

A Trial for High Treason in 1838

By

HONOURABLE WILLIAM RENWICK RIDDELL,
LL.D., F.R.S.C., etc.



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XII.

A TRIAL FOR HIGH TREASON IN 1838.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., ETC.

The extraordinary fiasco of Mackenzie's Rebellion in 1837 had unhappy results for many real lovers of their country: some misguided persons lost their lives, many were exiled, many lost their lands, and not a few were in deadly peril of death or exile, but fortunately escaped the worst.

It is of some of these last that this paper is intended specially to deal.

Mackenzie's attempt to take possession of Toronto occurred early in December, 1837,¹ and rumours of his operations ran like wildfire throughout the Province.

In the Township of Eramosa a meeting was called of the inhabitants at the Central Schoolhouse about seven miles from Guelph to consider what was to be done. The meeting, held on December 7, was attended by some sixty or seventy persons of all politics. James Benham was called to the chair—a man of high standing in the community and one who desired reform in the Government; he appears to have called the meeting. James Peters was appointed secretary—the Township Clerk and of equally high standing and like views.² Benham addressed the meeting and a paper was largely signed by those present. At once the story went abroad that some of those who had been at the meeting had there plotted armed insurrection and were about to carry out their treasonable scheme.

Walter King, who had spoken at the meeting, laid an information against James Benham, James Peters and others before "Squire" John Inglis, a Justice of the Peace in Guelph.³ Inglis was a warm supporter of the Government and took proceedings at once. Following the old practice of Fielding and other English magistrates he gathered some thirty men under arms to "break up the rebel nest in Eramosa." Before daybreak, December 14, 1837,⁴ a detachment under Inglis arrested Peters and scarcely gave him

¹The outbreak was arranged for Thursday, December 7, 1837; but Monday, December 4, the Rebels were advancing and Col. Moodie was killed. Tuesday morning was spent in parleying and that evening all was over.

²Of James Peters it is said that he was one of the very few in this most drunken Province who never used alcoholic beverages, even at "bees." An "active, energetic, consistent Congregationalist, a Deacon in the Church at Speedside from its formation, always in the front ranks of the progressive, liberal-minded citizens of his time." *Guelph Weekly Mercury and Advertiser*, Aug. 2, 1906. The late Dr. George Peters, of Toronto, was a grandson; and Dr. Janet Armstrong, of Cobourg, is a granddaughter.

³At that time, and for years thereafter, in the country places of this Province the title "Squire" was given popularly to an active Justice of the Peace; the custom is not yet dead. They have not yet attained the title of "Judge."

⁴James Peters, in an account in the *Guelph Weekly Mercury and Advertiser*, Aug. 2, 1906, says he was arrested "before daylight one morning, that is on the 13th of December, 1837"; but Benham in an almost contemporary statement says, "on the night of the 13th or the morning of the 14th December, 1837, John Inglis, Esquire, one of Her Majesty's Justices of the Peace, with a body of armed men amounting to 30 or more entered our dwelling houses, with fixed bayonets and arrested James Benham." etc.

time to dress. Next the cavalcade of two sleighs went to the residence nearby of James Parkinson, and after getting breakfast there arrested one of his sons of the same name. The elder Parkinson had been a staunch supporter of the Government, but that did not help his son. James Benham, John Butchart, Hiram Dowlan, Calvin Lyman and William Armstrong were arrested in the same way. They were taken to Guelph and four of them, Parkinson, Dowlan, Lyman and Armstrong, had a formal examination there before Inglis and were admitted to bail;² but those who were considered the ringleaders received no such courtesy; they were sent at once without examination of any kind to Hamilton Gaol, and Benham, Peters and Butchart, after a long sleigh ride, arrived at Hamilton at 10 o'clock p.m. There they lay until the session in April, 1838, of the Commissioners under a Special Commission of Oyer and Terminer and General Gaol Delivery for the District of Gore.

We are so fortunate as to have at Osgoode Hall the original notes made by the presiding judge.

