LAW AND AUTHORITY IN UPPER CANADA:
THE JUSTICES OF THE PEACE IN THE NEWCASTLE DISTRICT,
1803-1840

by

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A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy
Graduate Department of History
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Law and Authority in Upper Canada:  
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A B S T R A C T  

In frontier Ontario, the system of criminal justice administration relied heavily on the services of appointed magistrates who were untrained in law. Justices of the Peace performed many duties that would later become the responsibility of professional police and legally-trained officials. Despite the importance of the roles they performed, magistrates been the subject of few detailed studies, and those tend to examine only a particular aspect of their activities. This study explores more generally the functions that magistrates performed in criminal justice administration and the meanings of those roles in the broader social context. 

Using the court records of the Newcastle District, this dissertation describes and analyzes the activities of the magistrates at the pre-trial stage, in matters over which they had summary jurisdiction, and at the intermediate court of Quarter Sessions. It shows that justices actively carried out their responsibilities, and they did so in ways which demonstrated knowledge about the law and the effects that their actions had on others in their communities. Evidence suggests that magistrates acted to mitigate the effects of the criminal law on those who came into contact with the justice system.
This study also sheds light on aspects of the social and political history of Upper Canada. Settlers in frontier Upper Canada were remarkably litigious. Their willingness to use the criminal justice system and the services that magistrates performed within that system suggests a degree of popular legitimacy that some historians have argued was lacking in the upper courts. That the authority of most magistrates was viewed as legitimate might explain why most people did not become so alienated from the regime that they participated in the rebellion in 1837.
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Chapter 1

Introduction

This study examines the administration of criminal justice at the local level in Upper Canada. Those who have written about early Ontario criminal justice history have tended to look at the actions and opinions of judges and senior colonial officials, and the workings of the higher courts. While such studies provide important contributions to our understanding of Upper Canadian legal, intellectual, and political history, they do not generally address the "grass roots" operations of that system. This study focuses on the activities of Justices of the Peace, upon whose shoulders rested the burden of local criminal justice administration. As one English historian has written: "for most people, the justices, rather than the central government ... represented public authority as they would experience it in their daily lives." English historians have long recognized the importance of the roles that magistrates performed, and have investigated in depth the judicial activities of magistrates and the social composition of the bench in several English counties. Moreover, many have used the

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1See, for example, Patrick Brode, Sir John Beverley Robinson: Bone and Sinew of the Compact (Toronto: University of Toronto Press and The Osgoode Society, 1984); Robert L. Fraser, ed. Provincial Justice: Upper Canadian Legal Portraits (Toronto: University of Toronto Press and The Osgoode Society, 1992); Paul Romney, Mr. Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature, 1791-1899 (Toronto: University of Toronto Press and The Osgoode Society, 1986); Romney, The Administration of Justice in Ontario, 1784-1900 (Winnipeg: University of Manitoba Faculty of Law, Canadian Legal History Project, 1991); C.J. Talbot, Justice in Early Ontario, 1791-1830: A Study of Crime, Courts and Prisons in Upper Canada (Ottawa: Crimcare, 1983).


3A considerable body of literature on the English magistracy exists; I cite here only a few of the more prominent books on the subject: Sidney and Beatrice Webb, English Local
subject of magisterial activity as a window through which they can cast light on themes relating more broadly to social history. As the historian of early modern English criminal justice, J.A. Sharpe, has noted: "Popular conceptions of government and the social order were intimately connected with popular experiences of the law, both in its operation and as an ideology."^4

Upper Canadian magistrates, in contrast, have been the subject of few detailed studies. Although the importance of the roles that magistrates performed has often been commented upon, detailed investigation has been carried out only on their administrative and local government functions. The principal scholarly work on these aspects of the activities of magistrates, written by J.H. Aitchison in the 1950s, remains unpublished. That study argued that Upper Canadian J.P.s were even more influential than their English counterparts and described their influence as "all pervasive."^5 Similarly, Gerald Craig, Government, Vol. 1: The Parish and the County (London: Longmans, Green, 1906); Esther Moir, The Justice of the Peace (Harmondsworth, Middlesex: Penguin, 1969); David Philips, Crime and Authority in Victorian England: The Black Country, 1835-1860 (London: Croom Helm, 1977); L.K.J. Glassey, Politics and the Appointment of Justices of the Peace, 1675-1720 (New York: Oxford University Press, 1979); Norma Landau, The Justices of the Peace, 1679-1760 (Berkeley and Los Angeles: University of California Press, 1984); Cynthia Herrup, The Common Peace: Participation and the Criminal Law in Seventeenth-Century England (Cambridge: Cambridge University Press, 1989); Robert B. Shoemaker, Prosecution and Punishment: Petty Crime and the Law in London and Rural Middlesex, c. 1660-1725 (Cambridge, N.Y.: Cambridge University Press, 1991). For a fuller list of available sources on the subject, including numerous excellent articles, consult the bibliography.


author of the standard survey of Upper Canadian history, ascribed to them “a great range of powers.”
David Murray has written about some of the responsibilities of Upper Canadian magistrates, those involving poor relief and enforcement of regulations concerning the Sabbath. Upper Canadian historians often comment upon the status that an appointment to the magistracy conferred, and some summarize their wide-ranging responsibilities, but we still know very little about what they actually did, particularly what roles they performed in administering criminal justice. Indeed, the importance of magistrates and the absence of meaningful historical analysis of them has been noted in the literature and in historiographical reviews.

Historian of Upper Canada J.K. Johnson, for example, notes that the judicial roles of magistrates have not received a great deal of attention, although most criminal cases were


Magistrates were not lawyers, yet in the era that preceded the emergence of professional police forces, they along with the local constables were responsible for local law enforcement, and magistrates had broad responsibilities in the administration of criminal justice. If a victim of a criminal offence wished to initiate proceedings against a person, she or he had to make a complaint on oath before a magistrate. Magistrates had additional responsibilities at the pre-trial stage; they took depositions of witnesses, examined defendants, issued warrants and summonses, bailed or gaoled defendants, bound witnesses in recognizance to attend trial, and organized the paperwork for trials. They performed additional duties such as binding people in recognizance to keep the peace and encouraging the settlement of disputes. Magistrates had the authority to try a number of minor offences summarily (without a jury) and so acted as lower court judges. In addition, the district magistrates sat on the bench at Quarter Sessions, the intermediate level of courts. Justices of the Peace handled by far the bulk of criminal justice cases in the district, all but the most serious cases that were tried by Judges at the Assizes.

That magistrates were untrained in law and appointees of the Lieutenant Governor has influenced contemporary and more recent commentators to view them with criticism. Most contemporary critics were opponents of the colonial administration or people who

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resented the appointment of people to the magistracy when themselves or their relatives had been overlooked for the honour. Critics of the government charged that lay persons whose principal qualifications were connections to the authorities were manifestly incapable of performing the important functions for which magistrates were responsible. One common refrain was that the government consistently appointed the wrong sort of people -- Tories of dubious ability -- to the district bench. The radical farmer Robert Davis complained that "honest reform magistrates are almost daily getting their discharge from the commission of the peace...while the most ignorant and worthless of tories, are becoming magistrates."\(^\text{10}\)

Colonel E.A. Talbot had made a similar complaint in the early 1820s:

> It is an extraordinary circumstance, that there are some few persons in almost every district, whose appointment to a commission of the peace would add respectability to the magistracy of the country; and yet they are allowed to continue private characters, notwithstanding the great necessity there is for appointing such men to offices under the government. In the London District, in which I have resided for several years, I know many highly respectable individuals, some of whom are half-pay captains in the British army, whose names were left out of the commission of the peace, or rather not included in it; while many of their neighbours were appointed who would not add to the respectability of a gang of pig-jobbers.\(^\text{11}\)

Critics complained that the widespread appointment of government supporters to the magistracy led to a partial, not an impartial, system of government and judicial administration, which violated deeply held views of the rule of law. Talbot noted that the government expected magistrates to "toe the line":

> If a magistrate...were publicly known to disapprove of any of the measures of


the Executive Government, no matter how subversive those measures might be of the people's rights, he would very soon be deprived of his little share of "brief authority," and allowed to remain, the rest of his life, a cashiered officer or broken-down esquire.  

William Lyon Mackenzie, newspaper editor, government critic and later leader of the 1837 Rebellion at York, echoed Talbot's views, but he saw the tory magistrates as more active agents of government interests. "Justices of the Peace," he wrote in 1833, "are frequently proved guilty of the most criminal outrages against the peace of the community...."

Although the authorities ought to have punished them for such behaviour, Mackenzie was appalled to note that "they are encouraged in their disgraceful career -- advanced and promoted to places of greater power and trust...." The radical Robert Davis reported that at an election in London, government supporters knocked down and threatened anyone who disagreed with them "in the presence of Magistrates, Church of England Ministers and Judges, who made use of no means to prevent such outrages." According to Davis, "it is in vain for reformers to expect justice from such tory sycophants. They also form the grand jury at the district courts, and commissioners of the courts of request. Such being the state of things, how can an independent settler of reform principles be comfortable and prosper?" These commentators believed that the justice system was skewed, that it did not operate equally for everybody. They believed that the magistrates used the law to further

\[ \text{12} \text{Ibid.} \]

\[ \text{13} \text{William Lyon Mackenzie, Sketches of Canada and the United States (London: E. Wilson, 1833), 372. For an interesting discussion of the kinds of tory violence to which Mackenzie referred, see Carol Wilton, "'Lawless Law': Conservative Political Violence in Upper Canada, 1818-41," Law and History Review 13, 1 (Spring 1995):111-36.} \]

\[ \text{14} \text{Davis, Canadian Farmer's Travels, 14 and 9.} \]
tory interests and to victimize reformers. In other words, the rhetoric of the rule of law so vital to tory ideology was a sham in Upper Canada.

Equally serious as charges of partiality and corruption were allegations of incompetence. Early settler and diarist Anne Langton complained:

The newly appointed magistrates were men of almost the lowest degree, some unable to sign their own names correctly, & utterly incompetent to perform the duties of their office. When John went recently to Ops about the robbery of the contents of our boxes, he had himself to draw out the warrant for the magistrates to sign, & to dictate in every particular what steps were to be taken, having in the first place lost time in seeking another magistrate, because the one at hand, sensible of his own incompetency, had expressed reluctance to act.15

Similarly, memoirist T.R. Preston noted the shortcomings of magistrates, “whose efficiency or impartiality is very frequently impugned....” According to Preston, “The want of sufficient technical knowledge is the chief complaint...and it is sometimes productive of serious inconvenience....” He went on the recount a story of western Ontario magistrates who sentenced and imprisoned an American citizen for having used treasonable language against Canada while in the United States and, after American authorities demanded the man’s release, “were constrained to rescind their own proceedings, and to release the prisoner, at the expense of exhibiting themselves in a somewhat ludicrous character to the local community on either front.”16 That irascible critic E.A. Talbot opined that “honour can seldom attach itself to men, whose exalted situation serves only to expose their ignorance to


16T.R. Preston, Three Years’ Residence in Canada... (London: R. Bentley, 1840), 64-5.
ridicule, and to mark more strongly their lamentable inability to direct their endeavours for its most successful attainment." Talbot believed that in Canada, "where his power is so great and his duties so variable," a magistrate "should be a man of extensive knowledge and unimpeachable integrity." Yet "not more than one out of ten...could calculate from given data how many times the earth revolves around its axis in a week, or could say whether it revolves at all or not. They are equally incapable of advancing a solitary idea on the common principles of justice..."17

The views of contemporary critics that magistrates were partial, often disruptive, and incompetent have been taken up by historians. Gerald Craig, for example, noted that the magistrate inevitably reflected the bias of the Lieutenant Governor who had appointed him, "and often appeared to be one of his agents."18 J.K. Johnson refers to them as "totally unrepresentative, owing not the slightest responsibility to the people whose affairs they administered," although he does point out that if taken seriously, the position involved a wide range of thankless duties and he is careful not to tar all magistrates with the same brush.19 Paul Romney cites advocates of criminal justice reform who, concerned about pre-trial inaccuracies which endangered criminal proceedings, thought magistrates "often ill-educated and indifferently literate."20

17Talbot, Five Years' Residence, 414-5.
18Craig, Upper Canada: The Formative Years, 206.
19Johnson, Becoming Prominent, 64-5, 62. He says on page 65 that "some magistrates neglected or mishandled their duties or acted arbitrarily."
20Romney, Mr. Attorney, 214. Naturally those advocating the establishment of a system of crown attorneys would find justification in the real or perceived incompetencies of the existing system which relied on lay magistrates.
That local leaders could be corrupt, inefficient, and partial, even in the administration of justice, and yet maintain the allegiance of people in their localities, seems difficult to believe. This interpretation of local power relations may have been acceptable during the supremacy of “compact” ideology, which saw the Family Compact as “a complex network joining officials at the capital to interest groups in every locality,” and which I have described elsewhere as “a powerful octopus, with its tentacles reaching into every corner of the colony, into even the most remote rural townships.”

Accompanying this view of Upper Canadian officialdom was the view that ordinary inhabitants were peaceable and deferential to authority, a view which remained influential for a long time but which has been challenged in recent decades. We have come to understand that the exercise of power in the colony was not as simple as many had previously thought.

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22 Several historians have explored the subject of violence in Ontario history, but they have tended to focus on urban violence, labour-related violence, sectarian violence, and violence by political elites; in some studies two or more of these categories overlap. Some authors who purport to examine violence in “Upper Canada” actually focus on the post-union period. Still, these studies, most of which have been published as articles, have begun to shift the accepted view of the nature of political and social life in the colony. For studies which include or focus exclusively on Upper Canada see, for example, F.H. Armstrong, “The York Riots of March 23, 1832,” Ontario History 55 (1963): 61-72; Michael Cross, “The Shiners’ War: Social Violence in the Ottawa Valley in the 1830s,” Canadian Historical Review 54 (1973):1-26; Cross, “The Laws are like Cobwebs: Popular Resistance to Authority in Mid-Nineteenth Century British North America,” in Law in a Colonial Society: The Nova Scotia Experience, ed. T.G. Barnes et al. (Toronto: Carswell, 1984); W.T. Matthews, “The Myth of the Peaceable Kingdom: Upper Canadian Society during the Early Victorian Period,” Queen’s Quarterly 94, 2 (Summer 1987):383-401; Paul Romney, “From the Types Riot to the Rebellion: Elite Ideology, Anti-Legal Sentiment, Political Violence,
That magistrates must have played a role in the dialectics of power at the local level seems obvious and is a subject that begs for examination. The extent to which they operated in the interests of the government, of their communities, or of themselves individually would have profoundly affected the views that local inhabitants held not only of magistrates, but of the entire regime. According to one anonymous commentator:

Magistrates being appointed by the Crown, they are identified with the government. -- and the credit, and Influence of that government must rise and fall, according, and in proportion, as the Conduct of its Magistracy is upright and honourable or the contrary. -- ... Such magistrates [who abuse their power or act badly in office] the more they cry out for Government the more injury they do that Government, for the abhorrence with which the people view them, is then transferred to the Government. . . .

This study examines the ways in which magistrates carried out their duties in the administration of criminal justice in one district, but it has broader implications for the political and social history of the colony as well.

The magistrates of the Newcastle District, of which Cobourg was the judicial centre, provide the focus for much of this discussion, although examples from other places are included. Because the relationship between magistrates and other members of their communities was a central theme I sought to explore, a local study seemed the most

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23NA, RG5, AI (Upper Canada Sundries [hereinafter “Sundries”]), vol. 259, p. 141008; unsigned and undated memo. I am very grateful to Carol Wilton for bringing this document to my attention.
appropriate approach.\textsuperscript{24} I chose the Newcastle District because of the range of criminal court records which survive from the pre-1840 period, and which include hundreds of documents that magistrates themselves generated.\textsuperscript{25} The local court records were supplemented with official correspondence, newspapers, personal papers, printed primary sources, other court records, jail records and local histories.

The Newcastle District was also chosen for its essentially rural character in this period. The district was formed in 1802, and remained a frontier region of Upper Canada throughout the first half of the nineteenth century.\textsuperscript{26} Studies of Upper Canadian criminal justice administration tend to focus on the larger towns, which may not represent the experiences most people had with the criminal justice system at that time. As J.K. Johnson reminds us, even by 1841 Ontario society was still profoundly rural, with only 11.5\% of its

\textsuperscript{24}As Donald Akenson has noted, the interaction between the law and its inhabitants is probably more revealing than "top down" studies of criminal justice administration. Akenson considers local studies valuable because they can examine some of these subjects that cannot be explored in any other way. The Irish in Ontario: A Study in Rural History (Montreal and Kingston: McGill-Queen's University Press, 1984), 105.

\textsuperscript{25}Although assizes records have not survived, the Newcastle District Quarter Sessions records currently housed at the Archives of Ontario include invaluable series such as case files and returns of convictions by J.P.s. The Newcastle District came into existence in 1802. It consisted of Northumberland, Durham, Victoria and Peterborough Counties, and remained intact until its northern section split off to form the new Colborne District in 1838; see G.W. Spragge, “The Districts of Upper Canada,” Ontario History 34 (1947), 97-9.

\textsuperscript{26}42 Geo. III, c. 2, An Act to provide for the Administration of Justice in the District of Newcastle, was passed on July 7, 1802. A 1798 statute had decreed that when the Counties of Northumberland and Durham could certify to having a population of 1,000 people and that town meetings were being held in five townships, that a new district would be formed. The first commission of the peace specifically for the Newcastle District dated from 1803, which is the reason for its being the opening date of this study.
population living in what might be called urban environments.\textsuperscript{27} Greg Marquis has noted this tendency in the historiography and warns that criminal justice historians “must not neglect the countryside.”\textsuperscript{28}

From its origins in 1802 the Newcastle district grew slowly as new settlers began to arrive. The earliest settlers there were primarily late loyalists. However, they were soon joined by immigrants from the British Isles, including those who arrived as a result of pauper immigration schemes. By 1825 the population totalled close to 10,000, and the number escalated more quickly in ensuing years. By 1830, 14,850 people lived in the district; in 1835, that number had risen to 25,000; and by 1840, to 35,000.\textsuperscript{29} The ethnic composition of the district varied from township to township; the population of Cavan township was mostly Irish from the County of Cavan; the majority who lived in Percy were Canadian-born, although there was a sizeable proportion of Irish there; people in Clarke were mostly English, with significant Irish and Scottish groups; and so on.\textsuperscript{30} The political sympathies of the populations in various townships also differed. Darlington was “strongly reform,” Clarke “evenly divided,” and Cartwright “strong conservative.”\textsuperscript{31} Although the

\textsuperscript{27}Johnson, \textit{Becoming Prominent}, 8.

