>15</sup>The Indian name "Ganaraska" was replaced by "Smith's Creek" from the mill stream at whose mouth it was built. As Cobourg, seven miles east, was sometimes known as Perry's Creek, the village had the name Toronto for a short time, but when made a port of entry the permanent name, Port Hope, (from the township in which it was situated) replaced all others (1820-21).

It was nearly a year before the pardon was decided upon: and the boy lay in gaol at Cobourg. When the pardon was granted it was on condition that the chiefs of the tribe to which he belonged should give security that he would banish himself from Upper Canada for life. On this being transmitted to the sheriff of the Newcastle District, John Spencer, he was in quandary as to the form the security should take and wrote to Major Hillier.<sup>16</sup> How the matter was arranged does not appear, but it is quite certain that the boy was not hanged.<sup>17</sup>

Mr. Justice D'Arcy Boulton took the Western Circuit, the District of Gore, August 28, of London, September 7 (the court still sat at Charlottesville), and the Western District at Sandwich, September 18.

The only case reported was that of Reuben Crandell, "Elder" Crandell of the Township of Malahide, an "Anabaptist preacher," convicted for solemnizing matrimony unlawfully and sentenced to banishment for 14 years.

At the common law a marriage in England was valid only if solemnized in the presence of a "mass" priest, episcopally ordained, and when at the Reformation the former connection with the Church of Rome was severed, but the Church of England retained the orders of priest and deacon, it was considered that the presence of a priest or deacon was necessary to a valid marriage.<sup>18</sup>

The laws of England by the royal proclamation of 1763 and the Quebec Act of 1774, 14 George III, c. 83 (Imp.), were the laws of this province when first organized 1791-2 (and in the same territory from 1774), except that the civil law of French Canada was in force in most civil matters.<sup>19</sup> That law did not help Protestants, and conse-

<sup>16</sup>The letter is dated, Hamilton, 26 October, 1821—Can. Archives Sundries, U. C., 1821. Several writers have been misled by want of caution in distinguishing the two Hamiltons.

<sup>17</sup>It was one of my earliest recollections seeing the crowd of people around Cobourg gaol, at the "Court House" (formerly Amherst Village), on the hill at the north of the town, to witness the execution of Dr. King for the murder of his wife by arsenical poisoning. The trees growing in the gaol yard were crowded with men. This was the first (and only) execution at Cobourg.

The Indian was possibly of the Mississaugua Band of the Bay of Quinte, who a few years later were settled in the Township of Alnwick—Chippewas, they are sometimes called; or he may have been one of the "Rice Lake Band"—what is now the Hiawatha Band—from the north shore of Rice Lake.

<sup>18</sup>As I purpose writing an article on the marriage laws of Upper Canada, I do not here give an exhaustive account of these laws and the reason for them.

Those interested in the English of marriage cannot do better than read the interesting cases, *Reg. v. Mills*, 10 Cl. & F. 534; *Beamish v. Beamish*, 9 H. L. Cas. 274.

<sup>19</sup>Marriage was in French Canada matter of canonical law; to be a valid civil marriage there must be a religious marriage, and the decree of the Superior Council of Quebec, June 12, 1741, enjoined the curés to observe the canon law in marriage. By the canon law, as by the common law, a marriage to be valid required the presence of a priest.

quently those desiring to be married applied to the chaplains at the military posts; sometimes there was no chaplain and the surgeon or adjutant performed the ceremony. These were recognized to be irregular, and the legislature in 1793 passed an act<sup>20</sup> validating these marriages, and authorizing magistrates to solemnize marriages in future until there should be five parsons of the Church of England in the district. This was not wholly satisfactory, and in 1797 another act was passed<sup>21</sup> making it lawful for a minister of any congregation or religious community professing to be members of the Church of Scotland or Lutherans or Calvinists, to celebrate the ceremony of marriage for members of his own congregation or religious community on first obtaining a certificate in the statutory form from the Court of Quarter Sessions of his district. Such ministers were, however, by Sec. 4, forbidden to celebrate the ceremony except on the publication of banns for three successive Sundays or the production of a marriage license. These were the only persons outside of priests and episcopally ordained deacons allowed by the law a century ago to celebrate matrimony, and so it remained for ten years longer.<sup>22</sup>

It was an offense in the English law for any person, however qualified, to perform the ceremony without banns or license; and anyone "knowingly and wilfully so offending" was on conviction to "be deemed and adjudged to be guilty of felony and . . . transported . . . for fourteen years."<sup>23</sup> This law was in force in Upper Canada except that for transportation the provincial statute substituted banishment.<sup>24</sup> It was, moreover, a common law misdemeanor for

<sup>20</sup>(1793) 33 Geo. III, c. 5 (U. C.).