The Honourable James Buchanan Macaulay was the presiding Judge at this Special Assize; he had been a Puisne Justice of the Court of King's (Queen's) Bench since 1829 and was in 1849 to become Chief Justice of the Court of Common Pleas when it was formed in 1849, and Sir James and a Judge of the Court of Error and Appeal in 1857. He was a sound lawyer and a fair and impartial judge. When the Special Court of Oyer and Terminer and General Gaol Delivery for the District of Gore opened at Hamilton, Thursday, March 8, 1838, Mr. Justice Macaulay had as his associates, Hon. James Crooks, James Racey and Richard Beasley, but these gentlemen had no real authority or voice in the proceedings. A Grand Jury was sworn, Mr. Kirby chosen as foreman; the Grand Jury was charged and the Petit Jury sent home until Friday, March 23. The Grand Jury began at once to find True Bills amongst them—one against the seven men from Eramosa; while fifteen accused were released as nothing was found against them.

The first of those accused of High Treason to come before a Petit Jury were the seven from Eramosa who on Tuesday, March 27, 1838, were placed at the Bar to be tried for their lives.

The Crown Counsel was the new Solicitor-General, William Henry Draper;³ of English birth and descent he had run away to sea when a lad and arrived in Canada in 1820, not yet twenty years old. Abandoning the sea he came to Port Hope and entered the Law Society: by diligence and natural ability he achieved his call in 1828. Almost at once he obtained a place in the office of the influential Attorney-General, John Beverley Robinson, and soon entered politics on the Tory or Government side. He was a very sound, if somewhat narrow and technical, lawyer; and he

²Peters in the *Mercury* article says, "after being bled, in the pocket of course"—I assume he means paying costs of the Bail-bonds, etc.

³He had succeeded Henry John Boulton as Solicitor-General in March, 1837, when Boulton succeeded in the Attorney-Generalship Robert Sympson Jameson, who was made our first Vice-Chancellor.

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prosecuted these treason cases with vigour. With him there were no extenuating circumstances; the accused was either guilty of treason, or he was not.⁷ The Solicitor-General was ably and strenuously assisted by Allan Napier MacNab a comparatively young practitioner; he was called in 1826; but an old soldier—he had fought in 1812—and one who had done magnificent service to the Loyalist cause during the ill-timed, ill-considered, ill-fated rebellion. He had in January, 1838, been created the first Queen's Counsel for Upper Canada and was to live to be knighted and to become Prime Minister of the United Canadas.

The men of Eramosa (and others) had engaged Miles O'Reilly, a young lawyer practising in Hamilton; he had been called in 1830 and had a high reputation for ability and eloquence⁸—and they paid him a fee of “\$10 each or \$70 for the job.”⁹

By the Statutes of 7 Will. III, c. 3, and 7 Anne, c. 21, the accused were entitled to receive ten days before arraignment a copy of the indictment, a list of the witnesses and of the jury summoned, and this they did; but not only the three who were in Hamilton Gaol but also the four who had come from Eramosa to answer according to their recognizance were compelled to stay in gaol until the day set for the trial.

The tremendous indictment was read;¹⁰ they were all charged with conspiring to subvert the Government, to levy war against the Queen and to put her to death, and such like wicked and traitorous compassings, imaginings and intentions; they were false traitors, etc., etc. Of course they pleaded not guilty.

The evidence was very contradictory. William Campbell, of Eramosa, told of all the accused being present at the meeting and that Benham had spoken saying that Lower Canada was in possession of the rebels and that “we should keep in favour with the Lower Province and do the best we could for ourselves;” that the Reformers were in possession of Toronto, and such like. There is considerable insinuation but nothing that can be called evidence of treason in this testimony. Walter King was the next witness; his evidence, if believed, was almost conclusive; he said that Benham said that “Canada should throw off her allegiance to the British Crown;” that the meeting was called because of the news that Mackenzie had taken Toronto and to assist Mackenzie in the insurrection, all but five or six

⁷In an article in the *Guelph Weekly Mercury and Advertiser*, Aug. 2, 1906, James Peters says: “The late Sir Allan McNab and the Solicitor-General, afterwards Judge Draper, were Queen's Counsel, and if we did not get our necks stretched it was not their fault.”

