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THE SAD TALE OF AN INDIAN WIFE

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When in May, 1814, the Special Court of Oyer and Terminer sat in the White House or Union Hotel at Ancaster, in Upper Canada, to try those accused of High Treason against King George III by joining the American invader, about seventy Indictments for High Treason were found by the Grand Jury. Only nineteen of those charged were in custody and they were duly tried—four were acquitted, eight executed, three died in prison, one escaped and three were eventually allowed to go to the United States.

Many of those accused had gone to the United States before the Court sat, and many had otherwise eluded the Canadian soldiers and officers of the Crown, amongst them Epaphrus Lord Phelps.

Those who had gone to the United States, the country was well rid of; such of them as had no property were not thought of again, but those of them who had property were kept in mind, because by High Treason they forfeited all their property to the Crown. The forfeiture, however, took effect not on indictment, or even on conviction, but on attainder—that is, when judgment was pronounced upon the traitor.[1] This was the law of England, for as Blackstone somewhat sententiously says: "After conviction only . . . there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment, the indictment may be erroneous, which will render his guilt uncertain and thereupon the . . . conviction may be quashed, he may obtain a pardon, or be allowed the benefit of clergy. . . . But when judgment is once pronounced, both law and fact conspire to prove him completely guilty. . . . Upon judgment, therefore, of death, and not before, the attainder of a criminal commences, or upon such circumstances as are equivalent to judgment of death."[2]

Epaphrus Lord Phelps lived in the District of Niagara[3] and he had a lease for 999 years of one thousand acres of land on the Grand River from the well known Mohawk chief, Joseph Brant—and this valuable land was worth seizing for the Crown. But Phelps could

[1]This had long been established law, but a decision to that effect is reported in our courts in comparatively modern times: Doe dem. *Gillespie* v. *Wixon*, 1848, 5 O. S. 132.

[2]*Blackstone* Commentaries, Bk. IV, p. 374—of course high treason was without benefit of clergy. Blackstone is speaking of clergyable felonies, but the same rule applies in non-clergyable felonies and treason.

not be arrested to be brought to trial and formal attainder was impossible—consequently other proceedings must be taken, that the land might be seized. The criminal law of England, introduced in part of what was afterwards Upper Canada by the Royal Proclamation of 1763, confirmed in all the territory by the Quebec Act of 1774, was formally and specifically made the law of the Province by the Act of 1800.[4] That law provided that when an Indictment was found against any person for treason and he was not in custody, a writ of Capias was to be issued by a Judge directing the Sheriff of the County in which the Indictment was found to take the accused and him safely keep to answer the charge; if the Sheriff could catch him, he was (in practice) kept in gaol till the next Assizes; if not, a return was made of *non est inventus,* the Indictment was moved by Certiorari into the King's Bench and the accused was then "put in the *exigent* in order to his outlawry." The Court of King's Bench issued a "writ of exigent," or *"exegi facias,"* to the Sheriff, commanding him to cause the accused "to be exacted from County Court to County Court until he shall be outlawed according to the law and custom of England if he shall not appear. If he shall appear, that then you take him and him safely keep that you may have his body before us at Westminster, &c., &c." Thereupon the Sheriff at five successive County Courts "exacted, proclaimed and required to surrender" the accused; if by the fifth exaction he did not surrender, on a return *quinto exactus,* the Court pronounced judgment of outlawry against him, which had the same effect as to forfeiture as attainder.[5]

[3]The District of Niagara then contained an immense territory including the present Counties of Lincoln, Welland and Wentworth.

[4]The Quebec Act is (1774) 14 Geo. III, c. 83 (Imp.): the Provincial Act of 1800 is 40 Geo. III, c. 1 (U. C.).

[5]In the case of an indictment for any petty misdemeanor or on a penal statute the first process was a writ of *venire facias* ordered by a judge directed to the sheriff to summon the accused to appear: if he did appear the object was served, if not, and the sheriff returned that he had lands in the county, then at the end of four days a *distress infinite* was issued directing the sheriff to distrain the accused by all his lands and chattels to appear; and this writ might be issued from time to time until appearance; if the return to the *venire facias* showed that he had no lands by which he might be distrained or when distrained he did not appear, a *capias* was issued as in case of treason. In treason or felony there was no process before *capias*—in treason or homicide only one *capias* was in practice allowed (except where it was supposed that the accused was in some other county, in which case a *capias* was issued to the sheriff of that county under (1429) 8 Henry VI, c. 10, and (1432), 10 Henry VI, c. 6, as in other "Felonies and Trespasses"). In felonies other than homicide, the Statute of (1350) 25 Edward III, c. 14, provided for a second *capias,* but this was found to be impracticable and "the usage is to issue only one in every felony." *Blackstone* Commentaries, Book IV, p. 314 (1st Edit. 1769).