<sup>21</sup>(1798) 38 Geo. III, c. 4 (U. C.). This Act was really passed in 1797. See report of Mr. Justice Elmsley, Canadian Archives, Q. 284, p. 51, and reserved for the royal pleasure. The royal assent was promulgated by proclamation by Peter Russell, administrator of the government of Upper Canada, December 29, 1798, 38 Geo. III.

<sup>22</sup>In 1830 by the Act II, Geo. IV, c. 36 (U. C.), clergymen and ministers of the Church of Scotland, Lutherans, Presbyterians, Congregationalists, Baptists, Independents, Methodists, Mennonists, Tunkers and Moravians were empowered, on taking out a license from the Court of Quarter Sessions. The list was extended by the Act (1857), 20 Vic., c. 66 (Can.), and the Act (1896), 59 Vic., c. 39 (Ont.), but marriage is not yet "wide open." See *Rex v. Brown* (1908), 17 O. L. R. 197.

<sup>23</sup>(1753) 26 Geo. II, c. 33, s. 8 (Imp.).

<sup>24</sup>The royal proclamation of 1763 and the Quebec Act of 1774 were probably effective to introduce the Act of 26 Geo. II 33, but all doubt was removed by the Provincial Act of (1800) 40 Geo. III, c. 1, U. C. The Act prescribing banishment in the stead of transportation was the last named Act of 1800, 40 Geo. III, c. 1, s. 5. Curiously enough the provision in the Act of 22 Geo. II, sec. 18, that the Act should not apply "to any marriage solemnized beyond the seas," was not considered to prevent its being in force in Upper Canada.

Professor Newman in an historical article in the Baptist Year Book for

anyone who was not duly qualified to perform the marriage service.

Crandell had formerly lived in the Township of Cramahe in the County of Northumberland and District of Newcastle, and was there the minister of a congregation of Baptists—they called themselves "Calvinists" because they had "cordially embraced those five grand points of gospel doctrine which Calvin manfully defended against the errors of Popery, viz.: Presdestination, particular redemption, effectual vocation, justification by the imputed righteousness of Christ and the perseverance of the saints to glory."<sup>25</sup> Crandell appeared before the Court of Quarter Sessions for the District of Newcastle April 9, 1805, and obtained the qualifying certificate as minister of the religious congregation of Calvinists, and thereupon was enabled to celebrate the marriage ceremony between persons of his own congregation within that district.<sup>26</sup> But he removed to another district and performed the ceremony there; this in itself rendered him liable to prosecution for a misdemeanor at the common law.<sup>27</sup> He had, however, acted without banns or marriage license and it was decided to prosecute him under the act of 1753.

Mr. Justice Boulton not only reprieved Crandell, he released him that he might submit a petition for clemency to the Lieutenant-Governor in person. He reported the case saying that Crandell was of good character, but ignorant and misinformed as to the law, and as no one had so far suffered punishment for this offense (as he learned from John Beverly Robinson, the attorney-general who had prose-

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1900, p. 25, says that Crandell came a young evangelist from the United States about 1794, and settled in Hallowell (now Picton), Prince Edward County.

As a result of his labors a church was organized about 1795, of which the Haldimand Church is the perpetuation. Within the next few years the Cramahe, Rawdon and Thurlow churches were organized in the same region, and as early as 1803 these feeble churches formed the Thurlow Association.

The name "Anabaptist" was very frequently used to designate the religious communion now generally called Baptist. Usage now restricts the former appellation to the people of continental Europe of the sixteenth century and those who were immediately influenced by them. There were in England two schools of Baptists—the Arminian and the Calvinists. Most of those in Canada have been Calvinists like Crandell and the Clinton Church. I have to thank the Rev. Dr. Gilmour of McMaster University for some of the above information.

<sup>25</sup>See the address to Sir Peregrine Maitland, Lieutenant-Governor of Upper Canada, of the Baptist Church in Clinton, District of Niagara, signed by John Upfold, pastor, and Jacob Beam, church clerk, dated at Clinton, January 16, 1821, Canadian Archives Sundries, Upper Canada, 1821.