⁸Draper became Solicitor-General 1840, Puisne Justice of the Court of Queen's Bench 1847, Chief Justice of the Court of Common Pleas in 1856, Chief Justice of the Court of Queen's Bench and President of the Court of Error and Appeal in 1863; he died in 1877.

⁹Miles O'Reilly, Q.C., succeeded William Leggo (of Leggo's Chancery Practice and Forms) as Master at Hamilton, 1872; this office he held until 1890; he was a Benchet, 1871-1875; he had a respectable practice when at the Bar.

¹⁰The language of Mr. Peters in the article mentioned in Note 7.

¹¹A copy is set out in the article referred to; those interested will find a form in Chitty, Criminal Law, 2nd Edit., 1826, Vol. II, pp. 67-84.

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out of the hundred present being of that mind, etc. Robert Grindell (or Grindle) followed, but his evidence was ambiguous; he did not swear as had been anticipated or as he had sworn in a deposition before Mr. Geoffrey Lynch. The whole case was weak, and Mr. O'Reilly moved for the discharge of the prisoners on the ground that there was no evidence of a conspiracy to levy war against the Queen, etc., as charged; but Mr. Justice Macauley ruled that there was some evidence to go to the jury and the defence proceeded.¹¹

O'Reilly followed the modern practice and called his witnesses without opening to the jury. John Shaw swore that Benham did not advise to throw off allegiance or to join Mackenzie; that the whole object of the meeting was to protect the life and property of the settlers in Eramosa, mutual defence, and a meeting was arranged for a week later if Toronto was taken; they were to protect themselves from Mackenzie; there was no talk of rebellion. Joseph Parkinson testified to much the same effect, as did James Smith and George Sunley.

The counsel for the prisoners addressed the jury, and MacNab replied; then the Solicitor-General claimed the right to follow—quite against our modern practice although good in strict law—and had his claim allowed.

The charge was impartial; the jury was told that if the prisoners at the meeting declared in favour of revolt, openly approved of the rebellion and pledged themselves to support it, they would come within the indictment, as it was of common notoriety that the object of such rebellion was to overthrow the Government by force; but that if what was meant or contemplated was self-preservation, mutual protection, reform properly so-called as distinguished from rebellion or revolt, the verdict should be for the prisoners. "The jury retired and in just eight minutes returned into court with a verdict of not guilty."¹²

"In Mr. Peters' Statement in the *Guelph Weekly Mercury and Advertiser*, August 9, 1906, he says: "The evidence was so much in our favour that we told our Counsel we were willing to submit our case to the jury without examining any of the eight witnesses we had on our behalf." If such were the case, Mr. O'Reilly did not risk that course because he called four witnesses. Mr. Peters is apparently under a misapprehension as to the responsibility for calling these witnesses, for he says: "The crafty Queen's Counsel (Draper and MacNab) would not consent to this arrangement probably expecting to get something out of our witness they could not get out of their own, but after examining three of them they gave it up for a bad job"; this is quite incorrect.

"The language of Mr. Peters in the article mentioned in Note 11; he says: "After seeing the political complexion of the petit jury . . . our chance of an impartial trial was very small." In the previous article he said that "the Grand Jury . . . nineteen in number, were all pure, thoroughbred Tories. . . . There were eighty petit jurors summoned, namely fifty-seven Tories to the backbone and twenty-three Reformers."

The conviction of Lount and Matthews, in Toronto, in January, 1838, was believed by the time of the trial of the Eramosans to be about to be followed by their execution; and the country at large did not desire further convictions unless guilt were clearly proved. Moreover, Canadians, while bitter enough partisans at election times, do not usually carry political feeling so far as to desire the shameful death of political opponents.

Mr. Peters adds: "Six of the seven jailbirds are still (1866) living—Clear Grits yet. I do not think any of them has given a Tory vote since."