\textsuperscript{28}Marquis, “Doing Justice to British Justice,” 59.

\textsuperscript{29}Population figures from Morgan Jellett, \textit{Index to the By-laws...of Northumberland and Durham} (Cobourg, 1857); AO, RG22, ser. 134, Cobourg Quarter Sessions Minutes.

\textsuperscript{30}\textit{Illustrated Historical Atlas of Northumberland and Durham} (Toronto: H. Belden and Co., 1878), v-vii. It has not been possible to calculate the percentage of population of various ethnic groups for the whole district because there are no reliable sources.

\textsuperscript{31}John Squair, \textit{The Townships of Darlington and Clarke...} (Toronto: University of Toronto Press, 1927), 161.
district remained predominantly rural, towns did emerge, the two most important of which were Port Hope and Cobourg, incorporated in 1834 and 1837 respectively, and the latter of which became the judicial centre of the district in 1806.\textsuperscript{32} This study begins by examining the characteristics of the Justices of the Newcastle District before the 1841 Union, and placing them in the social context of their communities. Subsequent chapters follow the roles of magistrates through the criminal justice process, beginning with the pretrial process, and proceeding to the administration of summary justice, and their roles at Quarter Sessions. The final substantive chapter explores the tensions between elite and popular ideology, and, using a case study, delves into the themes of popular attitudes towards and expectations of legal officials.

This study shows that the majority of J.P.s in the Newcastle District exercised their criminal justice responsibilities. A greater proportion of them was active than was the case in other jurisdictions. Moreover, close examination of the court records shows that the district justices carried out their duties responsibly; there is little evidence to support the view that they were illiterate or ignorant about the law. They do not appear to have acted in a particularly heavy-handed way as magistrates. Almost always their actions were taken at the request of the victim of an offence. There is evidence to suggest that magistrates encouraged settlement of disputes rather than encouraging people to proceed to trial, and there are other indications that they saw their roles not so much as agents of the central

\textsuperscript{32}For details concerning the early rivalry between Cobourg and Port Hope which culminated in the choice of the former as judicial centre of the district, see Peter Ennals, "Cobourg and Port Hope: The Struggle for Control of the "Back Country,\" in Perspectives on Land and Settlement in Nineteenth Century Ontario, ed. David J. Wood (Ottawa: Carleton Library, 1975):183-96.
authorities but as leaders of their communities. There was a remarkably high level of litigiousness among the population of the district, and a high ratio of magistrates to people, but the vast majority of criminal business was conducted at the lower levels of the criminal justice system. The main role that magistrates performed was in the regulation of disputes involving acts of violence between people in this frontier society.
Chapter 2

The Magistrates of the Newcastle District

In order to investigate the role of the magistracy in Upper Canada, we must first look more closely at the men who held that office. This chapter presents a collective profile of the magistrates appointed between 1803 and 1840 in the Newcastle District. First the appointment process is discussed, followed by an exploration of demographic and geographic patterns of magisterial presence in the district, the socio-economic status of the justices, and other characteristics of the men on the Newcastle District bench. The chapter concludes with an examination of the proportion of those appointed to the commissions of the peace who were active as magistrates, and identifies the most active magistrates in the district.

The Appointment of Magistrates

Following the English tradition, legal training was not a requirement for appointment to the magistracy; indeed, practicing lawyers were barred from acting as Justices of the Peace. What a man had to have to be considered appropriate magisterial material was

1Although the Newcastle District came into existence in 1802, the first commission of the peace naming magistrates explicitly to that district was issued in 1803.

2According to the English statute 5 Geo. II, c. 18, s. 2, “no attorney, solicitor, or proctor shall be a Justice of the Peace” while in practice. This provision was repeated in W.C. Keele, The Provincial Justice, or Magistrate’s Manual... (Toronto: Upper Canada Gazette Office, 1835), 260. As one English historian noted, magistrates belonged to the judicial world “but often, they had only the most tenuous links with the legal world....”; Clive Emsley, “The English Magistracy, 1700-1850,” I.A.H.C.C.J. Bulletin 15 (Feb. 1992): 28.
property. In Upper Canada the property requirement was the same as that in England as established in 1744; the justice had to have property worth £100 per annum, clear of all deductions. The idea was that men who owned property had a stake in the community and were its natural leaders. As Hugh Taylor explained in his 1843 manual for magistrates:

Mr. Blackstone observes, that the country is obliged to gentlemen who will undertake the duties of this office, and particularly to men of rank and influence, who hold a greater stake in society, and from their situation in life must be presumed to be more alive to its general interest.

The practice of appointing magistrates in early Ontario was not as restrictive as that in England, though; while Englishmen with sufficient property to qualify as magistrates tended to be gentry, at least in the countryside, their Upper Canadian counterparts tended to be merchants, farmers and mill-owners.

In Upper Canada, the Lieutenant Governor appointed Justices of the Peace. As the monarch’s representative in the colony, the Lieutenant Governor exercised the equivalent of the royal prerogative over magisterial appointments. J.P.s were named to the commission of

318 Geo. II, c. 20; see also Keele, Provincial Justice, 260. By the statute 3 Vict. c. 3, the Upper Canadian property qualification increased to £300 effective 1 Jan. 1843, on which date more than half of those who had previously held office in the Newcastle District suddenly found themselves no longer qualified; AO, RG8, Provincial Secretary Records, I-1-P, Pre-Confederation Correspondence, Box 1, “Rough list of magistrates, Newcastle District,” n.d.


5A concern to elevate the status of J.P.s seems to have been the motive for raising the property qualification in 1843; the statute 6 Vict. c. 3 states that all magistrates “shall be the most sufficient persons dwelling in the districts.” Donald Fyson has emphasized that property qualifications in Lower Canada were very low and, in any case, often disregarded. There, too, an attempt was made to “raise the standard”; when new qualifications were established in 1830, about 52 Montreal District magistrates were dropped from the commission of the peace. “Criminal Justice, Civil Society and the Local State,” 103-105.
the peace for a specific district (or districts if they lived near a boundary) and held no power beyond the limits of that assigned area. The colonial administration issued new commissions periodically, which allowed the addition of new names and the removal of those who had died, moved away, or proven themselves unfit to hold the office.

The procedure for deciding whom to appoint is not entirely clear. Naturally the Lieutenant Governor himself was not sufficiently knowledgeable about appropriate candidates in each area to enable him to act alone in such important decisions. He required advice, which he sometimes solicited and which sometimes arrived at his office unsolicited. On occasion Judges travelling on circuit made local enquiries about suitable candidates and passed on the information they acquired to the Lieutenant Governor. A number of local officials -- members of the Executive or Legislative Councils, Members of the House of Assembly, the Chair of Quarter Sessions, the district Sheriff, the district Clerk of the Peace, and district magistrates -- counselled the Lieutenant Governor on prospective appointees. Freeholders or residents of townships sometimes also provided suggestions, particularly when they actively sought the appointment of a magistrate in their neighbourhood. Occasionally interested persons offered their services as if they were applying for a job.

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6Sheldon Hawley and George Ham of Murray township, at the easternmost edge of the Newcastle District, were named to both that district and the neighbouring Midland District benches in 1821 and 1835 respectively.

7For example, see William Campbell to Gore, 14 Sept. 1816; Sundries, 18631-3.

8A draft list of Newcastle District magistrates from the 1830s included names recommended by the following: Legislative Councillors Walter Boswell and Thomas Alexander Stewart; Captain Bullock, a magistrate prominent in the militia and in the Orange Order; Sheriff Ruttan; magistrates Cheeseman Moe, Sheldon Hawley, John Steele, and Robert Henry; "themselves," "uncertain," and "by petition." Sundries, 79411-3.
The district Clerk of the Peace screened the list of recommended magistrates to ensure that they met the property qualification. Recommendation for appointment, no matter by whom, was no guarantee that the appointment would actually follow, unlike the procedure followed in early-nineteenth-century England. How the Lieutenant Governor chose from among those recommended is not entirely clear, but he certainly relied upon local advice when considering new names to be added to the commissions of the peace. Recommending appointments was a responsibility not taken lightly. When asked for his views, one Member of the House of Assembly mused: “It is a difficult thing to recommend persons for this situation but we cannot do without magistrates....”

More insight into the appointment process can be gained by considering examples of recommendations for the magistracy in the Newcastle District and elsewhere. The most frequently cited factor in recommending persons to the bench was location. The above-mentioned M.H.A. explained that in formulating his list, “...I have had my particular attention to have persons appointed at convenient distances along the road....” As new

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9Each time a new commission of the peace was being prepared, the district Clerk of the Peace compiled a list of the names of magistrates already appointed, and crossed off those who had died or moved out of the district since the previous commission had been issued. Often a list of those recommended for the new commission follows, with notes stating by whom the names were recommended. Many of those new names are crossed off on the draft list, which suggests that the clerk eliminated them after checking their property qualification and consulting with local authorities, and then submitted this list to the Lieutenant Governor’s Secretary. See, for example, two lists of names recommended to the Newcastle District magistracy, n.d., Sundries, 79411-3, 79415-6.

10There the Lord Lieutenants of the Counties recommended the names of men to be appointed to the magistracy and that recommendation was a de facto appointment; Philips, “The Black County Magistracy,” 165; Emsley, “The English Magistracy,” 29.

11D.M.G. Rogers to Capt. Loring, 11 Mar. 1814; Sundries, 8013.

12Ibid.
townships were opened up to settlement, officials expressed concern that magistrates be appointed in them. In spring 1821 the chair of Quarter Sessions wrote that “it is absolutely necessary that some persons be appointed” in the new townships “to settle trifling [sic] disputes.” Among those recommended was Sheldon Hawley, who lived near the Trent River, because “a magistrate [is] most wanted at that place.”

Character was also frequently mentioned in recommendations for the office. For example, Judge William Campbell recommended for appointment along the Rideau John Oliver, “a sensible sedate well informed man,” and William and Alexander Morris, “men of more than common loyalty and integrity.”

According to Legislative Councillor Thomas A. Stewart, “the District cannot produce more Loyal and conscientious men” than the five he recommended. The three J.P.s and a missionary who recommended John Knowlson and John Thompson as good candidates for the magistracy from Cavan township said they were “of peaceful demeanour and unassuming.”

Local knowledge and experience was another relevant factor; the two Cavan candidates were “of the number of the first settlers” and therefore well versed in the ways of

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13 D.M.G. Rogers to George Hillier, 24 May 1821; Sundries, 26054-5. Of the twenty men Rogers went on to recommend in this letter, half were appointed in the subsequent commission of that year, two more were appointed later, and eight were not appointed to the district bench by 1840.

14 William Campbell to Gore, Brockville, 14 Sept. 1816; Sundries, 13631-3.

15 T.A. Stewart to Z. Mudge, 18 Dec. 1830, Sundries, 58935-6. Peter A. Russell identifies several qualities that were considered at the time to constitute “good character”; these include industry, sobriety, honesty, loyalty, and strict sexual mores; Attitudes to Social Structure and Mobility in Upper Canada 1815-1840: “Here We are Laird Ourselves” (Lewiston, Queenston, Lampeter: The Edwin Mellen Press Ltd., 1990), 145.
their neighbourhoods. Three magistrates recommended the names of four individuals with "long residence in the country and respectability." Earlier, Justice Campbell had considered the "military Gentlemen" who had settled along the Rideau in the mid-1810s unsuitable candidates for the magistracy, being "doubtful whether they are as yet sufficiently accustomed to the duties of civil life to be entrusted with Commissions of the Peace."

Also frequently mentioned were factors relating to competency. In addition to being of suitable character, John Knowlson and John Thompson were recommended as "fully competent for the duties of the office." After consulting with "some of the principal inhabitants," existing magistrates recommended the appointment of seven individuals "competent for the situation of magistrates." An unknown person recommended Robert Madge and John Hay, who were "in every respect well qualified for the Commission of the Peace," and Henry Duffield, who "would make a very efficient Magistrate."

Although nobody appears to have sought the opinions of ordinary settlers, some recommendations for office reflect a concern that candidates would be accepted as magistrates in their localities. A petition recommending the appointment of Peterborough-area magistrates claimed that the list of names was "calculated to give satisfaction to the District." Of the two names recommended for appointment in Cavan township, the

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16Petition to Lieutenant Governor signed by four individuals from Cavan, 5 Jan. 1835; Sundries, 81415-6.

17Steele, Hawley and Henry, Jan. 1833, Sundries, 69527-8.

18Campbell to Gore, supra note 11.

19Sundries 81415-6, 79417, 79418.
signatories believed "their appointment would give general satisfaction." Some individuals also protested the recommendation of people of whom they and their neighbours did not approve. In September 1835, twenty-one Peterborough-area residents signed a petition conveying "their strong feeling and decided opposition to a Petition which some of them have been called upon to sign, for the appointment of Magistrates selected by a very few individuals and to which we give our decided opposition from its partial tendency and the interference with the prerogative."[21]

Settlers clearly felt a keen urgency to have magistrates agreeable to them available in their neighbourhoods, and they pursued that goal in a number of ways. They petitioned the Lieutenant Governor directly, they appealed to their Member of the Assembly to exert his influence, and they applied to Quarter Sessions.[22] J.H. Aitchison observed that petitions asking for the appointment of magistrates were a common way in which settlers attempted to "struggle with the problem" of the "chronic, wide-spread, and appalling" shortage of magistrates.[23] Popular petitions did not generally ask for the appointment of particular kinds of men, only that they be appointed in particular locations.

The most common reasons for such popular requests were that settlers perceived

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20Sundries, 79408, 81415-6.

21Sundries, 79407.

22Direct petitions are most numerous but examples of other types of appeals can be located in the documents. Inhabitants of Percy township approached their Member of the Assembly, James Lyons, asking him to "make the lieutenant governor acquainted with the inconvenience they lay under for want of magistrates in the township"; Lyons to Z. Mudge, 11 Mar. 1831; Sundries, 60056-8. The inhabitants of Percy had earlier appealed to Quarter Sessions for help; see petition dated 1 Apr. 1816 in AO, RG22, ser. 37, Cobourg Quarter Sessions Petitions, Box 1, env. 1.

23Aitchison, "The Development of Local Government," 33-34.
themselves suffering from inconvenience, and that they were concerned about crime. Inhabitants of four remote townships believed they underwent great inconvenience from the want of magistrates, having to travel 25 to 50 miles to attend court, "and that through roads almost impassable." Even after going that far, they said, they were often disappointed because the magistrates did not appear and their cases went unheard. Two new magistrates were needed in Peterborough, because "it is very difficult to succeed in procuring their attendance to the great loss of time and inconvenience of applicants for justice." Settlers were particularly anxious that the early-nineteenth-century equivalent of small claims courts, courts of requests, be available to them. In their 1829 petition, the settlers of Murray township complained that they "had long been deprived" of these courts, and in 1831 those in Percy resented having to travel "upwards of twenty miles" to gain access to them.

The Percy settlers were not concerned solely with small claims. Because the one magistrate in their township was sometimes away or indisposed, "delinquents are liable to escape the punishment due to their crimes." Particularly eloquent testimony to popular

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24 Petition of inhabitants of Brock, Mariposa, Eldon and Thorah, n.d. [1833]; Sundries, 74756-8.


27 Lyons to McMahon, 11 Mar. 1831; Sundries, 60056-8.
concerns about crime in the absence of magistrates can be seen in the following quotation from a petition from the Eastern District:

That for Want of sufficient Justices of the Peace the said Township of Mountain is a resort to all loose Characters that Chooses to seek an asylum in it. It loudly and imperatively calls for a remedy against all such loose and idle Characters who are usually not only freebooters themselves but who by their bad example and pestilential influence are the means of encouraging fornication and adultry [sic], and until this evil is removed, the Inhabitants of the Township of Mountain must suffer amazingly. 28

"Respectable" people in frontier townships echoed this fear that crime would run unchecked unless magistrates were appointed to provide judicial services. John Darcus of the Rice Lake area wrote that magistrates were needed on either side of the lake as "we have no Magistrate nearer than Peterborough -- 28 miles," and thus "we are at present subjected to all the nuisance, Insolence, and I regret to say petty crime to which the unrestrained use of ardent spirits obtained at unlicensed Houses always lead, and some of us have actually been assaulted without the means of redress." 29

Once the Lieutenant Governor had accepted the necessity of appointing magistrates in a particular area, a commission of the peace was issued naming several individuals to the district bench. Occasionally a separate commission was issued for an individual magistrate as well. In order to explore in greater detail the collective profile of the magistrates, we will now turn to a discussion of the Newcastle District J.P.s more specifically.

28 The township wardens signed the petition on behalf of their neighbours. Petition of township wardens of Township of Mountain to Lt. Governor Sir George Arthur, 28 Apr. 1840; AO, RG8, I-1-P, Department of the Provincial Secretary, Pre-Confederation Correspondence, Box 2.

29 20 Apr. 1834; Sundries, 76668-9. Darcus himself was appointed a magistrate in 1835.
Numbers of Magistrates and their Location: Geographic and Demographic Patterns

A total of 155 men, many of whom were named in several commissions of the peace, were appointed to the Newcastle District bench between 1803 and 1840. As might be expected, the number of magistrates grew as the population increased and settlement extended into the more remote townships. Five commissions were issued before 1820, and the number of magistrates appointed to each of them was small: fewer than 20 in each of the commissions before 1818, and just 23 in 1818. The bench grew slowly but steadily after 1820. The 1821 commission named 34 magistrates to the district bench, that of 1823 listed 44, and the number increased to 53 in 1829. During the 1830s the number of appointees increased more rapidly as the population grew. The 1835 commission named 88 magistrates, and that of 1837 contained 107 names.

Before 1820, people settled almost exclusively along the shores of Lake Ontario, but in the 1820s and 1830s they gradually began to move farther inland, eventually occupying the “back townships.” The appointment of magistrates followed the settlement pattern, as

30The contents of the commissions of the peace appear in NAC, RG68, General Index to Commissions, Upper and Lower Canada, 1651-1841. Copies of several Newcastle District commissions can also be found in the Trent University Archives. During the period under investigation here, a total of ten commissions of the peace were issued for the district; their dates were 1803, 1806, 1813 (2), 1818, 1821, 1823, 1829, 1835 and 1837. The list of 155 magistrates, along with their locations where known and the dates on which they received appointments to the bench are listed in Appendix 1. This list includes only the local appointees who were likely to act, and ignores the merely honorary inclusion of Executive and Legislative Councillors and members of the judiciary; however, Executive and Legislative councillors who resided within the Newcastle District and acted as magistrates there are included in Appendix 1.