In misdemeanors, etc., while a judge might issue a *capias* at once, to bring about outlawry the strict practice was followed. After the first *capias* was returned *non est inventus,* a second or *alias capias* was issued and then a third or

The County Court in England was a Court incident to the jurisdiction of a Sheriff and the mere fact of a person being a Sheriff gave him (or her)[6] the right to hold a County Court. In this Province there was no statutory provision for County Courts; the four Courts of Common Pleas instituted by Lord Dorchester in 1788 were abolished and a Court of King's Bench formed in 1794; certain District Courts were formed in the same year with inferior jurisdiction and in 1792

pluries capias—on non-appearance and return *non est inventus* to the *pluries*, the proceedings were removed into the King's Bench by *certiorari* and a writ of *exigent* was issued and after five exactions, outlawry followed.

The number of County Courts at which the indictee was to be exacted seems to have differed at different times. I give the practice at this time which is explained with his usual correctness and clearness by Blackstone *op. cit.* (curiously enough he does not refer to the Statutes of 1429 and 1432).

The forms of the writs may be seen in Corner's Practice of the Crown Side Q. B., London, 1844.

[6]The original of the office in England is hidden in the depths of antiquity. It may be said, however, that it was established and the sheriff was a well known officer, when the common law of England was in the making. The function of the sheriff in those remote days may be gathered from his title itself. The word "sheriff" came from two Saxon words, "scir," a shire, and "geréfa" (the old form is "giróefa"); a chief magistrate, a "reeve." The exact authority of the geréfa is uncertain; it probably varied at various places and various times.

Before the Conquest in 1066, the "scirgeréfa" was an officer of high rank who was the representative of the King in his shire, presided at the shire-moot and was responsible for the due administration of the royal estates and for the execution of the law.

At the Conquest his wings were clipped, but he still continued to have judicial powers exercisable in certain courts (as is the case in Scotland to this day, where the sheriff depute is the judge ordinary constituted by the Crown over a particular division of the county).

As to his appointment in England it would seem that originally in some counties the office was hereditary, like an earldom. Westmoreland remained in that state till 1850 when the hereditary character of its shrievalty was abolished by Statute 13, 14 Vict., cap. 30, upon the death of the last Earl of Thanet, by which the title became extinct—the shrievalty being hereditary in this family. The result of a shrievalty being hereditary is shown by the curious incident that the celebrated Anne Clifford, Countess of Pembroke, Dorset and Montgomery, exercised the office in person, and as sheriff sat with the judges on the Bench at the Assizes of Appleby about 1650 (1 Co. Litt. 326 n.). In Scotland the hereditary nature of the sheriff's office had come to an end long before 1850, i. e. in 1747, by 20 Geo. II, cap. 43.

In many other shires, the sheriff was elected by the freeholders: there are corporations in England who elect their sheriffs to this day, e. g. London. But in most cases the sheriff is appointed by the Crown for one year only.

What is done is this: in November each year the Lord Chancellor, the Chancellor of the Exchequer, the President of the Privy Council and others of the Privy Council, and the Lord Chief Justice (or some of them) write on a slip of parchment the names of three persons, fit to serve as sheriff. His Majesty pierces the parchment with a gold bodkin at the name of one. This one is "pricked," i. e. nominated sheriff for the year.