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Of the twenty-one others tried for high treason at this Assizes ten were acquitted and eleven convicted;³³ of the latter class, one died in gaol one escaped and the statute of March 6, 1838, 1 Vic., c. 10, saved the life of one of the rest.

That statute provided that before arraignment every person charged with treason might petition for pardon; and, if pardoned, the effect would be the same as on an attainer; and the pardon might be on condition of transportation or banishment for life or for a term of years. In all the other cases there were pardons either conditional or otherwise, so that no one was executed.

I here subjoin copies of letters of the time, kindly furnished me by Dr. Janet M. Armstrong, of Cobourg, granddaughter of James Peters and of George Armstrong, brother of William Armstrong. I have also to thank Dr. Armstrong for copies of the *Guelph Mercury and Advertiser* to which I have referred.

"Wednesday, March 23	Horatio Hills, Guilty. Willard Sherman, Not Guilty
Thursday, March 29.....	Stephen Smith, Guilty. Nathan Town, Guilty.
Friday, March 30.....	Charles Walrath, Guilty. William Lyons, Not Guilty. Oliver Smith, Not Guilty.
Saturday, March 31.....	Adam Yeigh, Not Guilty. George Rouse, Not Guilty. John Leonard Ulme, Not Guilty. Samuel Marlatt, Not Guilty. Isaac B. Malcolm, Guilty. Finlay Malcolm, Not Guilty. Norman Malcolm, Not Guilty. Peter Malcolm, Guilty. Ephraim Cook, Guilty. Elias Snyder, Guilty.
Monday, April 2.....	William Webb, Guilty. John Tufford, Guilty. John Hammill, Guilty.
Tuesday, April 3.....	Solomon Lossing, J.P., Not Guilty.

Those found guilty were sentenced Wednesday, April 4, and the Court adjourned.

Horatio Hills died in gaol after his sentence had been commuted to banishment for life; Charles Walrath escaped from gaol; Stephen Smith was pardoned on giving security to keep the peace and be of good behaviour for three years; Isaac B. Malcolm is said to have petitioned under 1 Vic., c. 10, and received a pardon on the same terms; Nathan Town who was an unlicensed physician, Peter Malcolm, Elias Snyder, William Webb, John Tufford and John Hammill were treated in the same way as Stephen Smith; Ephraim Cook, a physician, was banished for life; he had received his license to practise only in April, 1831.

See Lindsey's *Life of William Lyon Mackenzie*, Toronto, 1862, Vol. II, pp. 391, 392, 393. There is an evident error on p. 392, as Nathan Town is said to have been acquitted; Lindsey's "Civil Court" means this Special Oyer and Terminer, and he frequently makes a mistake in the dates.

Endorsed "Mrs. Hannah Peters, Eramosa."

HAMILTON GAOL, Dec. 30th, 1837.

Dear Wife & Children;—

I send these few lines to inform you that I am in good health but troubled with a tickling Cough. I should be very glad to hear that you are all well and as much Reconciled to your present circumstances and separation as myself. I expect you would like to know something of the situation of myself and my companions, who has been lodged in Malone's Hotel (this is the Jailor's name) and methinks the Dear Children are often wishing to know what kind of a place Father is in, and in order to satisfy their innocent curiosity Shall endeavour to give a short account of my present Residence, and the number of our Family, which at present amounts to 45 in this part of the House, containing two rooms each about as large as our shop, these are well lighted and ventilated and 12 feet between the floors. We have also a spacious Hall of 8 or 10 feet wide, by 26 long, the Hall door is made of good oak six inches thick, and the windows well secured with Iron grates, so we have no fear of thieves or Robbers, And to conclude this hasty sketch shall just mention that it is the best House in the Town. We expect ten of our number to remove into another part of the house tomorrow morning. The high Sheriff visits us every day when at home and has certainly shown us much kindness. He has been with us this evening and Intimated that it is probable that a special Commission will be appointed to examine into the nature of the charges said to be against us. We hope that this will be the case for we have no desire to see Toronto at her Majesty's expense; and if we must be under confinement we have no reason to expect better treatment at any other place and should we remove we are afraid that it will be much worse. I forgot to mention that there is a Respectable Phisian or Doctor who comes and offers his services which has been sometimes much needed. Our company consists of one ex-member of Parliament, three Doctors, and five that either is now or has been school masters. We have made some Bylaws which is calculated to promote health, comfort and cleanliness which you will see if there is room in this letter. I wish in this place to acknowledge Mr. Malone's kindness unto us and if ever it should be in my power I should be very ungrateful if I did not make some suitable return.