31The numbers of magistrates named in each commission not stated explicitly in the text are as follows: 1803-16; 1806-16; 1813a-17; 1813b-16.
demonstrated in Map 2-1.\textsuperscript{32} Within this general pattern were variations between individual townships. Few magistrates were appointed in the westernmost lakefront township of Darlington before 1829, and many more were appointed there in the 1830s. In Hope township, which includes the town of Port Hope, the bulk of the appointments took place before 1829, with only a few additional ones in the 1830s. Cobourg, the judicial centre of the district, and Hamilton township in which it was located, had a significant number of appointments in each of the three periods. The two townships to its east, Haldimand and Cramahe, had few magistrates before 1829; they got just a handful more in the 1830s.

When the numbers of justices on the various commissions are compared to population figures for the district as a whole, the ratio of magistrates to people remained relatively constant during the period. Indeed, there seems to have been an extraordinarily heavy judicial presence in the Newcastle District. In the mid-1820s, the ratio of magistrates to people was about 1:230. During the 1830s, the period during which the district saw its population more than double from 15,000 to 35,000, the ratio remained consistent at about 1:280. By 1840 there was one magistrate for about every 325 people. Throughout the Upper Canadian period, there was one magistrate for every two to three hundred people.\textsuperscript{33}

\textsuperscript{32}The figures in the townships on the map show the numbers of magistrates appointed there in three time periods; the first represented in regular print font, the second in italics and the third in bold. The early period (1803-1817) contains the commissions of 1803, 1806, 1813 and 1813b; the middle period (1818-28) those of 1818, 1821 and 1823; and the later period (1829-40) those of 1829, 1835 and 1837.

\textsuperscript{33}Population figures for the Newcastle District have been estimated at: 1825-10,000; 1830-15,000; 1835-25,000; 1840-35,000. Population data was compiled from AO, RG22, ser. 134, General (Quarter) Sessions of the Peace, Cobourg (Newcastle District) Quarter Sessions Minute Books (1824 and 1830); Morgan Jellett, Index to the By-laws ... of Northumberland and Durham (Cobourg, 1857) (1835 and 1840).
Map 2-1. Geographic Distribution of Magistrates, Newcastle District, 1803-1840

1803-1817;
1818-28;
1829-40.

Eldon 1 1 1
Fenelon
Verulam 3 2 1
Harvey
Burleigh
Methuen

Mariposa
1
Ops 1, 5
Emily 1

Durham
Cartwright
Manvers
Cavan 4
Monaghan

Ontonabee 5, 18
Asphodel
Seymour 6

Darlington 1, 2, 7
Clarke 3, 3
Hope 5, 6, 3
Port Hope

Hamilton 1, 1, 3
Cobourg 6, 9, 15

Haldimand
Cramahé 1, 1, 3
Percy 2, 2
Murray 4, 3, 7

Location unknown: 4, 2, 2.

*Note: the total number of magistrates on the map is greater than 155 because some magistrates left the province but retained their appointment.
The magisterial presence in the district was considerably heavier than was the case in parts of Lower Canada during the same period. Donald Fyson found a ratio of one magistrate to every 1200 to 2000 people in Lower Canada between 1794 and 1830. 34

Variations occurred within this general pattern. The concentration of magistrates remained most dense in some of the lakefront townships and in and near the towns of Cobourg and Peterborough. While settlers in some of the back townships complained of a shortage of magistrates in the 1830s, people in some areas might have complained of the opposite problem. Emily township had only one magistrate, Richard Marmion, appointed in the 1830s. Its northern neighbour, Verulam, had what one commentator thought a ridiculously high judicial presence. According to John Langton, there were 33 families in Verulam and 5 in Fenelon in 1835, "and to keep these in order the late Commission of the peace has named three magistrates..."35 Langton himself was named to the district bench in 1837.

The reasons for these variations are not entirely clear, but several factors in addition to population patterns were undoubtedly involved. The presence of suitable candidates for the magistracy was one factor. In Otonabee township and Peterborough a number of "respectable" retired army and navy officers had settled who were probably grateful for the recognition bestowed upon them by inclusion in the commission of the peace, and who the administration saw as worthy of that recognition. Concerns for the safety of property and public order must have played an important role as well. Cobourg had a heavy concentration

34"Criminal Justice, Civil Society and the Local State," 94.

of magistrates, not only because it was the district judicial centre, but because its port was a
centre for mercantile activity and the disembarkation of large numbers of immigrants in the
1830s. Many of the Peter Robinson immigrants, paupers from Britain, arrived in the
Peterborough area during the same decade. A heavy concentration of magistrates in these
areas was meant to reinforce the authority of the law and encouraged poor immigrants to
behave. The lakefront township of Murray had a substantial magisterial presence, probably
because it contains Presqu’ile, a lengthy peninsula jutting out into Lake Ontario which was a
haven for smugglers.

The generally high ratio of magistrates to people has broader ramifications which
cannot be accounted for only by population growth and geography. The Newcastle District
underwent the process of settlement during the first four decades of the nineteenth century
and might be characterized as a frontier society. The ruling oligarchy at York must have
been very concerned to maintain order in the newly-emerging district for there to have been
so many magistrates appointed in that district. Colonial leaders must have wished to extend
political influence into the countryside into townships which were not necessarily reliable
politically. As Jim Phillips has shown for eighteenth-century Nova Scotia, the ruling

36Otonabee township had a population of about 2000 in 1840, yet 23 magistrates had
been appointed there by that time. Otonabee had the heaviest concentration of magistrates
per capita in the district at about 1:89. Otonabee population figure in AO, MS16, #31,
Otonabee census, 1841.

37While the settlers in some of the Newcastle District townships were characterized
as "firmly loyal" or "conservative," others were not. Darlington has been described as
"strongly reform," while in Haldimand and Cramahe “there were twenty rebels to one
sincere loyalist.” John Squair, The Townships of Darlington and Clarke... (Toronto:
University of Toronto Press, 1927); E.C. Guillet, “The Cobourg Conspiracy,” in Victorian
Cobourg: A Nineteenth Century Profile, ed. J Petryshyn (Belleville, Ont.: Mika Publishing,
1976), 110.
oligarchy saw the criminal law and criminal justice institutions as “a necessary bulwark in what was in many ways a frontier society.” The heavy presence of magistrates in the district of Newcastle might be viewed as a sign that colonial authorities there were also anxious to install forces of order in the far-flung reaches of Upper Canada as bulwarks against potential disorder.

The Occupation and Status of Newcastle District Magistrates

While Upper Canadian magistrates represented social groups in the colony that could be classified as “elites,” they were by no means of equivalent status to their counterparts in the English countryside, most of whom were aristocracy or at least gentry. Rather, they resembled more closely their counterparts in the English towns and in Lower Canada. A number of the Newcastle District magistrates were entrepreneurs, founding mills, distilleries, shops, or local manufactories. Some were farmers. While some became very wealthy, others sank into poverty.

Appointed for their respectability and local prominence, many Upper Canadian magistrates have now faded into the background of historical memory. Of the 155 men appointed magistrates in the Newcastle District between 1803 and 1840, only 16 (roughly 10%) were considered sufficiently prominent to warrant entries in the Dictionary of

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39 The Montreal District magistrates tended to be “at least locally prominent,” and active magistrates there were most likely to be businessmen, landowners, or professionals; Donald Fyson, “Criminal Justice, Civil Society, and the Local State,” 124-128. A comparison of the Newcastle District magistracy to its English counterparts appears later in this section and references can be found there.
Canadian Biography. An early settler who became a Member of the Legislative Council in the 1830s, Walter Boswell would undoubtedly be dismayed to know that he had been relegated to the historical dust heap by the D.C.B.'s evaluators with the note that he "would appear to be unimportant." Historian Edwin Guillet summed up the fate of several Newcastle magistrates when he wrote about one of them: "To have been a man of importance in his generation and almost entirely forgotten a lifetime later was the fate of Captain Hill of Dummer Township."

Several of the Newcastle magistrates failed at what they were trying to do and left the district, some in disgrace. A prominent businessman and developer in Cobourg throughout much of the 1820s and 1830s, James Gray Bethune was declared a bankrupt in 1834 and his failure caused the downfall of many others. Following a brief stint in debtor's prison he left the colony for the United States. The founder of the first Peterborough newspaper and an active magistrate in that community, John Darcus was convicted of fraud in the early 1840s, having forged several wolf bounty certificates. He too left the district and according to one

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40 And several of those who did warrant D.C.B. biographies appear never to have acted as Newcastle District magistrates. In contrast, of the active magistrates in the Montreal District from 1765 to 1830, a third had their biographies included in the D.C.B.; Fyson, "Criminal Justice, Civil Society and the Local State," 126-7.


42 E. Guillet, ed., The Valley of the Trent (Toronto: Champlain Society, 1957), 361.

43 Similarly, J.K. Johnson identified several men who served as Members of the House of Assembly who fell heavily into debt; Becoming Prominent, 12-15.

report later committed suicide. Founder and operator of the once-prosperous Marmora Iron Works, Charles Hayes sold the business when he ran into financial problems and returned to Ireland. Alexander McAndrew returned to England in 1835, the same year in which he had been appointed a magistrate. A local history reports that Thomas Murphy drank too much of the whiskey produced at his Peterborough-area distillery, succumbed to delirium tremens and left Upper Canada altogether.

Others who remained in the district did not lead altogether happy lives. At least two in addition to John Darcus died by their own hands: Ephraim Sanford in 1843 and Thomas Carr in 1860. Prominent in the militia, John Covert was so humiliated at being tried by court martial and losing his officer standing in 1837 that he went to the United States for a time to recover. Upon his return he was further mortified to learn that his name had been left off the commission of the peace issued during his absence, and he spent several years trying to get reinstated. He finally succeeded, but by the time his name was restored to the

45 Samuel Strickland, Twenty-Seven Years in Canada West (Edmonton: M. Hurtig, 1970), 185-6; D.C.B. biographical file; his suicide is reported in C.P. Mulvaney et al., History of the County of Peterborough (Toronto: C. Blackett Robinson, 1884), 331. Other local histories report only that he left the district and little seems to have been known about his subsequent activities.

46 D.C.B. biographical files.

47 J. Langton, Early Days in Upper Canada, 61, 154.

48 W. Kirkconnell, County of Victoria Centennial History, 2nd. ed. (Lindsay, Ont.: Victoria County County Council, 1967), 104-5.

49 Sanford’s suicide is noted in W. Poole, A Sketch of the Early Settlement ... of Peterborough (Peterborough, Ont.: Peterborough Review, 1867), 24 and Mulvany, Peterborough, 292. His obituary in The Cobourg Star merely reported his sudden death. Carr’s suicide is mentioned in the D.C.B. biographical files; Guillet, Valley of the Trent, 427; Poole, Peterborough, 138; Mulvaney, Peterborough, 386-7.
magistracy in 1843 he had only a few weeks to live.\textsuperscript{50} The granted land upon which George Arundel Hill tried to farm in Dummer township was so infertile and rocky that he just left it; according to one source it has remained abandoned to this day.\textsuperscript{51}

The families of several Newcastle District magistrates did not achieve the position and financial independence of which they had dreamt. The Moodies came to bitterly regret their decision to immigrate to Upper Canada.\textsuperscript{52} Francis Brockell Spilsbury died in 1830, leaving his wife with several young children. Evidently in dire financial straits and desperate to provide for her children, she opened a boarding school in 1831.\textsuperscript{53} Mrs. Spilsbury, though, fared better than either of the wives of the more financially successful surveyor, Richard Birdsall. The first Mrs. Birdsall died in 1825 at the age of 25, when she fell into the cellar of their house under construction, leaving behind four young daughters. The widower remarried a decade later and when he died at age 51 in 1852, the second Mrs. Birdsall became incurably insane, according to one local history, either because of her husband’s death or because of the sale of all the stock and farm equipment by his executors.\textsuperscript{54}

I mention these unfortunate cases first to dispel the pervasive notion that the


\textsuperscript{51}Guillet, \textit{Valley of the Trent}, 361-5; \textit{D.C.B.} biographical files.

\textsuperscript{52}Susanna Moodie wrote the “melancholy narrative” \textit{Roughing it in the Bush} in “the hope of deterring well-educated people...from entering upon a life for which they were totally unfitted by their previous pursuits and habits.” \textit{Life in the Clearings versus the Bush} (Toronto: McClelland and Stewart, 1989; first published 1853), 9.


magistrates of Upper Canada were all of a particular type -- that they were prominent, successful, and quite wealthy; that they obtained their positions through connections, which they used to further their own interests; and that this strategy invariably (or at least usually) worked. Even the recognition of colonial officials was not sufficient to help many of these men whose journeys to Upper Canada involved much more than they had bargained for.

As a group, the Newcastle District magistrates are not easy to categorize according to occupation. Many of them had more than one occupation, either at the same time or in succession. For example, Charles Fothergill's D.C.B. biographer classifies him as "naturalist, artist, writer, businessman, officeholder, justice of the peace, printer, newspaperman, publisher and politician." Similarly, that of Zaccheus Burnham identifies him as "farmer, land speculator, military officer, justice of the peace, office holder, politician and judge." Many of those not so illustrious as to warrant entries in the D.C.B. also had several interests. John Brown of Port Hope owned mills, several stores including a warehousing operation and a branch in Peterborough, a distillery, a barrel manufactory, a nail factory, a linseed oil factory, and a blacksmith's shop at various times; he was Member of the House of Assembly for Durham in the early 1830s, also sat on the Port Hope Board of Police, and was deeply involved in harbour construction projects. In his study of members of the Upper Canadian Legislative Assembly, J.K. Johnson refers to this phenomenon of


56Peter Ennals, "Zaccheus Burnham," D.C.B., Vol. VIII, 116. I have chosen to spell Burnham's first name "Zaccheus" because in legal documents his own signature was always spelled that way.

multiple occupations as "bunching." Most magistrates were farmers of some sort, whether or not they had other sources of income.

Some of the Newcastle District magistrates engaged in what might loosely be classified as "the professions," but they appear not to have been very numerous. Five were doctors, including the prominent reformer John Gilchrist and the Peterborough physician John Hutchinson, who succumbed to typhus in 1847 after tending to the sick in the immigrant sheds. At least eight surveyors were represented on the district bench, including three prominent office-holders who functioned as surveying contractors. Several were writers, journalists or printers. Richard Dover Chatterton was the first editor of the Cobourg Star, and John Darcus of the Peterborough Sentinel. Charles Fothergill was King's Printer

58 According to Johnson, "The striking fact about the working lives of these prominent people is not what occupations they followed, but the extent to which they ... changed or combined them." Johnson attributes this tendency to a preoccupation with security. Over half the M.H.A.s farmed while three quarters also pursued other economic activities; Becoming Prominent, 11-15.

59 I have attempted to streamline this discussion somewhat by leaving out excessive lists of names and footnoting only where specific points are made. Summaries of the biographical data and the sources used in its compilation can be found in Appendix 2.

60 Zaccheus Burnham, Charles Fothergill, and Henry Ruttan. Surveyors were paid in land so some of them, particularly Burnham, acquired huge land grants in the process of carrying out survey contracting duties.

61 Both Chatterton and Darcus were very active magistrates in the late 1830s, possibly because their offices were in towns and people knew where to find them. In the first Cobourg Star, published on 1 Mar. 1831, editor Chatterton editor declared that the paper would be devoted to "the pursuit of knowledge and the paths of truth." He promised that the paper would not be politically partisan "but remarks will ever fearlessly be made upon any measures that may affect the general interest of the community." Chatterton's name was removed from the commission of the peace in 1839; see Chatterton to B. Harrison, 26 Feb. 1839; same to same, 23 Dec. 1840; same to same, 15 Apr. 1841 in AO, RG8, Provincial Secretary's Department, Ser. I-1-P, Pre-Confederation Correspondence. Darcus also ran into trouble in the early 1840s; as was explained earlier, he was convicted of fraud left the area; see Poole, Peterborough 53-4.
for a time but lost that appointment in 1826 because he had begun to publicly attack government policies.62 Thomas Carr and J.W.D. Moodie contributed material to local newspapers.63 Charles Rubidge and George Arundel Hill both wrote manuals for immigrants to Upper Canada.64 Although magistrates were not supposed to practice law, at least four of the Newcastle District justices became lawyers: Robert Boucher; Zaccheus Burnham, who was appointed a Newcastle District Court Judge in 1839 and was called to the bar six years after that; Robert Dennistoun, who became a county judge in Peterborough after Confederation, and John William Bannister, who at some point became a member of the English Bar and died in 1829 while Chief Justice of Sierra Leone.65

More of the Newcastle District magistrates were early-nineteenth-century entrepreneurs, engaged in what might be termed “business.” In fact several of those already identified as professionals had business interests as well, some being involved in several enterprises either simultaneously or one after another.66 A few even extended their interests


65Boucher was called to the Bar of Upper Canada in 1845 and Dennistoun in 1849; Law Society of Upper Canada Archives, “Barrister’s Roll.” The D.C.B.’s biographical files note that Dennistoun practiced in Peterborough until 1868, when he was made Peterborough County Court judge. On Bannister see Guillet, Valley of the Trent, 145.

beyond the Newcastle District. At least 34 of the justices owned or operated sawmills or gristmills. A frequent sideline to gristmills was the production of alcohol; at least 16 Newcastle District magistrates ran distilleries, including one who also ran a large brewery at Cobourg. At least thirty Newcastle district magistrates were merchants or shopkeepers. Ebenezer Perry was a pork packer. Alexander Chisholm and Robert Henry engaged in the “Indian trade,” Henry having become a magistrate upon his retirement from the North West Company. The Smiths of Port Hope were “renowned Indian traders.” James Gray Bethune and Robert Henry were involved in banking. At least nine magistrates were involved in lumbering at some point. John Gilchrist and Samuel Street Whelmed operated tanneries. Thomas Carr, John Brown and John Hall operated manufactories that produced wood products: staves, shingles and barrels. Charles Hayes founded the Marmora Iron Works. John Brown’s establishments produced nails and linseed oil. Brown and David Campbell operated blacksmith’s shops. Two of the magistrates could be described as

67 As Peter A. Russell points out, a shopkeeper, innkeeper, sawmill owner or gristmill owner had a reasonable expectation of respectable status in thinly settled neighbourhoods. In heavily settled areas or towns a person of the same occupation and income could be hard pressed to maintain even a claim to respectability; Attitudes to Social Structure and Mobility, 74-5.


inventors. Richard Dover Chatterton, editor of the Cobourg Star, was granted a patent for an "improved paddle-wheel for propelling steam or other vessels." Described as a "self-taught engineer," Henry Ruttan invented ventilating systems for buildings and railway cars.