<sup>26</sup>See Note 4 to my article, "Some Early Legislation and Legislators in Upper Canada," 33 Canadian Law Times, Second Paper, February, 1913, p. 103.

<sup>27</sup>This was sometimes done by information ex officio. See for one case in York (Toronto) in 1802, Note 5 to the article mentioned above in Note 26. Sometimes, however, the charges were prosecuted by indictment.

cuted for the Crown<sup>28</sup>) he recommended mercy. The attorney-general was not quite so favorable; he pointed out that the conviction was not for officiating without legal qualifications, but for violation of the Statute of 26, George II. c. 33, and that the judge had no discretion in the matter. "This man's case is distinct from that of Mr. Cook or Mr. Ryan and the other preachers complained of . . . they assuming an authority which they had not, pretended to solemnize matrimony pursuing the legal forms . . . this man . . . solemnized matrimony in a manner that could not have been legal whatever was his authority."<sup>29</sup>

Crandell did not delay. On the very day of his conviction, September 9, he drew up a petition for a pardon, in which he said that he had been ignorant of the law until the conviction of Henry Ryan and since that time he had desisted. The grand jurors, some of whom were Methodists, but some members of the Church of England, joined in a representation that though they believed Crandell to be an ignorant man, he was useful to the neighborhood, and they recommended clemency. It is satisfactory to know that he received a free and unconditional pardon.<sup>30</sup>

Mr. Cook mentioned by the attorney-general was convicted at the Niagara Fall Assizes, 1819, before Powell, C. J. He was not known as a minister of any sect and produced no credentials. The jury made a strong recommendation to mercy, which the court did not second, but nevertheless Cook received a pardon.<sup>31</sup>

<sup>28</sup>By the Term Book of the Court of King's Bench it appears that the attorney-general took the Crown business at the Niagara Assizes and on all the Western Circuit, while the solicitor-general, Henry John Boulton, took the Newcastle Assizes. Presumably he took the Eastern Circuit also.

<sup>29</sup>Both these letters are dated from Charlotteville, September 10, 1820, that of the judge was to Maitland, that of the attorney-general to Major Hillier, Maitland's secretary. The attorney-general added "He goes to York, I believe, with much interest made in his favour." He thought Crandell's character "indifferent," but that remark seems unjust.

<sup>30</sup>There were at this time in Upper Canada about six hundred regular Baptist Communicants, but several thousand people attended the Baptist churches. In addition to the Clinton Conference there was an association eastward of York by the name of the Haldimand Baptist Association, consisting of six churches whose ministers were licensed to celebrate matrimony. See the Address of the Baptist Church, referred to in Note 25, *supra*.

<sup>31</sup>See Powell's Report, August, 1819, Canadian Archives, Sundries, Upper Canada, 1819. I have not been able to trace Cook further; he does not seem to have belonged to any recognized body of Christians. At the same Assizes were tried Henry Pope, an English Wesleyan Methodist minister, and Mr. Eastman, i. e., the Rev. Daniel Ward Eastman, a Presbyterian minister, settled in the Township of Grimsby, and authorized under the Provincial Statute. The former was found guilty of solemnizing marriage contrary to law, "but not feloniously, as charged in the indictment." Upon this the chief justice entered no judgment as the verdict was equivalent to an acquittal. This was Henry Pope, an Englishman, who was stationed at Niagara in 1819 by the English

Mr. Ryan was the well-known Elder Henry Ryan, the Boanerges of early Canadian Methodism. I have not yet been able to find any official record of his conviction, but as the offense was not capital, it might not be specially reported.

There were two bodies of Methodists in the province at this time—the Methodist Episcopal, in connection with the Church in the United States, and the British (or English) Wesleyan, in connection with the British Conference. The first ministers, preachers or teachers were from the United States, and it was not till 1816 that the British Conference sent their missionaries into the province because there was “much prejudice in many of the inhabitants of Upper Canada against American missionaries.”<sup>32</sup>

The British Methodists as a rule submitted to the law. They had no right in England in respect of the solemnizing of marriage and generally avoided setting up any claim in the colony. But the Episcopal Methodists were different. In the United States, from which they