None of these old time formalities was ever introduced into Canada—from the very beginning of British rule, the governor was given the power to appoint sheriffs, and that power exists today (R. S. O. 1914, cap. 16, section 2). See my address delivered before the Sheriffs' Association at Toronto, March 17, 1916, printed by order of the Legislative Assembly of Ontario.

still lower Courts, the Courts of Requests, were provided—all of these had civil jurisdiction and the Court of King's Bench had also criminal jurisdiction. Then each District had its Court of Quarter Sessions of the Peace.[7]

Nevertheless the commission of Sheriff was considered to give to the grantee the right to hold a County Court, or, as it was sometimes called, a Legal County Court, for the purpose of writs of exigent. No record of the holding of any such Court by the Sheriffs in Upper Canada is extant and it cannot be said that such Courts ever were in fact held. The fact that the Bailiwick of the Sheriff, i. e., the District,[8] contained in every case more than one County seems to have rendered the legality of such Courts doubtful. It being known that many traitors had escaped capture, the Legislature provided a means of procuring judgment of outlawry; the Act of 1814, 54 Geo. III, c. 13 (U. C.), "An Act to supply in certain cases the want of County Courts in this Province," became law March 14, 1814, which recited that "by law there is incident to the office of Sheriff a Court of exclusive jurisdiction in each County wherein all persons named in the legal Writ of Exigent shall be demanded, but that by reason that in the Province several Counties were contained in each of the Districts constituting the Bailiwick of the Sheriffs the Legal County Court is fallen into disuse to the great impediment of justice." The Act then constituted the several Courts of Quarter Sessions of the Peace, the Courts at which the Sheriffs should demand all persons named in any Writ of

[7]The Courts of Common Pleas were erected in consequence of the division of the territory afterwards Upper Canada into four Districts, Luneburg, Mecklenburg, Nassau and Hesse, by Lord Dorchester's Proclamation of July 24, 1788. These four courts continued (the names of the Districts were changed to Eastern, Midland, Home and Western by the Act (1792) 32 Geo. III, c. 8, U. C.) until they were abolished and the Court of King's Bench erected by the Act (1794) 34 Geo. III, c. 2, U. C. The District Courts were provided by (1794) 34 Geo. III, c. 3, U. C., these became County Courts in 1849 by the Act 12 Vic., c. 78, s. 3 (Can.): the Courts of Requests were erected by (1792) 32 Geo. III, c. 6, and became Division Courts in 1841 by the Act, 4, 5, Vic. c. 3 (Can.). The Courts of Quarter Sessions were Common Law Courts instituted by the mere granting a commission for the peace in and for any district.

[8]The districts as they existed in 1814 were as follows:

Name	When formed	Counties contained
1. Eastern	1800	Glengary, Stormont, Dundas, Prescott and Russell.
2. Johnstown	1800	Grenville, Leeds and Carleton.
3. Midland	1800	Frontenac, Lenox and Addington, Hastings and Prince Edward.
4. Newcastle	1802	Northumberland and Durham.
5. Home	1800	York and Simcoe.
6. Niagara	1800	Lincoln and Haldimand.
7. London	1800	Norfolk, Oxford and Middlesex.
8. Western	1800	Essex and Kent.

Exigent; and the Court of King's Bench was authorized on a return of *non est inventus* on an alias and pluries writ of Capias to issue a Writ of Exigent and award a Proclamation requiring the Sheriffs to demand the Party named three several times at three successive Courts of Quarter Sessions and to affix the Proclamation at the door of the Court House each time, and upon the third demand, the party not appearing, Judgment of Outlawry was to be pronounced by the Coroner and returned by the Sheriff with Writ and Proclamation, and the judgment of outlawry was thereupon effective.

This Act was apparently drawn under a misapprehension of the Law of England and under the supposition that in all cases an *alias* and a *pluries* writ of *Capias* was necessary before *exigent.* That, we have seen, is a mistake (see note 5). In the following year the error was rectified: the Act (1815), 55 Geo. III, c. 2 (U. C.), provided that the *alias* and the *pluries capias* should not be necessary except where required in similar cases by the Law of England. The Courts of Quarter Sessions of the Peace were declared to be "in the place of the Sheriff's County Courts in England as far as respects any purpose of outlawry or any proceedings therein." Then the Act provided fully for the practice. Capias, return non est inventus, alias capias, return non est inventus, exigent returnable the first day of the fifth term from that in which it was awarded (the Court has four terms every year), proclamation and demand at three successive Quarter Sessions, return and judgment of outlawry by the Court. This Act was to be in existence till the end of any session of Parliament sitting March 14, 1817; and the Act of 1814 was repealed.