Some Newcastle district magistrates were involved in businesses that helped facilitate travel in the district. Robert Jameson and James Wallis were partners in a Fenelon Falls hotel, and several others owned such establishments elsewhere. Three of the magistrates acquired ferry leases. John William Bannister acquired the right to run a ferry across Rice Lake in 1821, and upon his death in 1829, James Gray Bethune bought out the lease. John Bleeker ran a ferry across the Trent River in the early days. After his death in 1807 his wife took over the ferry operation.

Many of the men who became magistrates in the Newcastle District were deeply involved in the economic development of their neighbourhoods. They engaged in a variety of activities which may have lined their pockets but which also made settlement possible, if not always exactly thriving. The building of mills was crucial to farmers. Similarly, shopkeepers or merchants provided vital services in their neighbourhoods, including opportunities for employment. Stores, mills and distilleries required managers, clerks, labourers and sometimes skilled tradesmen. Cash was notoriously scarce in Upper Canada;

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71 Guillet, Cobourg, 21.


73 L.J. Delaney, Rice Lake... (Orillia, Ont.: Dyment Stubley Printers, 1983), 40; D.C.B. biographical files (Bleeker).
John Langton noted that “cash at all times is a most rare article.” Not only did businessmen provide some wage employment, but some also bought supplies from their neighbours. Distillers, for example, bought grain from settlers nearby. The Cobourg brewer and distiller James Calcutt was popular because he “paid cash for purchases which meant much to farmers.” John Brown’s blacksmith’s shop produced copper coins, “a great convenience.”

Perhaps as important as the goods and services that these enterprises provided was their symbolic importance as indicators of development. As one local historian puts it:

[Those] of shrewd common sense, and who held, in some respects, a vision of the future of the district, and an appreciation of the natural resources.... Those who at a time when the many hesitated to make investments in the much needed mills and other enterprises required to supply the needs of settlers did not hesitate to take a stake in the land and venture.

Some of them were more concerned with development than profit. While a Crown land agent in 1833, David Campbell wrote to Commissioner Peter Robinson:

Two mills would have been erected this summer and a store established, for the want of which we are suffering much. At my own expense, and without any prospect of profit, I have established a tavern, a ferry, a blacksmith’s shop and, with my brother’s aid, am about to cut a road from hence to


76 Reeve, *Hope*, 140.

77 F.H. Dobbin, *Our Old Home Town* (Toronto: J.M. Dent, 1943), 218-19. As J.K. Johnson puts it: “On the frontier, men of education or wealth or position or even leisure were readily accepted as local leaders for their usefulness in promoting regional needs by a population largely preoccupied with a relentless battle against the forest....; *Becoming Prominent*, 154.
Rawdon so as to have direct communication with Belleville.\textsuperscript{78}

Local businessmen, particularly merchants, provided another valued service: they sometimes let people have goods on credit. John Brown bought horses in Lower Canada and let farmers have them on long term credit. According to local histories, he realized that in order to grow wheat, the farmers needed the extra power that horses could provide.\textsuperscript{79}

Bowmanville magistrate Robert Fairbairn managed the principal business in that town, which "employed a generous system of credit to help farmers, especially those of limited means."\textsuperscript{80} Some merchant-magistrates offered credit too freely. Thomas Alexander Stewart opened a small store in a log house in the Peterborough area in 1825. A local history notes:

His ideas of a small credit business were not such as usually prevail in mercantile life. Many customers were unknown to him by name and instead of making the usual inquiry, he not unfrequently trusted to the accidents of the future to acquire that necessary information. Such entries as "a bar of soap, to the woman with the red cloak" were not unusual.

Needless to say, Stewart's shop did not last long.\textsuperscript{81}

While businessmen were interested in making money, their activities often did provide vital services to those in their neighbourhoods. Transportation was very difficult. A local shop and mill made life much easier for settlers. Early inhabitants in the back townships were recorded to have carried bags of grain on their backs for miles to get to the nearest mill before mills were built in newly-settled areas. Millers and shopkeepers could

\textsuperscript{78}Quoted in F.N. Pickford, "Two Centuries of Change," 45.

\textsuperscript{79}Craick, Port Hope Historical Sketches, 47; Reeve, Hope, 190. These sources do not divulge the rate of interest that Brown exacted from those he helped in this way.

\textsuperscript{80}Illustrated Historical Atlas of Northumberland and Durham, iii.

\textsuperscript{81}Poole, Peterborough, 16-17.
have charged exorbitant rates, knowing they had a local monopoly. However, it is unlikely that they would have been able to get away with making excessive profits by providing essential goods and services to their neighbours. Their credibility as local leaders would certainly have suffered irreparable damage. The kind of behaviour which might be viewed as benevolent, such as Brown’s purchase and distribution of horses, would have been far more likely to enhance the moral authority of Brown and others like him than practices amounting to usury. Magistrate-businessmen must have been concerned to balance self-interest with altruism. Thomas Need, for example, expressed this dualism when he wrote: “In consequence of so large an influx of settlers in the autumn, I had thought it prudent to lay in a considerable store of flour and pork, which proved extremely beneficial to my neighbours, and returned me a considerable profit.”

More than thirty of the district magistrates were involved in schemes to further the development of the district. Some were leaders of land settlement or immigration schemes, assisting Peter Robinson in his effort to settle pauper Irish near Peterborough. Many more were involved in schemes to improve all kinds of transportation -- road, canal, railroad, harbour, or steamboat. Agricultural improvement obsessed several, most notably John Covert, who made a concerted effort to diversify agricultural production to avoid total dependence on wheat. Zaccheus Burnham ran a large commercial farming enterprise that

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83 Peter Emmals, “John Covert,” *D.C.B.*, Vol. VII, 213-5. Covert pushed the Lieutenant Governor to foster the cultivation of hemp as a potential boon to the colony, and opened a hemp mill. His biographer reports that “few answered to his call.” A number of Covert’s letters survive in Upper Canada Sundries.
not only provided local employment, but food and livestock. Many J.P.s were stalwarts of local agricultural societies, dedicated to agricultural improvement. One historian has not viewed these activities sympathetically, seeing them only as manifestations of pretensions to gentry status:

The activities of these men bore little practical relation to the economic realities of the colony. When most farmers were struggling to clear land and develop a cash staple, improvers...were organizing agricultural libraries, competitions for prize farms, and ploughing contests.

According to historian Elsbeth Heaman, however, agricultural societies “brought farmers and local elites together to discuss how to spend money in the best interests of the community.” These local agricultural organizations ought to be considered within the context of the larger concern for improvement; the same men who served as officers in the township agricultural societies were involved in harbour development schemes and petitioned for the construction of roads, bridges and canals.

The types of men who were appointed magistrates in Upper Canada resemble more closely the types of men who were appointed in the English towns in the early nineteenth century rather than those in the English countryside. John Weaver notes that the colonial magistracy had more in common with that of metropolitan London, and comparisons could also be drawn between Ontario businessmen and the coal and iron master magistrates of the “Black Country.” However, the social status of most rural Upper Canadian magistrates was

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86 *The Inglorious Arts of Peace: Exhibitions in Canadian Society during the Nineteenth Century* (Toronto: University of Toronto Press, 1999), 49.
probably lower than their counterparts in the towns, and lower still than those in English towns. As Weaver notes, outside the main towns the rural merchants and millers who became magistrates “would probably not have received commissions of the peace in the old country.”

David Neal’s assessment of magistrates in the colony of New South Wales could be applied equally to Upper Canadian magistrates: “Most of them did not have the status to claim such an office in England but the patterns of power in the colony were relatively fluid.”

The majority of the Newcastle District magistrates engaged in trade, but this does not necessarily mean that they were “trading magistrates.” English historians have identified the phenomenon of “trading magistrates,” generally urban justices from the lower middle classes who managed to make a living from the fees they charged for their legal services. The charge that English “trading magistrates” stirred up trouble to increase their business is one that has been recently challenged by historians. In an essentially rural district of Upper Canada, though, a magistrate, no matter how busy he might have been, could not have managed to make a decent living on his fees alone, although they might have proven a useful income supplement in a few cases. The fees that magistrates could charge for certain

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89 Problems with “trading justices” are described in Jennifer Davis, “A Poor Man’s System of Justice: The London Police Courts in the Second Half of the Nineteenth Century,” The Historical Journal 27, 2 (1984), 311. Works which suggest that the bad reputation of “trading justices” may have been exaggerated include Landau, Justices of the Peace, 185; Beattie, Crime and the Courts, 63-4; Tompson, “Justices of the Peace...in an Age of Reform,” 276-7; and Emsley, “The English Magistracy 1700-1850,” 33.
judicial services were established by statute in 1827 and represented the maximum allowable fee. The busiest burst of activity by a Newcastle District magistrate over a relatively short time demonstrates the limits for the “trading justice” in early Ontario. Richard Dover Chatterton, editor of the Cobourg Star, was remarkably busy by Upper Canadian standards in the four year period 1837-1840 inclusive. During those years, he took 25 depositions, issued 12 recognizances to appear, conducted 11 examinations, committed 30 people to gaol, summoned three people to appear before him, and convicted three people summarily. If one totals up the fees to which he was entitled (but not all of which he may have received) for these activities, they add up to a total of about £8, or an average of £2 per year, a not very great sum for his time and trouble.

Despite the apparent shortage of magistrates in the colony, its governing officials did not resort to two measures routinely adopted in England and in other colonies: the appointment of clergymen to the bench, and the use of stipendiary magistrates in the towns.

Not one of the Newcastle District magistrates was a clergyman. I have found no reference

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90 8 Geo. IV, c. 7; superseded by 4 Wm. IV, c. 17 in 1834. For example, magistrates could charge 3s6d for an information and warrant; 6d for a subpoena; 2s6d for a warrant of commitment. It is not clear how fees were authorized prior to the passing of the 1827 statute, but according to E.A. Talbot, they were paid 6d for every summons and 5s for every warrant they issued; Five Years’ Residence in the Canadas, 414.

91 These figures were tabulated from the Quarter Sessions Records, including Case Files, Returns of Convictions, and Filings, as well as gaol records.

92 Emsley, “The English Magistracy, 1700-1850,” 28-38; Davis, “A Poor Man’s System of Justice.” The appointment of police magistrates in the towns was a development which would occur later in the nineteenth century.

93 According to Emsley, the appointment of clergymen “was seen as one way of maintaining the dominance of the landed gentry on the county bench and keeping out men whose fortune was based on trade.” Ibid, 36. By the early nineteenth century, clergymen made up more than half the justices on a number of county benches although their influence
to an edict prohibiting the appointment of clergymen to the bench in the colony, but perhaps colonial authorities recognized the potential for conflict if they were to appoint clergymen as magistrates. The favoured position of the Church of England already caused political problems which would certainly have been exacerbated by such a measure.

Similarly, I have found no indication that stipendiary magistrates were appointed in the district during this period. Although their number and influence were growing in England and in other British colonies, a development that engendered debate and controversy, they appear not to have been appointed in Upper Canada. What happened instead was that when towns were incorporated, as was Port Hope in 1834 and Cobour in 1837, the freeholders elected representatives to sit on a Board of Police, which functioned as a local Police Court. This measure fulfilled the need for local judicial services and did not require a large expenditure of funds. For the most part, though, appointed magistrates fulfilled the responsibilities of administering criminal justice at the local level.


David Neal discusses the debate that emerged over the appointment of stipendiary magistrates in Australia; see The Rule of Law in a Penal Colony, 124-6, 157-61. Some English commentators regarded stipendiary magistrates with suspicion; Sydney Smith wrote: “We have no doubt but that a set of rural judges, in the pay of the government, would very soon become corrupt jobbers and odious tyrants, as they often are on the continent.” Edinburgh Review 44 (1826), 441, quoted in Richard S. Tompson, “The Justices of the Peace and the United Kingdom in the Age of Reform,” The Journal of Legal History 7, 3 (Dec. 1986), 281.

Other Characteristics of Newcastle District Magistrates

This section examines a number of characteristics of the district magistrates other than those relating to occupation and socio-economic status. They include age at first appointment, length of time resident in the colony before appointment, place of origin, history of military service, family and marriage connections, other appointments, religion and political affiliation. These discussions demonstrate that Newcastle District JPs were a reasonably diverse group.

Age at First Appointment

Using a sample of just over a third of the Newcastle District magistrates appointed before 1840 (54 of 155, or 35%), it is clear that men from a broad age range were appointed to the bench.96 The age at first appointment ranged from 26 (Henry Ruttan in 1818) to 67 (Thomas Reed in 1835). The majority of J.P.s were first appointed while in their thirties and forties: 22 and 18 respectively (74% of the total number for which this information was found). While men did get named to the commission in their twenties, such appointments were comparatively rare; only 4 fit this category. Relatively few were older than 49; 8 were in their fifties and 2 in their sixties. Table 2-1 illustrates the age patterns at first appointment.

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96 Age at first appointment was calculated by comparing years of birth with dates of first appointment.
Table 2-1

Age at First Appointment of Newcastle District Magistrates

<table>
<thead>
<tr>
<th>Age</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 30</td>
<td>4</td>
<td>7.5</td>
</tr>
<tr>
<td>Thirties</td>
<td>22</td>
<td>40.7</td>
</tr>
<tr>
<td>Forties</td>
<td>18</td>
<td>33.3</td>
</tr>
<tr>
<td>Fifties</td>
<td>8</td>
<td>14.8</td>
</tr>
<tr>
<td>Sixties</td>
<td>2</td>
<td>3.7</td>
</tr>
<tr>
<td>Total</td>
<td>54</td>
<td>100</td>
</tr>
</tbody>
</table>

The average age at first appointment is 41. This figure is very close to the average age at appointment of Lower Canadian magistrates, which Donald Fyson has calculated at 42. Moreover, it represents similar patterns of age at first election of Members of the House of Assembly, which was 39.2. If the average age at appointment is compared to the average age at death, magistrates could expect to serve about thirty years.

Although few in number, the youngest appointees warrant further discussion. The four men known to have been named to the district bench in their twenties were from prominent local families. Both John David Smith and Asa A. Burnham were sons of early

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97 Fyson “Criminal Justice, Civil Society and the Local State,” 128; Johnson, Becoming Prominent, 67.

98 Dates at death are known for 54 of the Newcastle District magistrates. Of those 54 the average age at death was 70 years. The numbers of those who died at various ages are as follows: 40s-3; 50s-11; 60s-11; 70s-13; 80s-13; 90s-3.
loyalist settlers who were magistrates themselves. Both had virtually grown up in Upper Canada. Henry Ruttan was also a descendant of loyalists; he went on to serve as sheriff of the district from 1827 to 1849, and was elected to the House of Assembly while still in his twenties. James Gray Bethune was a prominent merchant and developer who had been born in Upper Canada; although appointed young, he seems not to have been active as a magistrate. Each of these four men achieved prominence at young ages, but family and other connections had not hurt them. Youthful appointments to positions of even greater authority than the magistracy took place in Upper Canada on occasion; John Beverley Robinson was only 21 when first appointed acting Attorney General in 1812.

About half of the men appointed to the bench in the Newcastle District were younger than 40 when first appointed. Several had become established early in life by modern standards. It was not unknown for boys to begin to pursue careers in the military at what we would consider tender ages; one Newcastle district magistrate had joined the Royal Navy at the age of nine. The Napoleonic Wars provided opportunities for rapid advancement. Francis Brockell Spilsbury had had a distinguished naval career before settling in Upper

99 John David Smith was the son of Elias Peter Smith, an early settler and magistrate in Port Hope, which had originally been called “Smith’s Creek.” Asa A. Burnham was the son of Zaccheus Burnham.


101 P. Ennals, “James Gray Bethune,” D.C.B., Vol. VII. Smith was appointed at age 27 in 1813; Burnham at 29 in 1837; Ruttan at 26 in 1818; Bethune at 28 in 1821.

102 Romney, Mr. Attorney, 57.

103 This was Charles Rubidge, whose Autobiographical Sketch was published in 1870; Wendy Cameron, “Charles Rubidge,” D.C.B., vol. 10, 635-6; Guillett, Valley of the Trent, 352.
Canada. He had become a Lieutenant at age 21 in 1805, commanded vessels on the Great Lakes during the War of 1812 and became a prisoner of war of the Americans in 1814; he could have been no older than thirty at the time. Despite his considerable experience, Spilsbury was only 37 when he became a magistrate in 1821.104

From the viewpoint of the administration, it must have made sense to appoint relatively young and active men to the bench. They might have long careers as magistrates, and would presumably benefit from experience to become more competent and more knowledgeable about the law. Moreover, they might become more useful to the administration if they served lengthy periods as JPs, as they would gain local influence and understanding of local concerns. The appointment of younger men to the bench would ensure that a significant portion of the district magistracy would survive through several commissions so that the bench would remain reasonably stable.105 However, despite the usefulness of appointing young men to the magistracy, very few were appointed in their twenties.

Not all of the magistrates were appointed at ages under 40. Some older first-time appointees had lived in the colony for some time before the early commissions of the peace were issued. Alexander Chisholm was appointed to the bench in the district’s first commission, issued in 1803, when he was 51 years old; he had been living there for 28 years.106 Others had immigrated later in life. David Campbell’s name appeared on the 1835


105Several of the magistrates died at ages we would consider young; of the known ages at death (50), 11 died at age 55 or younger.

106D.C.B. biographical files.
commission; he was 51, but had been resident in the district for only four years at the time. Some older appointees received commissions as a belated recognition of status. For example, Ebenezer Perry was appointed to the bench at age 47 in 1835; he had lived in the district for 20 years. Appointed in 1835 at age 53, Asa Walbridge had lived in the district 16 years. For men such as Perry and Walbridge, appointment to the magistracy must have been a welcome confirmation of local prominence.

Age at first appointment, then, varied somewhat, but most men received their first appointments while in their thirties and forties. The average age at first appointment was 41. Many of the magistrates remained on the bench over several commissions and aged on the job. At any given moment, most justices were probably over 40. When a person appeared before a magistrate, she or he was most likely dealing with a man in his 40s, 50s or 60s.

Length of Time Resident in the District at First Appointment

I was able to find information about the date of arrival in the district for 54 of the Newcastle District magistrates (35% of the total). Their arrival dates were compared to dates at first appointment to find out how long they had lived in the district before being appointed to the bench. Again, there were variations. Some men --such as John Covert, Charles Fothergill, Robert Reid and Thomas Alexander Stewart -- were named in commissions of the peace virtually upon their arrival in the district. Others waited

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107 D.C.B. biographical files (Campbell and Perry); J. Squair, The Townships of Darlington and Clarke... (Toronto: University of Toronto Press, 1927), 53 (Walbridge).