Dec. 31. The Jailor has favored us last night with the Hamilton Gazette which contains the Speech of the Lieutenant Governor at the opening of the Provincial Parliament and also MacKenzie's Proclamation and as near as I can see without Spectacles the coming week is likely to be the most eventful one that has been known since 1812. And I must confess that there is a gloomy prospect for us as it Respects our examination; for nothing can be done at present owing to the excitement which prevails at this eventful Period. I have heard your William is with you at present. If it true I want him to get 2 new straps for the Harness and unless the leather is very heavy they ought to be double and any business which is necessary to be done from home I want it to be done with the Mare. And if it should happen that I am detained here which is very likely at present I would like him to get John Kennedy or John McKerlie or any of the Neighbours to fetch Wheat or Barley to Dundas but as my note is not

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due to Charles until the 1st of February it is best to let the grain remain at home as long as possible hoping that things will be more settled ere that time arrives. However, I do not wish you to be governed altogether by my directions for I have been so long from home and you have never favoured me with a letter so that I am ignorant of how you are getting on at home. You will exercise your own Judgment according to circumstances. I hope all the children are industrious—at least all that is able to work, and if they have any sympathy or love for their Father which I do not doubt in the least, I wish them to render implicit obedience to your commands; hoping you will not abuse your Authority over them I shall now close this letter by wishing each of you a happy New Year. I received supplies yesterday from somewhere, least it seems to me they did not come from you. You need not send anything more until further directions as the mess received heavy supplies at the time. Give my best respects to your Father and Mother and all your Brothers and Sisters & Uncle Peter, to my Mother & to George & Mary Ann, to John, & my sisters, & except the same for yourself and all the children, from your Affectionate Husband,

James Peters.

It is my wish that you should be careful and not take any Bank notes unless W. Armstrong will take them at his own risk & have nothing to do with that note against Charles Crowther at present. If it is not done already get some straw to put on the Pits in the garden.

Addressed on outside: "William Hewitt, Esq., Guelph."

ERAMOSA, July 10th, 1838.

Dear Sir;

In compliance with your request* I have endeavoured to state some facts on the subject of our conversation. But have purposely left the Congratulatory address to Lord Durham to your superiour judgment well knowing your abilities to compose it with a better grace and more formal manner than I am able to do, and have only to mention that no one entertains a higher opinion of His Lordships exalted character than myself. Should you find anything in this humble attempt to throw light on an unpleasant subject you are at liberty to cull it out. If there is nothing it is only my time lost. I regret that the busy time has prevented more attention to the composition of these hasty sketches requesting you to let me have these lines again at some convenient opportunity, by so doing you will much oblige.

Yours respectfully,

JAMES PETERS.

A statement of facts relative to the arrest of James Benham, Hiram Dowlan, John Butchart, Calvin Lyman, James Peters, William Armstrong, and James Parkinson. All inhabitants of the Township of Eramosa, in the District of Gore and Province of Upper Canada. And also short account of their Imprisonment and subsequent treatment previous to being brought to trial for High Treason, together with some facts respecting the

manner which Jeffrey Lynch, one of her Majesty's Justices of the Peace, insulted and extracted money from the pockets of the People of 60 or 70 of their Neighbours in the Township aforesaid (the exact amount which Jeffrey Lynched at that time I am not able to state being Boarding and Lodging at Her Majesty's expense in those days).