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Wesleyan Conference. Sanderson's “First Century of Methodism in Canada,” Vol. I, p. 104; Carroll's “Case and His Contemporaries,” Vol. 2, sec. 170, et al. Mr. Eastman was acquitted, although, as the chief justice reports, he was proved to have known that the license had been obtained by fraud, under a false name, as a spinster, by a woman known to him to be the wife of another man. Daniel Ward Eastment was a native of Goshen County, New York; he came to Beaver Dams, near St. Catharines, in 1801, then became a pastor of a Presbyterian church in Stamford. After ordination at East Palmyra, N. Y., 1802, he took up residence in Beaver Dams, where he had a farm of fifty acres. In 1809 he organized the churches at Louth and Clinton and at the close of the war removed to Barton, in 1819 to Grimsby, where he lived until his death in 1865. He is said to have married nearly 3,000 couples in the course of his ministry. Gregg's “History of the Presbyterian Church in Canada,” Toronto, 1885, gives a full account of Mr. Eastment and his labors.

Unless there is a mistake by the chief justice in his report, or by the attorney-general in his letter, the charge was laid “feloniously,” whereas if the real offense was performing the ceremony without having due qualification, as Robinson's letter says, it was really a misdemeanor, and the word “feloniously” was improperly inserted. If so the verdict was right and the chief justice was right in considering it as an acquittal; for in those days if the offense was not a felony, but was charged as such, there could be no valid conviction. I remember succeeding in a defense at Cobourg before Sir Thomas Galt in just such a case of misdescription.

The chief justice points out that juries are very loath to convict of felony in such cases and recommends a relaxation of the law.

<sup>32</sup>See letter to Henry Goulburn, Undersecretary of State for War and the Colonies, dated from Wesleyan Mission House, 77 Hatton Garden, 3 July, 1821, signed by John Burdsall, Jos. Taylor, and Richd. Watson, Secretaries. Canadian Archives, Sundries, Upper Canada, 1821. Four of their missionaries were sent in 1816 from Lower Canada, and as many as eight came in by 1821, when the British Conference, finding that there was “no evidence of their American brethren interfering in political questions” and that they “generally remained in the Province during the late war,” not thinking it well to carry on warfare with their American brethren, withdrew the missionaries except at Kingston—that was different from the remainder of the Province, as it was “a great naval and military station.” See same letter.

came,<sup>33</sup> they had the right to perform the ceremony and they claimed the same right in Canada. There were many petitions from Methodists to the legislature—which was wholly legitimate; but some of the ministers did not stop at petitioning, they, in the face of the law, ventured to solemnize matrimony between members of their flock. They were men of strong religious feeling, self-sacrificing, devoted to the saving of souls, but, although they repudiated the dogma that marriage is a sacrament, they seemed to think that their ecclesiastical position gave them a right against the law of the land. The appalling consequences on the status of the woman and her children do not seem to have occurred to them.

Henry Ryan was a presiding elder, i. e., president of the district, from 1810 till 1823, and it is said that he brought himself within the law, but was pardoned on account of his well-known loyalty.<sup>34</sup>

The difficulty of obtaining a verdict of guilty to a charge of felony under the Statute of 26 George II, was pointed out by the chief justice in his report of the Niagara Falls Assizes, 1819, and he recommended a relaxation of the law (see Note 31 ante). We have seen, that in his report of the Eastern Circuit for the fall of 1820 he expected a change; his expectation was not disappointed. In the session of 1821 the legislature passed an act "for the more certain punishment of persons illegally solemnizing marriage within the province," which made it a misdemeanor for anyone not legally authorized to marry any persons and for anyone legally authorized to marry without banns or license—the prosecution to be begun within two years.<sup>35</sup>

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<sup>33</sup>Andrew Prindle, born in what is now Prince Edward County, in 1780, ordained 1806, and stationed at Ottawa, is said to have been the first native-born Methodist Episcopal minister in the Province.

<sup>34</sup>He was an Irishman who first appears as a Methodist minister in Upper Canada in 1805, at the Bay of Quinte. From that time until 1810 he was an ordinary member of the Conference, but in 1810 he became presiding elder, which position he occupied until 1815, when the Province was divided into two districts. From that time until he took a mission in 1824 he was presiding elder of one or other district. He subsequently led a portion of his church to form an independent church, the Canadian Wesleyan Methodist Church (1829), the "Ryanites," which after a few years merged in the Methodist New Connexion (1841), at which time it had twenty-one preachers and two thousand four hundred and eighty-one members (Webster, p. 237).