108 These four were included in commissions of the peace issued in the very year of their arrival.
decades; Eliakim Barnum first became a magistrate 21 years after his arrival. If all 54 are considered together, about half (48%) were appointed within five years of their arrival, and about half (52%) longer than five years after their arrival. Within this general pattern, there was a shift over time which favoured recent arrivals over longer residents, as Table 2-2 demonstrates.

Table 2-2

<table>
<thead>
<tr>
<th># Yrs. Resident at First Appt.</th>
<th>First Appointed before 1820</th>
<th>First Appointed 1820s</th>
<th>First Appointed 1830s</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 5 years</td>
<td>2 (13%)</td>
<td>12 (55%)</td>
<td>12 (75%)</td>
<td>26 (48%)</td>
</tr>
<tr>
<td>Over 5 years</td>
<td>14 (88%)</td>
<td>10 (45%)</td>
<td>4 (25%)</td>
<td>28 (52%)</td>
</tr>
<tr>
<td>Total</td>
<td>16 (101%)</td>
<td>22 (100%)</td>
<td>16 (100%)</td>
<td>54 (100%)</td>
</tr>
</tbody>
</table>

Of those appointed before 1820, only two had been resident five or fewer years. Fourteen (88% of the total of 16) had lived in the district for longer than five years. This pattern is easily explained. Early commissions recognized the prominence of early settlers, some of whom had lived in the district for a decade or longer before the early commissions were issued. Alexander Chisholm was named to the bench in its first commission in 1803, at which time he had lived there for 28 years. Several men who had arrived before 1800 were appointed to the first commission of the peace and had been resident for longer than five years.110

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109 Barnum was appointed in 1829 at age 45. The examples of Ebenezer Perry and Asa Walbridge were mentioned at the end of the preceding section.

110 Asa Burnham, Benjamin Marsh and Elias Peter Smith had each lived six years in the district when appointed to the first commission of the peace in 1803; Richard Lovekin...
Others who had longer terms of residence before being appointed to the magistracy had arrived as children and had grown up in Upper Canada. Although they had lived in the district for a decade or more when first named to the bench, they were young men when they became magistrates. If Asa A. Burnham arrived in Upper Canada about the same time as his father, he would have lived there for twenty years before being named to the bench while in his twenties. Similarly, John David Smith had lived there for eighteen years when he became a magistrate; he too was in his twenties.

As Table 2-1 demonstrates, the pattern of appointing relatively long-term residents to the district bench began to change in the 1820s. A greater proportion had been living in the district for five or fewer years when named to the bench, about the same proportion as those who had lived there longer. Of 22 identified, 12 fit into the first category and 10 into the second. In the 1830s, this pattern became even more pronounced; of 16 identified, 12 had been resident for five or fewer years, and only four for longer. Over time, there appears to have been a shift in favour of recent arrivals.

The increasing proportion of recent arrivals appointed to the bench seems to provide evidence to support the complaints of some contemporaries, who were concerned that North-American born men with greater experience of life in the colony were being overlooked in favour of inexperienced British-born immigrants. However, there may be another

 seven years; John Bleeker thirteen years; Joseph Abbott Keeler fourteen years; and Leonard Soper fifteen years.

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Aitchison, "Development of Local Government," 66-8; Johnson, Becoming Prominent, 104; E. Richards, "The Joneses of Brockville and the Family Compact," Ontario History 60, 4 (Dec. 1968):169-84. Allan Greer points to divisions between British immigrants and older settlers of Canadian-American origin and a somewhat overlapping split between rural and urban interests as causes of the rebellion in the colony; "1837-38:
explanation for this pattern. In the previous section we saw that more men from the back townships were appointed to the bench as time went on and as these more remote areas became settled. Those who took up residence in the back townships were more likely to be named to the bench simply because there was a shortage of magistrates in such locations. Recent arrivals, most of them from Britain, were more likely to settle in those regions than longtime residents, particularly those already established. It seems obvious that newly arrived men would be appointed to the bench in such circumstance. Settlement patterns might have had as much to do with the apparent favouritism towards the newly arrived as official attitudes of favouritism towards those from Britain. Location was possibly as important a consideration as place of origin.112

Place of Origin

I was able to determine the place of origin of 59 (38%) of the Newcastle District's magistrates. More is known about the earlier appointees; I found the place of origin of half of the justices first appointed before 1830, while I was only able to locate that information for about one quarter of those first appointed during the 1830s. Of the total of 59, more

112I would have liked to be able to compare the length of residence of those first appointed in Cobourg and vicinity in the 1830s with those in some of the more remote areas. Unfortunately, I do not have sufficient information to be able to do so. Of the 15 first appointed in the Cobourg area in the 1830s, I have information for length of residence of only two. Ebenezer Perry, first appointed in 1835, had been there for twenty years; the brewer James Calcutt, appointed in 1837, had been there for five. Of those first appointed in the 1830s from the back townships, I have been able to identify ten who had arrived in the colony fewer than five years before, while only one had been there for longer than five years. Although data is far from complete, these figures suggest that my conclusions are sound.
came from the United States and Ireland than from any other location: 18 and 16 respectively. Nine had come from England, and nine from Scotland. Six were born in Upper Canada or arrived as children. Only one of the magistrates was clearly identified as originating from somewhere other than North America or the British Isles; this was Adam Henry Myers, a native of Hanover.113

Of the magistrates first appointed before 1815, the place of origin is known for half (13 of 26). Of those, 11 had come from the United States, and two from Ireland. It is hardly surprising that early appointments were dominated by Americans: large numbers of immigrants from the British Isles began to flood to Upper Canada only after 1818. Loyalists and “late loyalists” predominated until that time, and they dominated the district bench as well. This pattern changed in the decade 1818-29, during which four commissions of the peace were issued. Again, the place of origin of half of them is known (27 of 51). Nineteen of these were from the British Isles (9 from Ireland, 7 from England, and 3 from Scotland). Five had come from the United States, 2 were Upper Canadian, and the one “other” was appointed during that period. Only 19% of the identifiable magistrates came from the United States during the late 1810s and 1820s, a considerable decline in proportion. Of the magistrates first appointed in the 1830s whose origins can be identified (19 of 78, or one quarter), the British Isles continued to dominate at 13 (6 from Scotland, 5 from Ireland, and 2 from England). Four came from Upper Canada and 2 from the United States. The trend shifted from a predominance of American-born in the early period to British after 1818. A small number of Upper Canadians also began to be present on the bench after 1818.

113See list of names in Appendix 2.
Of those identified, the Irish-born out-numbered those born in England in each of the three periods, though these figures may not be sufficiently complete to indicate with certainty that this pattern held true overall. Some Irish magistrates were well known local Orangemen, which may explain their presence on the bench. John Brown, Richard Bullock, and John Huston were active Orange magistrates. Irish Catholic magistrates were rare, however; Patrick Maguire, first appointed in 1829, was the only justice clearly identified as Irish Catholic.

Overall, then, the pattern seems to change over time from predominantly American-born to 1818, and predominantly British-born afterwards. Again, this would seem to support the contention that native-born and longtime residents were being ignored in favour of recent arrivals from Britain. However, as we saw before, settlement patterns may have been the crucial factor in that trend as well. As time went on and settlement extended into the back townships, the need arose for magisterial appointments in those more remote areas. The only candidates were recent arrivals from the British Isles.

Previous Military Service

At least 28 of those appointed to the district magistracy before 1840 had had previous military experience. Many were retired army or navy officers on half pay. A number had seen active service during the Napoleonic Wars, and some had fought for the British Crown during the American Revolutionary War. Many more than 28 may have had such experience; I have included here only those for whom I have found convincing evidence.114

114 In some areas, such as the Niagara District, the “officer class” was able to transfer its military authority to peacetime civilian authority. See, for example, H.V. Nelles,
Thirteen had been in the Royal Navy, six of whom had been Captains. Francis Brockell Spilsbury and John Tucker Williams commanded vessels on the Great Lakes during the War of 1812. Williams also fought under Nelson at Trafalgar. Years later, when he sought election to the House of Assembly (in 1841), Williams ran under the campaign slogan, "New measures, new men; my colours are naval blue." \(^{115}\) Thomas Allan, Walter Boswell, and John Logie were also navy Captains. Six other magistrates were Lieutenants: John W. Bannister, Robert Madge, Cheeseman Moe, Thomas Reed, Charles Rubidge, and Thomas Traill. Francis Connin and John Thompson were former navy surgeons.

The Army was also well-represented on the Newcastle District bench. At least nine magistrates had previously served in the British Army. George Arundel Hill fought under Wellington at Waterloo as a young man. Robert Hamilton had been a Major in the 79th Regiment. John Fraser was Captain of the 76th, and Francis Shea of the 27th Regiment of Foot. William Handley was Captain of the 11th Light Dragoons. David Campbell and Thomas Murphy were Majors, James Black a Colonel, and Richard Lovekin was an army officer of unspecified rank.

Five others were Captains, but whether in the Army or the Navy is unknown. Alexander Chisholm had served as Captain during the American Revolutionary War. Archibald McDonald, Elias Peter Smith, and Robert Wilkins all were Captains. Susanna Moodie’s husband J.W.D. Moodie was a Colonel.

One man who served on the Newcastle District bench made a career in the military in

\(^{115}\) Craick, 129; Schmid and Rutherford, \textit{Out of the Mists}, 176; Reeve, \textit{Hope}, 255.
Upper Canada. In addition to serving as Sheriff of the Prince Edward and then the Midland Districts in the 1830s, and acting as Deputy Grand Master of the Orange Lodge, Richard Bullock was Adjutant General of Upper Canada from 1837 to 1846. Although Lieutenant Governor Sir George Arthur was not overly impressed by Bullock’s abilities, judging him “gallant but incompetent,” Bullock held onto the post for some time.116

Although many of these men apparently served admirably in the military, the coming of peace following the Napoleonic Wars cut short their careers and they were pensioned on half pay. Stephen Leacock best described their predicament: “These were what were called in England ‘good’ people, meaning people of the ‘better’ class but not good enough to stay home, which takes money....”117 Half pay officers were probably more likely to emigrate before 1820 as their military careers were terminated, rather than later. While such men were appointed to the magistracy into the early 1820s, their numbers declined thereafter. As J.K. Johnson has remarked about Members of the House of Assembly, “Among the prominent, military careers dwindled over time.... New occupations emerged.”118

Family and Marriage Connections

As might be expected, a number of magistrates were connected to others by birth and by marriage. Three Burnham brothers were appointed to the district bench: Asa, John and

116 Arthur quotation from Read and Stagg, Rebellions, fn 17, 262. Bullock played a prominent role in the turbulence at Port Hope in the early 1830s which is discussed in chapter 6.


118 Johnson, Becoming Prominent, 24.
Zaccheus. Five pairs of Newcastle District justices were fathers and sons: Walter and John Crease Boswell, Zaccheus and Asa A. Burnham; Elias Peter and John David Smith; Samuel Street and Allan Whelmed; and John and James Platt.\textsuperscript{119} They may be indicative of an emerging "hereditary" magistracy, but their numbers are not large enough to conclusively state that this was the case. Only a few of the examples fit the classic model. Two leading members of what might be described as Cobourg's "local compact" saw one of their sons appointed to the bench.\textsuperscript{120} Asa A. Burnham's appointment to the magistracy in 1837 marked the beginning of a distinguished career; subsequently he became county warden, mayor of Cobourg, an M.P.P., and was appointed to the Canadian Senate upon Confederation. John Crease Boswell became a militia captain and postmaster at Cobourg in the 1860s, but did not become as prominent as the junior Burnham.

Two sons of magistrates may have been appointed primarily due to their location. Allan Whelmed was named to the bench in 1835 in Clarke township, in which magistrates were never very numerous. When John Platt of Percy was in his late seventies, residents of that township requested that another magistrate be named in their area. There apparently being few qualified candidates, his son James was put on the commission in 1837. Although there are examples of hereditary JPs, there might be explanations other than connections to account for some of these appointments. In any case, such relationships were not very numerous.

\textsuperscript{119}James G. Rogers may have been the son of David McGregor Rogers, but I have found no reference to this relationship so it is omitted from the discussion in the text.

\textsuperscript{120}Zaccheus Burnham and Walter Boswell were both appointed Legislative Councillors in the 1830s. Both were influential at Quarter Sessions.
Relations by marriage were far more common. Many younger magistrates or men who were soon to become magistrates married the daughters of other JPs. For example, James Gray Bethune married a daughter of John Covert. Each of Walter Boswell’s three sons married daughters of other J.P.s: a Spilsbury, a Perry and a Sowden. George Ham and Richard Birdsall married daughters of Zaccheus Burnham. One of Elias Jones’s sons married another of William Sowden’s daughters. Asa A. Burnham’s wife was a daughter of Samuel Street Whelmed.\(^{121}\) Interconnectedness by marriage was far from uncommon, and such relationships cemented and enhanced the status and respectability of up-and-coming young men.

**Other Appointments**

While some of the Newcastle District magistrates received other appointments from the colonial government, the numbers so honoured were apparently not very large. There were no appointments to the Executive Council from the district, and only three to the Legislative Council during the entire period. Six of the Newcastle magistrates were made judges of the District or Surrogate Courts. Three served as Sheriff, and one as an early Clerk of the Peace.

Most of the appointments which went to the district justices were relatively minor ones. For example, four were clerks to councils or courts in the early stages of their careers. Sixteen became postmasters, apparently lucrative and thus a desirable appointment.\(^{122}\) At

\(^{121}\)Information on marriages was obtained primarily from notices in the Cobourg Star.

\(^{122}\)However, in rural neighbourhoods postal business could not have been brisk. One local history notes that there was never very much mail in Otonabee township and its first
least thirty (and probably more) served as officers in the militia, which J.K. Johnson has characterized as “the basic status appointment, almost an indispensable requirement for anyone hoping to assume a regional leadership role.” Many worked their way up the ranks over time. Probably most of the JPs in the district had some appointment in the militia; although this recognized status and was therefore eagerly sought, the position did not bring with it a great deal of influence.

Religion

I was able to find information about the religion of 25 of the Newcastle District magistrates. Several of them were Anglicans, and nearly all the rest came from a range of Protestant denominations. It is not surprising that many were Anglicans, as that was the established church of the colony. At least twelve of the district justices were Anglican (60% of the known figure), but the actual number was undoubtedly greater. Representing other faiths, six (24%) were Methodists; two (8%) were Presbyterians, and one was Quaker and one Roman Catholic (4% each). Although information is incomplete, the pattern appears to resemble that found by J.K. Johnson in his examination of Members of the House of Assembly of the colony. The information on religion is displayed in Table 2-3 below.

postmaster, Charles Rubidge, carried around the letters in his hat. When he met someone for whom he had a letter, “he took the Post Office off his head and picked out the welcome missive.” Mulvany, Peterborough, 385. A list of magistrates who had post offices is in Appendix 2.

123 Johnson, Becoming Prominent, 79. A list of militia officers is in Appendix 2.

124 See list of names in Appendix 2.

125 Johnson was not able to discover the religion of 31% of the 283 M.H.A.s. For those where religion was known, the breakdown as percentage of the total was as follows:
At least four of the Newcastle District justices were members of the Orange Order, which, while not a religion itself, had religious connotations. Orangemen were fiercely Protestant and anti-Catholic, and allied with the administration. The Orange Order was a far from stabilizing force in Upper Canadian society. Many Orangemen engaged in acts of violence to further their political interests; as well as being anti-Catholic, they were virulently anti-Reform.\textsuperscript{126}

Table 2-3

\textbf{Religion of Newcastle District Magistrates}

<table>
<thead>
<tr>
<th>Religion</th>
<th>Number of J.P.s</th>
<th>Percentage of Total Known</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anglican</td>
<td>15</td>
<td>60</td>
</tr>
<tr>
<td>Methodist</td>
<td>6</td>
<td>24</td>
</tr>
<tr>
<td>Presbyterian</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Roman Catholic</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Quaker</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Total</td>
<td>25</td>
<td>100</td>
</tr>
</tbody>
</table>

\textbf{Political Affiliation}

Information about the political affiliation of most magistrates is not available, an interesting fact, given the heat with which political views were expressed at the time. The nature of the appointment process made it inevitable that far more tories than reformers would be appointed to the magistracy. Historians formerly thought that tories had a virtual

Anglican 34\%, Presbyterian 15\%, Methodist 9\%, Roman Catholic 7\%, others 4\%. Johnson notes that very few were Irish Catholic. \textit{Becoming Prominent}, 32-3.

\textsuperscript{126}This is a subject to which I shall return in chapter 6, which explores conflict in Port Hope. At the centre of the conflict was a prominent Orange magistrate.
monopoly on the office but more recent works recognize that reformers were not completely excluded from the district benches.\textsuperscript{127}

Several active and prominent members of the Newcastle District bench were reformers or demonstrated sympathy to the reform cause. Doctor John Gilchrist, briefly a M.H.A., was so well-known a reformer that he was arrested following the Rebellion in December 1837, but was released shortly thereafter because no evidence linked him directly to the uprising. David McGregor Rogers, an early magistrate who held other appointments as well, has been described by his D.C.B. biographer as an early opponent of the central ruling elite. John David Smith, David Smart, and John Tucker Williams of Port Hope appear to have been reformers. The latter ran on the reform ticket in the 1841 election. James Lyons was a reform M.H.A. Charles Fothergill was a reformer for a time, although he appears to have drifted back into the tory fold. J.W.D. Moodie has been described as a "moderate reformer," and Cheeseman Moe as an opponent of the Family Compact. While these examples may not be numerous, they are sufficient to demonstrate that many reformers held prominent positions on the district bench. Reformers were very influential in some areas, such as Port Hope.

The existence of reform magistrates is important, but the local bench largely consisted of men who were tories. Many leaders of what might be described as the local compact at Cobourg were tories: Zaccheus Burnham, Walter Boswell, and Henry Ruttan. John Brown of Port Hope was a tory, and he fought constantly with reform magistrates in

\textsuperscript{127}Gerald Craig believed that virtually all magistrates were tories; \textit{Upper Canada: The Formative Years}, 206. J.K. Johnson writes that while it is not quite true that very few reformers were magistrates, certainly a higher proportion of conservative than reform Members of the House of Assembly were magistrates; \textit{Becoming Prominent}, 57.
the town, aided by other tories such as Richard Bullock. Tories appear to have been particularly influential in the judicial centre of the district, Cobourg. However, in other communities it is far less clear who was in charge.