On a day in Michaelmas Term, 55 Geo. III, Saturday, November 19, 1814, the Acting Attorney General, John Beverley Robinson, moved the Court of King's Bench (Scott, C. J., Powell and Campbell, JJ.) and obtained an order for a writ of *certiorari* to the Commissioners who presided over the Special Court of Oyer and Terminer[9] to return the Indictments against "Epaphrus Lord Phelps, late of the County of Haldimand in the District of Niagara, Schoolmaster."[10] The Attorney General also obtained a Writ of Certiorari addressed to the Justices of

[9]Themselves and their "associates"—the associates were mere "dummies" and the justices did all the work, sitting alternately. See my article, "The Ancaster Bloody Assize," 1814.

[10]See King's Bench Term Book No. 6 now in the Ontario Archives.

[11]Writ of Certiorari to the Special Commission and to the Ordinary Assize Judges were also obtained in the cases of 1. Daniel Phillips, 2. Abraham Harding, 3. Ebenezer Kelly, 4. Asa Bacon (or Baton), 5. Barnabas Gibbs, 6. Simon Maybe, 7. George Peacocke, Senior, 8. John Gibbs, 9. John Dixon, 10. Elisha Green, 11. John Bacon, 12. Henry Dockstader, 13. Jonas Olmstead, 14. Seth Smith, 15. William Sutherland, 16. Martin Feit, 17. Henry Ouston, 18. Frederick Ouston, 19. William Stewart, 20. Samuel Green, 21. John Harvey, 22. Elias Long,

Oyer and Terminer and General Gaol Delivery for the District of Niagara to return the writs of Capias against Phelps returned before them at their Court—this was the regular Assizes held at Niagara after the Special Court at Ancaster had risen.

The Indictment and proceedings being returned to the Court of King's Bench, a writ of *exigent* and Proclamation was obtained by D'Arcy Boulton,[12] the Attorney General, against Phelps on Saturday, January 14, 1815, the first day of Hilary Term, 55 George III.[13]

He was duly exacted for three successive Courts of Quarter Sessions, and on the First Day of Easter Term, 1816, the Sheriff made

23. Guy Richards, 24. John Shoefeldt, 25. William Merritt, 26. William Wallace, 27. Ira Bentley, 28. Joseph Lovitt, 29. Gideon Frisbee, 30. George Cain, 31. Phineas Howell, 32. Abraham Markle, 33. William James, 34. Eleazer Daggett, 35. Oliver Grace, 36. William Biggars, 37. Andrew Westbrook, 38. Samuel Jackson, 39. David Hill, 40. Benejah Mallory, 40. Silas Deane, 42. Josiah Deane, 43. Joseph Willcocks, 44. William Markle, 45. Eliakim Crosby.

George Peacocks, Jr., has been executed July 20, 1814, Nos. 32 and 43 were members of the House of Assembly and were expelled therefrom—the latter was found killed at Fort Erie in the uniform of an American colonel.

[12]D'Arcy Boulton, the Solicitor General, had been taken prisoner by a French privateer and was prisoner in France when John Macdonell, the attorney-general, was killed at the Battle of Queenston Heights, October, 1812. John Beverley Robinson, a law student not yet called to the bar, was made acting attorney-general; when Boulton returned to Canada during the short peace of 1814, he became attorney-general: Robinson went to England, but was soon made Solicitor General.

[13]The same order was obtained against all in list in note 11 except Nos. 35 and 36, on the first day of Trinity Term, 55 Geo. III, July 3, 1815, and *Exigent* and *Proclamation* issued "on return of alias capias non est inventus": on the same day, also against Nos. 5, 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 45, the reason of this duplication of process does not appear.

On Saturday, April 13, 1816, Easter Term, 56 Geo. III (Scott, C. J., Powell and Campbell, JJ.), D'Arcy Boulton, Attorney General, obtained "Duplicate Writs of Exigent against the undermentioned persons (on Mr. Sheriff's affidavit of the loss of the original writs):

1. Danl Phillips
2. Wm. James
3. Ira Bentley
4. Asa Bacon
5. Epaphrus Lord Phelps
6. Joseph Lovett
7. Ebenezer Kelly
8. Phineas Howell
9. Abram Markle
10. William Merritt
11. Abram Harding
12. George Cain
13. Gideon Frisbee
14. William Wallace
15. William Markle

These Writs all issued 26th April, 1816."