A good account of Elder Ryan will be found in Canniff's "History of the Settlement of Upper Canada," Toronto, 1869, pp. 295 sqq. This is a most interesting book, but unfortunately disfigured by errors and inaccuracies in fact and by defective proof-reading.

<sup>35</sup>(1821) 2 George IV, c. 13 (U. C.).

Many of the Methodist writers speak of the prosecution—what they call persecution—of their ministers. Most of the references are traditional and not wholly to be relied upon, and all that I have seen indicate that they believed the rights of their ministers interfered with. Many wholly baseless assertions

Presbyterians of the Church of Scotland claimed that their church was established in Scotland and their ministers claimed the same rights as to marrying as the clergy of the Church of England. Unfortunately for them it was the laws of England and not the laws of Scotland that were introduced into the province and their claim was disallowed.

are made. The following is a sample taken from Webster's "History of the Methodist Episcopal Church in Canada," Hamilton, 1870:

"Some Methodist ministers at a former period solemnized matrimony, but the government had refused to acknowledge such marriages legal, and in consequence the authorities had given the ministers who thus officiated, considerable annoyance. Rev. Joseph Sawyer had been obliged to leave the country for a time, in order to escape the vengeance of the bitter enemies of Methodism, though he was a *regularly ordained* minister, and at the time presiding elder, simply because he had ventured to solemnize marriages in his district, and that at a time when there was no law in the land passed by the representatives of the people forbidding it. Rev. Henry Ryan was sentenced to banishment to the United States by an obsequious judge for a similar offense, but the sentence was not carried into execution against him in consequence, it is said, of his well known loyalty. The Rev. Isaac B. Smith was prosecuted for marrying a couple on his charge. He protested against the claims of superiority set up by the would-be "Established Church," stood his trial, pleaded his own case, and, notwithstanding all the legal advantages of his opponents, the technical skill of adverse lawyers, the exertions of the prosecuting counsel, and the very apparent partiality of the presiding judge, he won the suit, the jury deciding in his favour."

This is very inexact.

1. Methodist ministers never solemnized matrimony in this Province legally until after the Statute of 1830.
2. The government had not refused to acknowledge these marriages as legal, the legislature had full control.
3. There was a law of the land passed by the people's representatives in 1800 introducing the English law and forbidding such marriages.
4. "The obsequious judge" did not make the law and had no option but to sentence Ryan to banishment.
5. The jury which tried Isaac Smith were false to their duty.

Sawyer came to the Province in 1800, became presiding elder 1806, and remained such until he "located," i. e., went into secular life in 1810. He does not appear in the conference lists for 1804 or 1805; he may have been absent to allow the three years to elapse during which a prosecution under 26 George II could be brought. See Sanderson's "First Century of Methodism, etc.," pp. 36, 41, 46, 48, 49, 53, 58, 59.

Isaac B. Smith became Henry Ryan's son-in-law; he came to the Province in 1807, "located" in 1812; returned to clerical service 1817, was superannuated in 1825, and went to the United States in 1829. See Sanderson's "First Century of Methodism, etc.," pp. 48, 49, 62, 71, 88, 100, 111, 123, 137, 148, 168, 228.

Rev. John Carroll, in the first volume of his "Case and His Contemporaries," p. 148, sec. 17, speaking of the Rev. Isaac B. Smith, a Methodist missionary, says: "He was courageous. After his ordination he ventured to marry a couple within the Province boundaries, and was, consequently prosecuted by the privileged class, who claimed the exclusive right to celebrate matrimony. Unlike the excellent but timid Sawyer, who for a time fled the country on a similar charge being preferred against him, Smith stood his ground, searched into the law on the subject, plead his own cause, and despite the talents and legal lore of the prosecuting attorney, and the judge's brow-beating, came off scot-clear. In this he was more fortunate than his father-in-law, Mr. Ryan, who, according to report, was banished for a similar offense, though afterwards made a subject of the government's clemency for his known loyalty."

They were put in the same category as Lutherans and Calvinists by the legislature of 1798.

Being thus favored above the Methodists, they were not found to be offenders against the law. There are, however, a few instances of transgressing on the part of those who were in fact Presbyterian, though not of the communion of the Church of Scotland.