**Active Magistrates in the Newcastle District**

This chapter has presented a collective profile of all of the men included in the Newcastle District commissions of the peace in the Upper Canadian period. However, some of the justices acted far more often than others and would therefore have been more likely to leave their stamp on the judicial administration of the district. This section identifies and examines some of the most active magistrates.\(^{128}\)

One of the most common conceptions about magistrates in Upper Canada and elsewhere is that few of them carried out their duties. J.H. Aitchison, for example, writes that many whose names were in the commissions of the peace refused or neglected to take the oath, and many who did take the oath refused to act.\(^{129}\) According to Greg Marquis, few magistrates actively pursued their duties.\(^{130}\) However, Donald Fyson has found that the proportion who were active in the Montreal District was higher than is usually assumed: 71% of the appointees there took the oath of office that authorized them to act as magistrates.\(^{131}\)

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\(^{128}\)The information in this section is supplemented by more detailed analysis of the involvement of the district magistrates in certain kinds of activities related to criminal justice administration in the chapters on the pretrial process, summary justice, and Quarter Sessions.

\(^{129}\)"Development of Local Government," 34.

\(^{130}\)"Doing Justice to 'British Justice,'" 59.

\(^{131}\)"Criminal Justice, Civil Society and the Local State," 111-12.
Most of the men named to the commission of the peace in the Newcastle District must have taken the oath of office, because there is evidence that 129 out of 155 of them (83% of the total number) acted as magistrates at least once.\textsuperscript{132} It is possible that this figure is even higher; some of the apparently inactive magistrates may have generated documents which have not survived or been involved in proceedings the records of which have not survived. This proportion is far greater than was the case amongst their counterparts in England and even in Lower Canada.\textsuperscript{133} Historians of eighteenth- and early-nineteenth-century England have noted that under half of those appointed actually acted as J.P.s, and the definition of “active” sometimes means nothing more than having taken the oath of office. R.W. Shorthouse found that fewer than one in four of the justices appointed to the Northamptonshire bench between 1830 and 1845 were active.\textsuperscript{134} Richard Tomson speculates that the writs of dedimus potestatum for the Newcastle District have not survived. One writ from an early commission to take oaths of office appears in the district court records (AO, RG22, ser. 46, Quarter Sessions Miscellaneous Records, env. 6, Dedimus Potestatum, 15 June 1818). Upper Canada Sundries contain a few references to magistrates who had not taken the oath. For example, in February 1831 the district clerk reported that four persons had “neglected” to take the oath to qualify them as J.P.s in the two years since the commission had been issued; those four were James Gray Bethune, John Taylor, William Shaw, and Alexander McDonell. T. Ward to Z. Mudge, 28 Feb. 1831; Sundries, 59907. Similarly, an 1835 list contains the clerk’s remarks that a few of the magistrates appointed to the commission in that year had died, and that thirteen others were “not sworn.” 14 Apr. 1835; Sundries, 86940-3.

\textsuperscript{132}The writs of dedimus potestatum for the Newcastle District have not survived.\textsuperscript{133}As noted earlier, Donald Fyson has found that Montreal District magistrates tended to be far more active than their historical reputation suggests. He also found that more than three-fifths of his sample acted at least once in criminal matters; “Criminal Justice, Civil Society and the Local State,” 113.

\textsuperscript{134}Shorthouse counted those who took out their qualification and who appeared at Quarter Sessions or petty sessions some time during the period; “Justices of the Peace in Northamptonshire, 1830-1845,”\textsuperscript{131} Northamptonshire Past and Present v, 2 (1974), 131 incl. fn. 12.
that in the eighteenth century “probably the ratio of active J.P.s was less than one in five...”
but continues that “there appeared to be an increase in the proportion of active J.P.s” in the
early nineteenth-century.\(^{135}\) According to David Philips, about half of the names in any
commission never took the oaths and did not carry out any magisterial duties.\(^{136}\) Clive
Emsley attributes the fact that “many men simply declined to take out their dedimus” to the
burdensome nature of the office.\(^{137}\) In comparison to these figures, those in the Newcastle
District seem remarkably high.

It is not entirely clear why this pattern differed so dramatically from the situation in a
number of English counties. It might have had something to do with the kinds of men who
were appointed to the bench. Members of the gentry or aristocracy did not have to be seen
to act as magistrates to enhance or legitimize their authority. In some ways such men might
have been elevated above their communities rather than belonging to them. The kinds of
men appointed to the bench in the Newcastle District were deeply entrenched in their
communities. They must have welcomed the status of their appointment to the magistracy,
which might have afforded them social and even perhaps economic advantages. Half-pay
officers and people with claims to respectability must have welcomed the sign of recognition

\(^{135}\)”The Justices of the Peace and the United Kingdom in the Age of Reform,” The
Journal of Legal History 7,3 (Dec. 1986), 274. Tompson recognizes the difficulty of
arriving at an accurate count because of the paucity of records.

\(^{136}\)”The Black County Magistracy, 1835-1860,” 165. Philips’s definition of “active”
was men who actually sat on the bench at petty sessions and Quarter Sessions.

\(^{137}\)”The English Magistracy 1700-1850,” 30. English magistrates bore heavy
responsibilities for administering the poor law, the responsibility for which Upper Canadian
magistrates were spared. See Murray, “The Cold Hand of Charity”; R. Baehre, “Paupers and
Poor Relief in Upper Canada,” Canadian Historical Association Historical Papers (1981):57-
80.
by the colonial elite that their appointment represented. Local authority might be enhanced and social pretensions legitimized by being seen to act as magistrates.

However, not all of the Newcastle District magistrates were active, and several of those who remained inactive were just the sort of people one would expect to be eager to take up the burdens of office. Among the 26 for whom no trace of involvement in criminal justice administration remains were some of the most well-known among them. These include John Langton and J.W.D. Moodie, both literary figures appointed to the bench in the 1830s, and the latter of whom, along with his wife, expended much energy seeking government appointment during that decade. Several of the half-pay officers, the very kind of person often associated with the magistracy in Upper Canada, declined to act as magistrates. These included John William Bannister, David Campbell, Robert Hamilton, William Handley, Moodie, and Francis Shea. Some prominent businessmen also appear to have avoided magisterial responsibilities. The Cobourg brewer and distiller James Calcutt appears not to have acted and neither does Charles Hayes, founder of the Marmora Iron Works.

Other apparently inactive magistrates lived in remote townships where there might not have been much judicial business before 1840. From Seymour township these included David Campbell, Henry LeVesconte, Thomas Masson and Francis Shea. John Hay resided in Harvey township, north of the Kawarthas. John Langton founded Fenelon Falls, a small settlement during this period. However, several of the inactive magistrates lived in or near the most populous communities in the district. The reason for their inactivity remains a mystery.

The magistrates who did act did not all do so with the same frequency. A number
carried out magisterial duties only a handful of times while others did so very often over several decades, while still others acted frequently for a shorter period of a few years. Another group was involved in criminal justice administration fairly regularly for a few years or decades. The impact of these magistrates on criminal justice administration must have been very different, although the exact nature of their impact is difficult to determine. Moreover, different types of men were active magistrates in different parts of the district. The patterns of work of the Newcastle District magistrates are summarized in Appendix 3, which demonstrates the number of times each J.P. performed a range of judicial activities for which evidence survives, and calculates the average number of activities per year during the period when they acted as J.P.s. These work profiles are not described in great detail in the text. However, certain patterns emerge in them which will be the subject of further discussion in subsequent chapters. Some acted almost exclusively at Quarter Sessions, while others acted almost exclusively outside of Quarter Sessions, providing judicial services in their neighbourhoods. This pattern suggests that some magistrates were more closely linked to their communities than others who were more closely linked to the central administration, but that those outside the central clique were not shut out from local influence.

The judicial activities of the magistrates who acted most often are outlined in Table 2-4. Fourteen justices acted more than eighty times each. Although about half of these magistrates lived in the two principal towns, Cobourg and Port Hope, others represent smaller communities. Most acted over a period of many years, with the notable exception of Richard Dover Chatterton, a remarkably busy magistrate in the late 1830s. These magistrates warrant fuller discussion.
Table 2-4

The Most Active Newcastle District Magistrates

<table>
<thead>
<tr>
<th>Name</th>
<th>Location</th>
<th># JP Actions</th>
<th>Years Active</th>
<th>Av. # Acts/yr.</th>
</tr>
</thead>
<tbody>
<tr>
<td>E. Jones</td>
<td>Cobourg</td>
<td>237</td>
<td>1803-35</td>
<td>7.2</td>
</tr>
<tr>
<td>J.T. Williams</td>
<td>Port Hope</td>
<td>228</td>
<td>1822-40</td>
<td>12</td>
</tr>
<tr>
<td>Z. Burnham</td>
<td>Cobourg</td>
<td>174</td>
<td>1814-40</td>
<td>6.4</td>
</tr>
<tr>
<td>R. Henry</td>
<td>Cobourg &amp; Ops</td>
<td>149</td>
<td>1818-40</td>
<td>6.5</td>
</tr>
<tr>
<td>R. Hare</td>
<td>Haldimand</td>
<td>123</td>
<td>1807-40</td>
<td>3.6</td>
</tr>
<tr>
<td>J.D. Smith</td>
<td>Port Hope</td>
<td>117</td>
<td>1814-40</td>
<td>4.3</td>
</tr>
<tr>
<td>J.A. Keeler</td>
<td>Cramahe &amp; Cob.</td>
<td>114</td>
<td>1803-40</td>
<td>3</td>
</tr>
<tr>
<td>S. Hawley</td>
<td>Murray</td>
<td>108</td>
<td>1822-40</td>
<td>5.7</td>
</tr>
<tr>
<td>R. Bullock</td>
<td>Port Hope</td>
<td>106</td>
<td>1818-34</td>
<td>6.2</td>
</tr>
<tr>
<td>R. Chatterton</td>
<td>Cobourg</td>
<td>103</td>
<td>1837-40</td>
<td>25.8</td>
</tr>
<tr>
<td>J. Brown</td>
<td>Port Hope</td>
<td>100</td>
<td>1823-40</td>
<td>5.6</td>
</tr>
<tr>
<td>J. Huston</td>
<td>Cavan</td>
<td>96</td>
<td>1829-40</td>
<td>8</td>
</tr>
<tr>
<td>J. Lister</td>
<td>Darlington</td>
<td>87</td>
<td>1825-40</td>
<td>5.4</td>
</tr>
<tr>
<td>J. Hutchison</td>
<td>Peterborough</td>
<td>82</td>
<td>1821-40</td>
<td>4.1</td>
</tr>
</tbody>
</table>

Several of the most active magistrates might be considered leaders of a “local compact” at Cobourg where “the tools of a Compact...have long since rendered themselves odious to Canadians.”¹³⁸ Zaccheus Burnham was reportedly one of the most influential men in the district. He was its Treasurer from 1814 to 1849; chair of Quarter Sessions from 1821 to 1828, and registrar from 1826 to 1844. He was elected to the house of assembly in 1816

and again in 1824, and served on the Legislative Council from 1831 until the union. In 1839 he was made a district court judge. In addition to holding these offices, he rose steadily in rank through the militia and gradually acquired huge tracts of land in his capacity as a surveying contractor, parlaying his initial grant of 1500 acres into around 13,000 acres.\

Elias Jones might be regarded as Burnham’s Lieutenant; although he too received largesse from the central authorities, his plums were smaller than those awarded to Burnham. Jones was district court clerk from 1801 until his death in 1836; was commissioner of the district land board and school trustee from 1819, and inspector of licences from 1816 to 1831. He ran a store at Cobourg and was a major in the militia. His land grant of almost 450 acres later became part of the town of Cobourg. When he died at age 67 his newspaper obituary lamented the loss of “[a] good subject, a good neighbour, a good father, a Christian and an honest man.”

The Port Hope contingent of the local compact included active magistrates John Brown and Richard Bullock, both Orangemen and both difficult men. As noted before, Brown owned several businesses. He was elected to the House of Assembly in 1830, where he sat for six years. He was heavily involved in the development of the harbour at Port Hope, as well as in other transportation improvement schemes. Brown acted in ways which


140Rae Fleming, Eldon Connections, 11, 13, 30-1, 45 [obituary quoted on 31]; Guillet, Cobourg, 7, 26; Armstrong, Handbook; Guillet, Valley of the Trent, 59, 234, 293, 332; W.L. Smith, 31; “Two Centuries,” 65; Reeve, Hope, 114.
made him the subject of much local criticism in his zeal to further the tory cause. Brown was closely connected to Bullock, a colonel and then adjutant general of the militia later appointed sheriff of the new Prince Edward District, apparently to remove him from proximity to Brown.

It is hardly surprising that active magistrates might be among those identified as leaders of a local compact. However, several of the busiest magistrates do not fit this description at all, which is somewhat surprising. Often opposing Brown and Bullock were very busy Port Hope magistrates John Tucker Williams and John David Smith, both of whom were reformers. We know very little about Darlington magistrate-shopkeeper John Lister, Murray magistrate-farmer Sheldon Hawley; or Haldimand magistrate Richard Hare, the only detail about whom I have been able to find is that he was involved in the Northumberland Agricultural Society. "Squire" Henry, "most entertaining and friendly," owned one of the largest flour mills in Canada after spending 25 years in the North West fur trade. He appears to have been involved in local government. John Huston was a surveyor in Cavan and a leading member of the Orange Order and the Masonic Lodge who "helped smooth religious and factional tensions" in the district. John Hutchison was a

\[141\] J.K. Johnson, Becoming Prominent; D.C.B. biographical files; Reeve, Hope, 42, 93, 139-43, 190; Craick, Port Hope Historical Sketches 20, 23, 31, 47; Read and Stagg, 295, fn. 106; Poole, Peterborough, 17; Shining Waters, 44; obituary in Cobourg Star, 2 Feb. 1842.

\[142\] Read and Stagg, 262, fn. 17.

\[143\] Cobourg Star, May 31, 1831.

\[144\] Stewart, Our Forest Home, 21.

\[145\] D.C.B. biographical files; Brown, Cavan, 30. Documents suggest he was quite heavily involved with Brown and Bullock so might fit the "compact" mould.
physician of Scottish origin so beloved in Peterborough that a number of the town’s citizens built him a large stone house to prevent him from moving away.  

The magistrates who acted as such most often, then, were not all the same kinds of men, and the experience of seeking justice must have differed somewhat depending on where a person lived or to whom she or he decided to go for help. A few more examples illustrate this point more forcefully. For years, the only magistrate in Percy township was farmer John Platt. Platt acted as a magistrate 32 times between 1822 and 1840. Platt was an indifferent speller and wrote in a shaky hand, charging people with “asualt and theratening,” for example. Of all the documentary evidence left behind by the district’s early magistrates, his are the only ones that suggest a magistrate who may have been less than fully literate. However, his neighbours appear to have been satisfied with the services he provided; at least, they did not complain about him to the Lieutenant Governor. When Platt died at age 81 in 1840, a newspaper obituary described him as “an upright worthy man.”

The experience of those who sought help from Platt would have been different than those who appeared before Henry S. Reid. In the late 1830s Reid, an “English gentleman,” became very active as a magistrate in the Bowmanville area. He owned a set of Burn’s Justice, upon the pages of which he carefully annotated references to British legal works as well as to Upper Canadian statutes. These two magistrates represent opposite ends of the magisterial spectrum: Platt the semi-literate farmer magistrate and Reid the assiduous student of legal detail. While this study tends to focus on general patterns in the administration of justice by

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146 Shining Waters, 283.

147 Climo, Star, 86.
 justices of the peace in one district, there are occasions where distinctly local patterns are pointed out. The experience of justice was not the same for everyone, either for the justice himself or for the people who came before him.

**Conclusion**

The typical Newcastle District magistrate was a man between the ages of 40 and 70 who owned property in the district. He was involved in businesses in his neighbourhood and perhaps farther afield. He owned a mill and a shop, and perhaps another business such as a blacksmith’s shop, a distillery, a tavern, a ferry service, or a lumbering enterprise. He was a leader of improvements in his township or town. Before 1830 he was more likely of North American origin, but after then he was more likely to have come from the British Isles. He was more likely to be a tory than a reformer, although there were a number of significant reformers on the Newcastle District bench. He was more likely Anglican than any other Christian denomination, but magistrates of other denominations were appointed J.P.s. He was likely an officer in the militia and may have served in the military at an earlier stage of life. He was a man who probably saw his role as a magistrate as an extension of his role as community leader. In the villages and rural townships of the Newcastle District of Upper Canada, the entrepreneur-magistrate was part of his community, rather than elevated above it. In the principal towns lived a handful of magistrates who identified closely with the ruling elite in York, but outside of Cobourg and Port Hope, many magistrates carried out their duties with scant attention to the central government or the courts. It was possible for magistrates to have a different kind of judicial career in response to their own interests and those of their communities.
The Newcastle District magistrates appear to have taken their appointments seriously, as evidence from the documents demonstrates that a large proportion of them took the oath and acted as magistrates. Not only were a large proportion of the magistrates active, but there was also a high ratio of magistrates to population. These patterns suggest that the Upper Canadian countryside in frontier townships was heavily policed. Colonial officials appear to have ensured that magistrates be appointed in sufficient number to act as agents of control over the population and shape the emerging society. Possibly fearful of disorder that might have accompanied the immigration of large numbers of pauper Irish and anxious to quell potential unrest by government opponents, the Lieutenant Governor and his advisors appointed what they hoped were loyal and like-minded magistrates.

The appointment and actions of magistrates must not be viewed solely as a "top-down" phenomenon, though. There is ample evidence to demonstrate that people wanted magistrates in their neighbourhoods, and they petitioned the Lieutenant Governor’s office asking that such appointments be made. They wanted small claims courts and some mechanism to discourage crime. However, ordinary people expressed a preference for the appointment of certain individuals agreeable to them, who may not have always fit the profile that officials might have preferred. Still, from the point of view of officials it would have been unwise to have appointed people to whom the majority of the population was hostile; doing so would have defeated the purpose for which officials might have preferred to have magistrates in the newly emerging neighbourhoods.
In Upper Canada, as in England, magistrates managed the prosecution of offenders. Justices of the Peace recorded complaints, took depositions of witnesses, and examined the accused. If the offence was minor, magistrates might try accused persons summarily, either individually or in small groups. For more serious offences, they decided how closely to investigate each case, which witnesses would be bound over in recognizance to attend court, whether there was sufficient evidence to warrant a trial, at which court the trial would be held, and whether the accused would be released on bail or committed to gaol to await trial.¹

Magistrates facilitated the settlement of disputes at the pre-trial stage, so that many complaints did not proceed to trial. For those that remained unsettled, justices sent the documents to the district Clerk of the Peace or the colony’s Attorney General, depending on whether the case would be tried at Quarter Sessions or at the Assizes, so that officers of the crown could use the information to prepare the prosecution’s case.²

¹As English historian John Langbein has emphasized, the pre-trial activities of magistrates contributed to the rapid pace of criminal trials. They had done the necessary leg-work of examining all the witnesses, extracting the details, and ensuring that the best witnesses appeared at court. See “The Criminal Trial Before the Lawyers,” University of Chicago Law Review 45, 2 (Winter 1978):277-82.