Another prosecution appears from the following entry in Term Book No. 6:

"In Hilary Term, 57 Geo. III, Friday, January 10, 1817, before Scott, C. J., and Campbell, J.

The King
vs.
Saml. Thompson
High Treason

Motion for Writ of Exigent in the above cause tested of the first day of Hilary Term instant.

Motion of D'Arcy Boulton,
Attorney General."

Issued 20 Jan'y '17.

his return, whereupon by virtue of section 9 of the Act of 1815, 55 Geo. III, c. 2 (U. C.), Phelps incurred the same forfeiture and disabilities as in cases of outlawry by the criminal law of England.[14]

This case was not, however, the only ground upon which the Crown could claim that the land of Phelps was forfeited. The Legislature in 1814 passed an Act[15] reciting that many persons inhabitants of the United States had claimed to be British subjects and had obtained lands in the Province, but had since the declaration of war withdrawn from their allegiance into the United States; and the Act declared that they should be taken and considered as aliens born and incapable of holding lands in the Province. The Act further provided for an Inquisition by a Commissioner "by the oaths of twelve good and lawful men" as to the persons so offending and their lands as of July 1, 1812. All persons interested were to have a year after the finding of the Inquisition or one year after the conclusion of Peace to traverse the Inquisition. Peace was declared after the Treaty of Ghent, December, 1814; but the Commissioner to inquire concerning the lands of Phelps and others did not sit until January 28, 1818. The Commissioner presiding was Abraham Nelles; he called a jury of twelve men, whose Foreman was William Nelles, and they found that Phelps was seized of the unexpired portion of the lease of 999 years from Captain Brant. No claim was made at the time against the right of the Crown; nor was any made under the Act of November 27, 1818,[16] vesting the estate of such "aliens" in Commissioners and giving all interested the right to claim within a limited time before the Commissioners with an appeal to the Court of King's Bench.

But when the Commissioners began to take possession of the land, there was trouble at once. The land had been leased by Brant, May 1, 1804, to Phelps for 999 years for providing for his wife, Esther, a Mohawk woman and three children born to them. The wife and children were likely to lose their support; Brant indeed was dead, but the Chiefs of the Six Nation Indians were alive to the importance of the matter. An Act was procured from the Legislature, April 14, 1821, giving Esther six months to traverse the Inquisition.[17]

Dr. William Warren Baldwin was retained by the Indians; he was Treasurer of the Law Society and had been in this high position five separate years and was to be such again. Baldwin filed a traverse

[14]See the return made by Attorney-General Boulton, May 27, 1817. Canadian Archives, Sundries U. C., 1817.

[15](1814) 54 Geo. III, c. 9 (U. C.) passed March 14, 1814.

[16](1818) 59 Geo. III, c. 12 (U. C.) November 27, 1818.

[17](1821) 2 Geo. IV, c. 31 (U. C.) April 14, 1821.

claiming that the Six Nations were allies and not subjects of King George III, a distinct though feudatory people; that the land given them by Sir Frederick Haldimand, October 25, 1784,[18] was theirs to dispose of as they would; that the lease was in accordance with Mohawk custom; that Phelps had such an estate as he could not forfeit, a trust limited to him providing for Esther Phelps and her children.

The case was argued before the two puisne Justices, Boulton and Campbell, JJ. (the Chief Justice, Powell, being absent), by Baldwin for the Traverser and Henry John Boulton, Solicitor General for the Crown in Michaelmas Term, 4 Geo. IV, 1823. The report[19] shows that it was well argued on both sides. The Solicitor General took the position that the "supposition that the Indians are not subject to the laws of the country is absurd; they are as much so as the French Loyalists who settled here after the French Révolution" (thé De Puisaye settlers). The Court held for the Crown and the Indian wife was left to the care of her tribe.

[18]A so-called treaty—see *Morris'* Indian Treaties—whereby October 25, 1784, Halidmand, then Governor General of Canada, at the direction of the Home Government did "authorize and permit the Mohawk Nation and such others of the Six Nation Indians as may wish to settle in that quarter, to take possession of and settle upon the banks of the river commonly known as the Ouse or Grand River running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river . . . which they and their posterity are to enjoy forever."

[19]*Taylor's* Reports, Court of King's Bench of Upper Canada, p. 47.