July 20, 1809, instructions were given by Lieutenant-Governor Francis Gore to the attorney-general, William Firth, to "institute proceedings against Mr. McDowall of Earnestown for solemnizing marriages illegally and Reauben Beagle of the same place for the same offense."<sup>36</sup>

The Rev. John Langhorne complained to Governor Gore January 4, 1811, that "Mr. McDowel the preacher to the Low Dutch has been again at his old practice marrying unlawfully"; he had performed the ceremony December 11, 1810, between John Phillips and Polly Defoe (daughter of Samuel Defoe), both of Fredericksburg and not of his religion, but nothing seems to have been done about it, though the clergyman closes his letter, "God bless the protection of old England as to its clergy and the defender of the faith, Amen and Amen." "Mr. McDowell" was the "Mr. McDowall" of Ernestown already mentioned and a Lutheran, afterwards a Presbyterian.

The circuits did not form the whole of the duties of His Majesty's justices. One William Stoutenburgh had been convicted before Mr. Justice Boulton at York in 1818 of petty larceny and had been sentenced to two months' imprisonment in the common gaol and to receive 25 lashes. He made his escape from the gaol, but repented and returned in 1820. He then petitioned that the whipping might be remitted. The chief justice reported that whipping was the "most exemplary punishment," and Mr. Justice Boulton did not advise clemency, but rather the

<sup>36</sup>Canadian Archives Sundries, Upper Canada, 1809. Beagle I cannot trace, but Mr. McDowall was the Rev. Robert McDowall who came to this Province in 1798 from the United States, a minister of the Dutch Reformed Church, and organized churches from Brockville to Toronto. In 1800 he accepted a call to the congregation of Adolphustown, Ernestown, and Fredericksburgh on the Bay of Quinte, where he labored until his death in 1841. He remained of the Classes of Albany until 1818 when he became a member of the Presbytery of Canada, and afterwards joined the synod of the Church of Scotland, organized in 1831; so that in 1809 he was not technically a Presbyterian. He is said to have married up to 1836 one thousand and one hundred couples; in his record for 1800-1822, he has entries of seven hundred and fifty-two. Burns' "History of the Presbyterian Church, Toronto, 1885, pp. 168-181.

July 14, 1802, an information *ex officio* was filed against John Wilson, who, on June 7, 1801, pretended to solemnize matrimony between Paul Marin of York, baker, and Jane Butterfield, of the same place, spinster, otherwise called Jane Burke. Nothing further seems to have been done on this information and I cannot find what qualification John Wilson had, if any.

reverse, as he thought it "not a good time for clemency." The prisoner renewed his prayer for relief. He produced a certificate<sup>37</sup> from Captain John Button of the First York Militia that he had joined the captain's company of militia "cavalry" in 1815, and had "equipt himself with a good hors, sadel and bridel and youniform and cuterments as the law equared and he always dun his duty faithful when he was cold upon."

Luke and Eliza Stoutenborough—so they spelled the name—his parents, also presented a petition. They said they had brought up fourteen children respectably, that their son's offense was "taking"<sup>38</sup> some tar from a neighbour to repair a canoe he had on the River Humber for fishing and that they were ready to make recompense. The mother appealed to Lady Sarah, the wife of Sir Peregrine Maitland. It does not appear what the result was or whether the young man escaped whipping or not, but whatever the course taken by the authorities, Stoutenburgh does not appear to have been turned from evil ways. August 25, 1821, Samuel Ridout, sheriff of the home district, wrote to the Governor's secretary, McMahan, saying that an attempt would probably be made by some persons unknown to release "William Stoghtenborough," then in confinement in the York gaol on a charge of capital felony, and asking for a military sentinel at the gaol during the nighttime until the Assizes.<sup>39</sup>

<sup>37</sup>Dated at Markham, November 17, 1820: the gallant captain was an efficient and soldierly officer if he was a bit short in orthography.

<sup>38</sup>"'Convey' the wise it call." It is no wonder that the petitioners were indignant at a neighbor prosecuting for such a trivial offense—what we used to call "hooking" in my boyhood days and would have indignantly resented it being called stealing.

<sup>39</sup>Canadian Archives Sundries, Upper Canada, 1821. Whipping in petty larceny survived until 1841, 4, 5 Vic., c. 25, 5, 6 (Can.), and was restored in certain cases of crime in 1847, 11, 12 Vic., c. 49, 5, 9 (Can.).