²The material in this chapter is based primarily upon documents located in the records of the Cobourg Courts of Quarter Sessions, the courts which dealt with minor offences, the most useful of which are the case files (AO, RG22, ser. 31), filings (ser. 32), and returns of convictions (ser. 38). While the Newcastle district magistrates performed important pre-trial functions in cases of a more serious nature, the records of the Assizes courts have not survived, so my remarks on that subject will be limited. A few pre-trial Assizes records appear in the Quarter Sessions filings, and gaol records allow some insight into patterns of
The system was remarkably flexible and left a great deal of discretion in the hands of magistrates and, to a lesser extent, prosecutors. At every stage, justices had a variety of options, although these were constrained within limits imposed by law, primarily depending on the category of the offence and the nature of the evidence. Magisterial discretion was far more limited in cases of serious crime than those involving petty offences, but the vast majority of complaints brought to the attention of Newcastle district justices concerned petty offences. Therefore, magisterial discretion played an important role in the administration of justice at the pre-trial stage.

Prosecution and Detection

In the early stages of criminal investigations, the victim of the offence played an instrumental role. Most criminal proceedings began when the victim made a statement of information and complaint upon oath before a justice of the peace. The magistrate recorded committals. But except for these fragments, we must rely upon the more complete Quarter Sessions records for insight into the pre-trial process. Additional sources are Newcastle district magistrate John Huston's J.P. records, Trent University Archives, B-71-006, Cameron Collection, series 1, subseries C; Upper Canada Sundries; and newspapers.

the complaint, which usually consisted of a brief account of the incident, as well as the names of the principals and the date upon which the offence occurred. For example, on 4 Sept. 1832, Cavan township magistrate John Huston recorded John O'Brien’s complaint that on the previous day, Thomas Medill had shoved him and hit him a blow on the chin. Some victims of assaults or threats swore articles of the peace rather than formally initiate criminal proceedings against the perpetrators; Dorothy Porter, for example, complained that she was afraid that Joseph Nickerson would injure or kill her and sought to have him required to find sureties to keep the peace. Complaints of property offences generally contained a description of the goods stolen and an estimate of their value. Farmer Richard Fallis reported that a horse cover and bridle valued at 12s/6d had been stolen from his stable at night, and that he suspected they were hidden in Joseph Byers’ house in a neighbouring township. Sometimes complaints described offences in greater detail, but the basic ingredients of the victim’s and suspect’s names, the date and the nature of the offence remained constant.

If the identity of the offender was unknown, the victim was responsible for performing detective functions. The name of the offender had to be reported to the subsequent proceedings, and without which it seems that the justice is not authorized in intermeddling, except where he is authorized by statute to convict on view.” The Law and Practice of Summary Convictions... (London: Sweet, Stevens, Maxwell, Butterworth and Richards & Co., 1838), 31.

4 All examples from Huston JP Records; O'Brien’s complaint against Medill, 006/5/2, 4 Sept. 1832; Dorothy Porter's complaint against Joseph Nickerson, ibid, 28 May 1834; Richard Fallis's against Joseph Byers, 006/5/3, 22 Feb. 1840.

5 The private nature of pre-police detection methods has been noted by historians of early modern England. For example, Cynthia Herrup found that the victim was almost always the major investigator of theft charges in seventeenth-century East Sussex, and that magistrates
magistrate if the victim wanted any action taken. Magistrates did not participate directly in tracking down offenders unless they were the victims of offences themselves. Victims of assaults, a category of offence which comprised the majority of complaints in the district, virtually always knew the identities of their assailants and were therefore able to report to the justice very quickly. Victims of property offences could not always name a potential suspect, and sometimes had to do considerable legwork to identify a thief. Some complaints of theft were made weeks or even months after the property had been missed. In the example cited above, Richard Fallis reported the theft from his stable two weeks after it occurred. In October 1836, Susan Porter complained of a theft which had occurred the previous March.6

The procedures for issuing search warrants demonstrate the essentially private character of detection. Before a magistrate could issue a search warrant, the complainant had to provide the name of a suspect and grounds for suspicion against that person. The first Upper Canadian magistrate's manual advised:

It seems that formerly it was not unusual for justices to grant general warrants to search all suspected places for stolen goods; yet such practice is generally condemned by the best authorities.... Likewise, upon a bare surmise a justice cannot legally grant a warrant to break any man's house to search for a felon or stolen goods. But in case of a complaint, and oath made, of goods stolen, and that the complainant suspects the goods are in a certain house or place,

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6Huston JP Records, 006/5/3, 18 October 1836; she suspected Thomas Argie of Cavan of stealing a black veil valued at £2 from a house.
and shews the ground of his suspicion, the justice may grant a warrant to search in those suspected places....

Justices apparently followed these rules. Each surviving search warrant in the Newcastle district court records names a suspect. For example, a warrant to search for Nancy Rogers's missing fowling piece named Thomas Coghan, and a warrant to search for George Noble's stolen bank bills identified Thomas and Eliza Davy. A settler in Pickering in the mid-1840s blamed the "inefficiency of the law for detecting stolen property" for an epidemic of thefts; because the victims were "at a loss to discover" the identities of the thieves, "and the magistrates can only give a warrant to search the premises of the particular individual, the party deposes he hath suspicion of," "the rascals go unpunished." Society "would be purged of these pests" if "a general search warrant could be issued." Nevertheless, it is possible that some magistrates were willing to bend the rules a little in cases of serious crime. The constable executing a search warrant for James Dougall's missing trunk visited five houses and then arrested Lewis St. George.

7W.C. Keele, The Provincial Justice, or Magistrate's Manual... (Toronto, 1835); 2nd ed. (Toronto, 1843), 548.

8Quarter Sessions Filings, box 4, env. 2, "Thomas Coghan;" Quarter Sessions Case Files, box 13, "Thomas and Eliza Davy." Search warrants are not numerous in the records. Complaints of theft are far more common; many of them identify a suspect but there are no corresponding search warrants in the records. In some of these cases the magistrates may have been unconvinced that the suspicions were well-founded; in most, however, it is more likely that the documents have not survived.


10Cobourg Quarter Sessions Accounts, box 3, env. 2; two magistrates certified a constable's bill for executing the search warrant, 4 Apr. 1827. Because this case was tried at the Assizes, the search warrant itself has not survived, and we are unable to determine
The records provide an occasional glimpse into Upper Canadian detective methods. During an attempted burglary at John Brown's Port Hope establishment, a clerk who slept in the store, possibly to provide security, shot one of four men who broke in one night. The men fled. According to the newspaper report, "Blood was tracked in the morning for a considerable distance, but the villains have not yet been discovered." When John Tucker Williams was a victim of theft, he noted "it is apparent by the impression of the Robbers feet, that several persons were engaged in it." In neither of these cases did rudimentary detective work succeed in catching the culprits. The victims had to resort to other methods.

In Upper Canada there were no prosecution associations to assist victims to detect or prosecute offenders. From time to time such organizations were recommended; for whether the warrant was general or named five suspected houses.

11Details of the attempted burglary of Brown's premises are in Cobourg Star, 1 Nov. 1831. Although theft from a store did not constitute burglary under English common law, such an offence could be so categorized if someone lived therein, which may have been the case in Brown's establishment. See Richard Burn, The Justice of the Peace and Parish Officer, 21st ed. (London: Cadell and Davies, 1810), 381. John Tucker Williams wrote about the theft of his property in a letter to Z. Mudge, 9 October 1829; Sundries, 53793-4. Both Brown and Williams were district magistrates.

example, "Tom Tough & Co." wrote a letter to the Editor of the Cobourg Star suggesting that a prosecution association for horse thieves and runaways be founded.\(^{13}\) Newspapers did provide an avenue for the circulation of descriptions of offenders or stolen property and some advertisements appeared in them requesting information about crimes and, sometimes, offering a reward. An issue of The Colonial Advocate described thieves probably headed for the United States. A reward notice appeared in the Cobourg Star for the return of F.P. Rubidge's stolen watch, and $500 was offered for information about the "Daring Burglary" at John Brown's "premises and store." Jacob Ryckman offered a "suitable reward" for information leading to the discovery of a stolen mare or the identities of the horse thieves.\(^{14}\)

Magistrates occasionally placed advertisements in an official capacity seeking information about offenders in newspapers and offering rewards, but evidence suggests that they did so only when there was no-one else to act on behalf of the victim. The following example underlines the essentially private nature of detection. In 1821, four men robbed an old Eastern district trader of £1800 worth of property and murdered him. The victim "was unmarried; had no Heir, or even any relative whatever in America...." The murderers were:


\(^{13}\)Cobourg Star, 13 Feb. 1833.

four young and active Men, therefore nothing but a most prompt and strenuous pursuit could effect their apprehension; under the impression of these circumstances and the further considerations that no relative whatever was in the country to take any steps & that the Murderers might escape with the property and annoy the Province by further depredations, we [three magistrates] determined to promise rewards to all persons, both verbally and by advertisement, who undertook their pursuit to their apprehension.

The murderers, "four daring and desperate Ruffians," were found with most of the stolen property, and were jailed. That having been accomplished, the three magistrates realized that they were liable for payment of the expences, which amounted to between sixty and eighty pounds. They had "certainly entertained the impression that the expences may be defrayed out of the deceased's property." However, the stolen property had been sealed until the trial. The magistrates wrote to the Lieutenant Governor's office requesting that they be remunerated for the expences out of the property of considerable value found in the murdered man's house. The magistrates placed the advertisement and offered the reward only because there was no one else to do it; they acted, in effect, as agents of the victim. The way they described their actions and their expectation of reimbursement makes it clear that responsibility for the expense and trouble of detection rested with the victim or the victim's family, even in murder cases.

Successful detection of property offenders was more likely the result of good luck and an exchange of information than of forensic techniques, and could take time. In the incident in which John Tucker Williams lost property stolen from his desk at the Mansion House Hotel in Port Hope in August 1829, several months elapsed without an arrest, despite the victim's offer of a reward of several hundred pounds advertised in a local newspaper.

15 This account appears in David Scheck, Cornwall, to George Hillier, York, 3 July 1821; Sundries, 26283-4. I was not able to find a reply to this request.
Not until February of the following year did a break in the case occur when a search party found the stolen items in a house five miles north of Port Hope while investigating two unrelated thefts, and notified Williams. 16

Magistrates performed essentially passive roles in detecting offenders unless they themselves were the victims of offences. However, as victims they responded as individuals and not as legal officials, although they could put their knowledge of the law and their connections to good use, as is evident in the Mansion House burglary.

Magistrates and their families had little control over the timing of when people came seeking judicial services. In her diaries, Mary O’Brien recorded several inconvenient disruptions. On June 9, 1833, “Just after prayers Edward was called to hold an inquest on the case of a labourer who had died suddenly whilst sleeping with his fellows....” A month and a half later, “Just as we were going to bed and Edward was feeling tired, there came a poor man on the wings of apprehension to ask him to bind one of his neighbours over to keep the peace.” In August 1834, “...Edward had a long job of justice business among a dozen black people, ending in a five shilling fine and five good lectures. Thus it was late before we got dinner.” Soon after breakfast on a morning after Mary had given birth “arrived Mr. Lally with a brace of pistols in his pocket and a brace of prisoners in his charge.” On New Year’s Day, 1836, constables brought six or eight prisoners, arrested for

16 This robbery was mentioned above, after which the victim examined footprints; see note 14. The account appears in two letters John Tucker Williams wrote to the Lieutenant Governor’s Secretary on 9 Oct. 1829 and 15 Feb. 1830 (Sundries, 53793-4 and 55506-7), supplemented by the Assizes Minute Books, Fall 1830, at which John Butler was convicted of burglary and sentenced to twelve months imprisonment and to be whipped three times at thirty-nine lashes on each occasion. If more than one person was indeed involved in the burglary, as Williams surmised upon examining the footprints, Butler’s accomplices apparently escaped detection and punishment.
committing “an outrage to celebrate the New Year,” to her house. “The examination took a long time,” she lamented, “and at last, at a late hour, in despair of their being concluded, I went out to order dinner.... At the first break in the business I got the prisoners and the constables turned out” and let the children in to see their father. 17 People expected magistrates to be available when they needed them even if this meant interrupting them in their homes to seek their help.

**Settling Disputes without Proceeding to Trial**

Not all of the criminal complaints people made to magistrates led to a trial. Some prosecutors pursued the case no further than that initial stage. Some of those accused were bound over in recognizance to keep the peace rather than formally charged with assault or other offences. Also, some criminal cases were settled informally without the case coming to court. It is not entirely clear what roles the Newcastle District magistrates performed in encouraging people to choose less litigious options than proceeding to trial, or the extent to which they actively participated in negotiating settlements. Nevertheless, it is clear that many complaints of criminal actions did not end up in trials.

In eighteenth-century England, assaults, trespasses, and other misdemeanours were frequently settled by the justice's mediation; magistrates were "clearly encouraged" to

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attempt to reconcile disputing parties rather than send the matter to trial. Prosecuting to the full extent of the law or initiating malicious prosecutions endangered community harmony, and took time, trouble and money; magistrates were concerned to try to smooth over differences between people rather than allow them to fester or escalate. Magistrates in many Upper Canadian communities must have followed the example of their English counterparts, particularly as the distance and cost involved in pursuing a case to trial at the district capital was likely to exacerbate tensions.

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20 Several British historians have suggested that many cases were dropped due to costs and inconvenience, factors that deterred prosecution; see Shoemaker, *Prosecution and Punishment*, 84-5, 277; Sharpe, “Enforcing the Law,” 110-11; Sharpe, “Such Disagreements,” 173; Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge: Cambridge University Press, 1989): 26. Distances people had to travel in England to trial were nowhere near as far as many in Upper Canada had to travel, and the travel in the colony was often more difficult than in Britain.
thought the better of pursuing criminal actions once their anger had cooled down and they considered the difficulties that might ensue from prosecution.

Donald Fyson estimates that in the Montreal District of Lower Canada in the late-eighteenth and early nineteenth-centuries, about one third of complaints ended up in court. While it is not possible to quantify the proportion of complaints that proceeded to trial in Upper Canada, it is clear that many did not. Of at least thirty criminal complaints made to Newcastle District justice John Huston between 1835 and 1840, for example, only two appear in the district court records. The Quarter Sessions records from the Newcastle District contain documents relating to several hundred disputes which never proceeded to trial. From August 1834 to June 1839, Prince Edward district magistrate D.B. Stephenson


Trent University Archives, B-71-006, Cameron Collection, Series 1, John Huston Papers, Subseries C, Justice of the Peace records. Thirty-five complaints of assault or minor theft survive from 1835-40 and there may have been others. I searched Assizes and Quarter Sessions records to see whether these complaints reached the courts. Only a complaint against Florence McCarthy for petit larceny reached Quarter Sessions in July 1830; and a presentment against Jacob Smeadis for assault and fraud appeared in the Assizes minute books for Sept. 10, 1839.

I estimate the number of cases at between three and four hundred. Newcastle District Quarter Sessions Filings (AO, RG22, ser. 32). This figure was estimated by comparing the names of the accused mentioned in the documents in the Filings series to the names of defendants at Quarter Sessions and Assizes trials. While some of the documents in the
recorded 113 complaints in his informations book. Twelve of these were recorded as having been settled, including one that was "compromised" and another "settled by arbitration." 24

Some information concerning the settlement of disputes appears in the court records. In the Quarter Sessions case files, at least seventeen cases were explicitly stated to have been settled or the indictments were withdrawn.25 Sometimes all that was needed was for one of the accused to offer to pay the costs which had been compiled in the registration of the complaint. For example, potential prosecutor Michael Power, who swore a statement against three people for assault, issued a statement to Quarter Sessions saying that "whereas P[atrick] Callaghan [one of the accused] agrees to pay all expenses pet[itione]r requests indictment should not be forwarded."26 Similarly, a case of assault in 1840 was "settled upon payment of costs by the prosecutor."27 If the dispute involved theft or the destruction of property, an accused might offer restitution. When Robert Tate's dog killed and ate a sheep belonging to Samuel Redmond, Redmond complained to a magistrate. Rather than pursue the case to trial, "Samuel Redmond agrees to take 10 shillings for the above sheep."28

Filings related to cases which did result in trials, by far the majority of them did not.

24 Archives of Ontario, RG22, Series 86. Picton General (Quarter) sessions. Miscellaneous Records, 1834-1839. This document records informations taken by Stephenson after the passing of the Summary Punishment Act in 1834, which gave individual magistrates the jurisdiction to try cases of assault and petty trespass summarily. Whether this means that Stephenson would have been involved in fewer such settlements previous to this date remains unknown.

25 Quarter Sessions Case Files, AO, RG22, ser. 31, boxes 2, 5, 8, 9, 10, 11, 12.

26 Cobourg Quarter Sessions Orders; AO, RG22, ser. 37, box 1, env. 6, n.d.

27 Case Files, box 13, case against James Hagerman.

28 John Huston Papers, Subseries C, 006/5/4, Justice of the Peace Papers that were not Huston's; statement signed by magistrate P. Maguire, dated 22 Sept. 1834.
Similarly, a Picton dispute was "settled by agreement to pay for the pigs killed."\textsuperscript{29}

When complaints involved acts of violence or threats, it was not uncommon for the perpetrators to be bound over in recognizance to keep the peace rather than bailed or committed to gaol to await trial. As English historian Cynthia Herrup has noted, the peace bond hung like a "Sword of Damocles" over troublesome people.\textsuperscript{30} So long as they behaved themselves, they did not suffer punishment; however, if they violated the terms of the recognizance, they would have to pay a hefty fine and, moreover, so would those who had pledged their sureties, who therefore had a direct interest in convincing the person to behave. Magistrates issued recognizances to keep the peace routinely. James Lyons, a magistrate from the eastern edge of the Newcastle District, bound over at least six people to keep the peace between March 17 and July 3, 1830.\textsuperscript{31} Peterborough-area newspaper editor and publisher John Darcus bound over at least 25 people in recognizance to keep the peace between 1835 and 1840.\textsuperscript{32}

The ability of magistrates to lead disputing parties to a settlement at the pre-trial

\textsuperscript{29}Stephenson Informations book,

\textsuperscript{30}The Common Peace, 88. Norma Landau identifies the power to demand a person to enter into recognizance "one of the most potent weapons" at the disposal of magistrates; The Justices of the Peace, 23-4.