On the Night of the 13th. or the Morning of the 14th. of December, 1837, John Inglis, Esq., one of Her Majesty's Justices of the Peace, with a body of Armed Men amounting 30 or more, entered our dwelling Houses with fixed Bayonets and Arrested James Benham, Hiram Dowlan, Calvin Lymans, John Butchart, James Peters, William Armstrong and James Parkinson, and took them prisoners to Guelph where the said John Inglis, Esq., promised the Prisoners should have an examination. And he kept his promise with respect to William Armstrong, James Parkinson, Hiram Dowlan and Calvin Lyman, this formal examination took place before His Worship, in presence of Major Young, a leader of an Orange Lodge at Guelph, James Hodgert acting as Clerk on that occasion, said Hodgert also a leading Member of the same lodge, after some delay William Armstrong, Hiram Dowlan, James Parkinson and Calvin Lymans were admitted to Bail and James Benham, John Butchart and James Peters were committed to Gaol without any examination at all. And in my Humble opinion the said John Inglis and Co. Virtually suspended the Habeous Corpus Act in these Arbitrary proceedings 12 days before the House of Assembly met. Benham, Butchart and Peters were taken to Hamilton Gaol, and thrust into the Cells at midnight without either Bed or Blanket, one of the coldest nights ever experienced at that season of the year. They was kept in the Cells until 4 o'clock next day and then removed to the Debtors' Rooms, 3 weeks after James Peters was admitted to Bail in the sum of £250 and two sureties in one hundred pounds each and James Benham and John Butchart were kept 4 Weeks longer although great exertions were made to get them out on Bail, thus it will be seen that James Benham and John Butchart were kept 7 weeks in prison & James Peters 3 also besides 2 weeks each after the Grand Jury found true Bills against them, these three men each was torn from his distracted Wife two of which were left with 9 children each and the other with 5 for an alledged crime of which an Intelligent Jury after eight minutes consultation a part of which time must have been taken up in choosing their Foreman, pronounced them not Guilty.

I shall now proceed to mention one or two of the Causes that in my opinion has had a tendency to involve this Province in this deplorable situation, for if Lord Durham could get at the root of the evil, or find out the cause he would be better able to apply the remedy. It is well known though it was not susceptible of proof at the time, that undue influence was used by the Government to defeat the Reformers when Governor Head dissolved the late House of Assembly because they refused to grant supplies. Sir Francis succeed in his scheme and got such a house as he wanted but in an evil hour this most Intelligent (he said) nay this almost Immaculate House passed a law to violate the British Constitution by holding their seats in case of the demise of the King and for anything we know these same Members may at the coming Session pass another Law for them to keep their seats during their invaluable lives for they had as much right

by the Constitution to pass the latter as they had the former, and it does appear to me that this late attempt to overthrow one of the best features of our glorious Constitution has been the direct cause of sundry wicked Persons attempting to overturn it in another way, but mark the difference, those who were the first aggressors are loaded with fat offices while the others are stigmatized as a band of Rebels; it my opinion if the odious Law alluded to had not been passed Rebellion would not have raised its Hydra head in this Province for I am fully of opinion that this detestable act stands at the head of all our Grievances for by this and some other measures the Government party has done more to create disaffection and bring about a Revolution than all the Reformers put together previous to the passing the law alluded to.

The Clergy Reserve Question is another stumbling block in the way of the present House of Assembly for the quibbling underhand manner in which they have attempted to dispose of them will forever stand foremost amongst their sins of Commission.* When the King and the Imperial Parliament granted these Reserves for the benefit of support of Protestant Clergy they do not so much even as hint that the Church of Rome is considered as having any claim to these valuable lands and their conduct in endeavouring to give a fifth part of them cannot be Justified nor excused.

I have a few observations to make Respecting the Legislative Council but must be very brief having already extended my remarks to an unreasonable length, but so far as I am acquainted with the sentiments of all Constitutional Reformers a reformation of some kind must begin here for so long as it remains as at present constituted we have no reason to hope for a better state of things for the House of Assembly may be composed of the Best men in the Province and pass the most Judicious Laws, yet they have the power and have always had the disposition to reject everything that seems to confer any priviledges on the people. I have something to say Respecting a responsible Executive Council but must defer it for want of Room.

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