\textsuperscript{31}AO, RG22, ser. 32 (Newcastle District Quarter Sessions Filings), box 3, env. 7 & 8 (1830), recognizances of George Sharp, Mar. 17; Barry Dougherty, Apr. 1; Daniel Johnson, Apr. 6; Patrick Martin, Apr. 9; Elizabeth Carson, June 8; Abraham Brooks, July 3. Lyons was first appointed a magistrate in the commission of 1829 and he appears to have sent his paperwork to the Clerk of Quarter Sessions because he did not realize that he did not have to do so. Most of the recognizances in this series are those ordering a court appearance. It is not possible to quantify the use of recognizances further because most of them have not survived.

\textsuperscript{32}AO, RG22, ser. 32.
stage, before costs and hostility had escalated, should not be underestimated when trying to evaluate their influence. Such services would no doubt have been valued by the participants because it saved them the trouble and expense of proceeding to trial and it probably minimized the tensions between the disputing parties.

**The Pre-Trial Examination**

After the victim made the complaint, the magistrate summoned witnesses and issued processes to bring the accused before him. Magisterial discretion played a crucial role at this stage. The justice evaluated the reliability of the participants, the nature of the offence, the circumstances behind the dispute, the strength of the evidence, and the options for settlement. The magistrate might dismiss the case, encourage the parties to settle, decide that the offence fell under summary jurisdiction and try the accused on the spot, or send the case to Quarter Sessions or the Assizes for trial.

The magistrate's first decision was whether it appeared "either that the party has actually committed the offence, or that there are reasonable grounds to suspect him of having committed it." At this point, the magistrate had two options. If he deemed that the

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33 A somewhat different version of this section has been published as an article, "The Pre-Trial Examination in Upper Canada," in G.T. Smith, A.N. May and S. Devereaux, eds., Criminal Justice in the Old World and the New: Essays in Honour of J.M. Beattie (Toronto: University of Toronto Centre of Criminology, 1998):85-103.

34 Summary justice is discussed in a separate chapter and therefore is not explicitly referred to here. Nevertheless, summary and pre-trial proceedings are not necessarily mutually exclusive. In the course of examining witnesses and inquiring into an offence, a magistrate might decide the case was one over which he could properly preside summarily, and try the offender then and there.

complaint was unfounded, he could refuse to act on it. However, if the justice accepted that the complaint was worthy of investigation, "his duty [was] to have the offender brought before him." In such cases the magistrate issued either a warrant or a summons, depending on the severity of the crime. A warrant was a more forceful command than a summons; it authorized and ordered the bearer, a constable, to arrest the accused and bring him or her before a justice of the peace. In cases of misdemeanour, magistrates did not usually issue warrants right away, unless they considered the case aggravated or that the accused might abscond. The nature of the offence was the primary factor for the justice in determining which process to issue. Keele's manual suggested that in cases of petty assault it was more advisable to issue a summons because "in many cases it is found that there is little or no pretence for the accusation." Magistrates generally used a summons to procure the attendance of the accused "where the offence is between party and party, and not of an aggravated nature; but where the offence is of a higher nature, as felony, breach of the peace, &c. and in cases where the king is a party, it may be proper to issue a warrant in the first instance." In addition to having the accused brought before him, magistrates subpoenaed witnesses. Sometimes depositions of witnesses were taken prior to the attendance of the accused, possibly to enable the justice to evaluate the validity of the prosecution's case. Witnesses were often present at the examination.

This section examines pre-trial practices in Upper Canada, and the extent to which procedures there mirrored the laws and practices in England from which they were derived.\footnote{Keele, 1st ed., 264-5; 2nd edition (1843), 586, 624.}

\footnote{The reception of English laws into Upper Canada is a subject not yet adequately addressed. By the Quebec Act and the Constitutional Act of 1791, English criminal law was}
During the course of the eighteenth century, English practices involving pre-trial examinations of accused felons were altered in fundamental ways before statutes of 1848 explicitly instructed magistrates to take these new practices into account. The pre-trial examination effectively evolved into a pre-trial hearing rather than a mere gathering of evidence against the accused. Evidence from the Newcastle district court records suggests that Upper Canadian magistrates also carried out pre-trial examinations as if they were pre-


trial hearings. They sometimes dismissed cases, questioned witnesses for the defence as well as for the prosecution, and displayed consciousness of emerging rules of evidence, such as the right of the accused to avoid self-incrimination.

In England, laws governing the pre-trial examination of persons accused of felony dated back to the sixteenth century. These early laws merely required magistrates to take the examination of the accused, which meant that they noted whether the person confessed to or denied the charge and summarized what the accused and the witnesses said. The prosecutor was required to swear to his or her statement under oath. However, although they established that justices had to examine each accused felon, the Marian bail statutes provided little guidance about the ways in which the pre-trial examination ought to be conducted.40

English procedure gradually altered in fundamental ways during the seventeenth and eighteenth centuries. By the end of the eighteenth century, “the magistrate’s examination ceased being simply a means of assembling the best evidence against the prisoner and took on some of the characteristics of being a judicial hearing.”41 Whereas the presiding magistrates previously heard evidence only from prosecution witnesses, they now began to consider the statements of potential defence witnesses as well. Also, although there had previously been little if any concern for the rights of the accused, legal process gradually

39“Felony” meant serious offences, which included most types of larceny as well as more serious violent and property offences. Degrees of larceny, determined by the value of the goods stolen and the location from which they were taken, were critical to the legal classification of the offence, and therefore all thefts were probably examined by magistrates routinely.

401 & 2 Ph. & M., c. 13, s. 4 (1554-55); 2 & 3 Ph. & M., c. 10 (1555).

41Beattie, Crime and the Courts, 274.
began to take the prisoner's rights into account. Judges were increasingly concerned about the status of confessions as evidence. As John Langbein explains, the distinction between a pre-trial confession "that was free and voluntary" and therefore deserved credit, and one "forced" by "hope" or "fear" became the important criterion. Judges objected to considering as evidence depositions sworn by witnesses who had died before the trial took place, on the grounds that the defendant had no opportunity to cross-examine the witness in court, and thus had no opportunity to cast doubt on the validity of the evidence. They increasingly regarded depositions as legitimate pieces of evidence only if the accused had the opportunity to cross-examine the deponent as she or he gave the statement to the magistrate at the pre-trial stage. That the prisoner might be entitled to the advice of a lawyer during the examination was also considered. In addition, magistrates could dismiss cases in which there was insufficient evidence against the accused. All of these changes occurred gradually in practice, and these matters were still in flux in the first quarter of the nineteenth century in England.

Indeed, they were not finally resolved until the three Jervis Acts in 1848. The first clarified the role of magistrates in dealing with accused felons, and this is the statute which primarily concerns us here. The Jervis Acts have been lauded as a major step towards the recognition of the rights of the accused. For example, it has been argued that before the

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42"Shaping the Eighteenth-Century Criminal Trial," 103.


4411 & 12 Vict., cc. 42-44. The second statute related to matters over which justices of the peace had summary jurisdiction. The third protected magistrates from malicious prosecution for actions they took in exercise of their duties.
Jervis Acts, magistrates could take statements “from witnesses in secret without the presence of the suspect, who could be interrogated in secret without legal assistance,” whereas the Jervis Acts required magistrates to act “in a more open fashion to determine whether there was sufficient evidence” to commit persons to trial. The view that the first of the Jervis Acts represents a watershed in the treatment of the accused at the pre-trial hearing has been challenged by John Beattie and Wes Pue, both of whom characterize it as merely recognizing in statute what had long been occurring in practice. According to Pue: “Far from being a radical enactment, that statute was conservative in the deepest sense of that word.”

Canadian equivalents of the Jervis Acts were passed in 1851. Before that time, Upper Canadian magistrates relied upon British sources for information about how they were expected to carry out their judicial duties until sources specifically intended for the Upper Canadian market appeared. The first of these was William Conway Keele’s *Provincial Justice*, first published in 1835. Before 1835 the reference work most widely

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47 *Provincial Statutes of Canada*, 14 & 15 Vict., cc. 96-98.

48 W.C. Keele, *The Provincial Justice, or Magistrate’s Manual*, being a complete digest of the Criminal Law of Canada, and a compendious and general view of the Provincial Law of Upper Canada; with practical forms, for the use of the Magistracy (Toronto, 1835). Subsequent editions of Keele’s volume were published in 1843, 1851, 1858, and 1864. Keele was a Toronto attorney who was never called to the bar. In addition to compiling material for *The Provincial Justice*, he published two other legal works: a reference book for constables entitled *A Brief View of the Township Laws up to the Present Time...* (Toronto, 1836); and *A Brief View of the Laws of Upper Canada to the Present Time...* (Toronto,
used was Burn's *Justice of the Peace and Parish Officer*, which consisted of five huge volumes, not all of which were relevant to Upper Canada.\(^4^9\) In the case of accused felons, Burn specified that the examination ought not to be upon oath, but rather should be voluntary, presumably because a person could not be made to produce evidence against himself in a criminal prosecution. If the accused confessed voluntarily, however, that evidence could be used against him. Some kinds of evidence was considered problematic: depositions of deceased witnesses were to be allowed as evidence in cases of felony or manslaughter but not in cases of misdemeanour. In cases involving serious offences, justices were instructed to take information for the defence as well as the prosecution, “for such information, evidence, or proof so taken, is only to inform the king and his justices of the truth of the matter.” Burn continues, “it seemeth also just and right that the justices who take information against a felon, or persons suspected of felony, should take and certify as well such information, proof, and evidence as goeth to the acquittal or clearing of the

\(^4^9\)Most Upper Canadian magistrates probably did not have extensive legal libraries, but they undoubtedly found a manual essential. While it is difficult to determine exactly what sources Upper Canadian magistrates used for information about the law, we can be reasonably certain that they relied upon Richard Burn’s *The Justice of the Peace and Parish Officer* before 1835, and perhaps even after that date. During the 1820 election, a platform collapsed under the weight of too many people; witness William Bell noted “The only fracture I observed was in the board of a volume of Burn’s Justice, which a magistrate was gravely consulting at the moment the accident happened” (*Hints to Emigrants in a Series of Letters from Upper Canada* [Edinburgh, 1824], 147). A copy of each of the five volumes of the twenty-second edition of Burn’s *Justice* (London, 1814), inscribed with the name of Henry S. Reid, a Newcastle District magistrate appointed in 1837, is held in the collection of Robarts Library, University of Toronto. Each volume of Burn’s *Justice* contained over eight hundred pages, which made it a thorough but unwieldy reference work. The arrival of Keele’s single-volume manual on the market in 1835 was apparently welcomed warmly; the list of subscribers extended to three pages (v-vii) and included seventeen magistrates and several other people from the Newcastle District.
prisoner as such as maketh against the prisoner."

The right of the accused to cross-examine witnesses and the right to have a lawyer present at the examination are not mentioned in Burn. However, because these practices developed long before being accepted in law, we have no reason to expect them to be mentioned. A statute allowing the presence of counsel appearing for the defence of accused felons in court was not passed in England or in Upper Canada until 1836. Counsel may have appeared for the accused at pre-trial hearings, but we have no way of knowing how frequently they did so. The broadening of the examination process to include the accumulation of potential evidence for the defence suggests that the pre-trial examination had, in Upper Canada as well as in England, taken on the character of a judicial hearing in some ways.

An Upper Canadian statute of 1833 required magistrates to examine those arrested for felony or suspicion of felony, and those taken on charges of misdemeanour or suspicion of misdemeanour, but the primary function of the statute appears to have been to ensure that the magistrates had good grounds for granting bail or confining prisoners in gaol to await trial rather than laying down clear instructions concerning the form of the examination.

50Burn, Justice of the Peace I:843 and 855-56.


523 Wm. 4, c. 2; An Act relating to the bailing and commitment, removal and trial of Prisoners, in certain cases (1833).
Nevertheless the statute maintained that when examining suspected felons, justices were to take “the information upon oath of those who shall know the facts and circumstances of the case” and “shall put the same into writing in the presence of the party accused, if he be in custody, who shall have full opportunity afforded him of cross-examining such witnesses, if he shall think proper so to do.” The justices were then to bind by recognizance all persons who knew anything material about the felony to appear at the next Quarter Sessions or Assizes “to prosecute or give evidence against the accused.” While this statute formally recognized the accused felon’s right to cross-examine his accusers, there is no indication that he was expected to produce witnesses in his defence. In fact, the wording of the statute implies that the justice had to bind over witnesses for the prosecution only.33

The first legal reference work specifically published for the use of Upper Canadian magistrates, Keele’s manual, incorporated British statutes and legal commentary together with Upper Canadian statutes. The first edition consisted of a single volume of close to three hundred pages. Entries were alphabetized by subject and the duties of the justices laid out clearly, along with sample forms to cover every conceivable circumstance. Keele also recognized the legal principle, which had emerged in eighteenth-century England, that an accused could not be forced to incriminate herself or himself. A forced or induced confession would not be considered admissible as evidence in cases of felony. By 1835 magistrates were being instructed more clearly about this than they had been in the earlier Burn manual. When a felony occurred,

533 Wm. 4, c. 2, s. 2. There is no indication that persons accused of misdemeanours were permitted to cross-examine witnesses (s. 3). The process by which magistrates were kept informed of changes in legislation which affected their judicial duties is not entirely clear, but a number of Upper Canadian statutes were published verbatim in local newspapers.
if it appear that a case, even of suspicion, be made out against the accused, the justice then asks him if he would wish to say anything in his own behalf; if he decline to do so, he should not in any manner be pressed, or interrogated further on the subject, and he should upon no account be induced to say anything upon a promise or hope, or even the slightest intimation being held out to him that it will be better or worse for him; because, his confession, under such circumstances, would be afterwards inadmissible in evidence against him. ... 54

This provision might not have provided the accused with as much protection as one would expect. The justices were further instructed that “if he say anything voluntarily, the justice must take it down in writing.” So when the magistrate asked the accused if he would like to say anything, without apparently warning him that he did not have to say anything, whatever he did say would be recorded and could be used in evidence at trial. But if the accused said nothing, he could not be forced or coerced. There was, however, another catch. If the accused refused to answer the question, that potentially damaging fact was to be recorded by the magistrate: “whether he says or declines to say anything in his own behalf, the justice, in prudence, should take down in writing what passes upon the occasion, in order that the judge, at the trial, may see that the justice has done his duty in this respect.... The examination must not be upon oath.” 55 Although the prisoner had the right to refuse to incriminate himself, his failure to answer the prosecution’s evidence probably did not work to his advantage at trial.

There is further evidence that the Upper Canadian pre-trial examination had taken on the nature of a judicial hearing by the 1840s. Magistrates were required to put the evidence

54Keеле, Provincial Justice, 269 (emphasis in original).

55Ibid. Keele’s words resemble closely the principal British sources; see John Jervis, Archbold’s Summary of the Law relative to Pleading and Evidence in Criminal Cases, 7th ed. (London: Sweet and Stevens, 1838), 109.
presented by witnesses into writing "in the presence of the party accused, if he be in custody, who shall have full opportunity afforded him of cross-examining such witnesses, if he shall think proper to do so."\(^{56}\) Moreover, lawyers must have been increasingly present at pre-trial examinations, although disapproval of that practice lingered:

> It is in the discretion of a magistrate, when he takes the examination of a prisoner, whether he will allow the presence of an attorney or other legal adviser, either for the prisoner or prosecutor: it cannot in either case be claimed as a matter of right, as information might thereby be obtained and conveyed which would defeat the course of justice. In the case however, of a trial of summary conviction, before a magistrate, there is a difference; but in the latter cases, it is reasonable, that a party upon his trial should have professional assistance.\(^{57}\)

By 1844, though, examination procedures had been made more clear, the right to cross-examination allowed, and the right of the accused to have a lawyer present at the examination admitted:

> When the accused appears before the Bench, the [complainant?] and his witnesses should also be present. The Information should be read to the accused, and unless he voluntarily admits the charge, the Magistrate is to swear and examine first the Witnesses for the Complainant, and then those for the Prisoner, taking the whole of the evidence down in writing, as nearly as possible in the words of, and when read over to be signed by, the Witnesses. The accused or his Counsel had the right to cross-examine each witness. After the evidence is given the accused may be asked if he wishes to make any statement of his own. If he does, that should be reduced to writing, and be signed by the accused. Where the Prisoner wishes to make any such statement, it should be intimated to him he need say nothing that will criminate himself.\(^{58}\)

\(^{56}\) Wm. IV, c. 2 (1833).


\(^{58}\) Circular by George Gurnett, Chairman of the Home District Quarter Sessions, to all magistrates in the Home District, 6 Nov. 1844 (AO, Thomas Mossington Papers, MU5895); emphasis in original).
Magistrates's manuals imply that the changes in the pre-trial examination which had occurred in eighteenth- and early nineteenth-century England had found their way into Upper Canadian magistrates' parlours. But had they in fact done so? Accounts of pre-trial hearings were not reported in the newspapers or legal literature. However, in the 1850s an anonymous attorney included in "memoranda of my early days," a description of his first case.\textsuperscript{59} An admirer of Dickens, the author tended to add colour and dialect to embellish his account.\textsuperscript{60} But there is no reason to doubt his general description of the proceedings, and he provides a useful case study of the pre-trial hearing. The attorney's recollection demonstrates that the nature of the pre-trial examination resembled a judicial hearing, wherein witnesses for both sides were allowed to state their cases. The proceedings were informal, which encouraged the participation of all of the interested parties and assisted the justice in evaluating the reliability of those who gave evidence. Counsel for the accused was present at the hearing.

The magistrate dismissed this case because he was not convinced that the offence was a felony, and because he could see that the parties were feuding with one another and that the prosecution was not without malice. It involved a series of disputes between two neighbours, whose relationship had not gone well for at least a year before the case was initiated. Previously, trouble brewed over hogs trespassing in a potato patch. The victim

\textsuperscript{59}P.T.S. Atty, Esq., "From 'Law and Lawyers in Canada West,'" (1854); reprinted in The Prose of Life, eds. C. Gerson and K. Mezei (Downsview, 1981), 63-69. Although no date is attached to the case it is likely from the 1830s. The author, writing in the mid-1850s, introduced the piece by saying that he wanted to give some idea of the practice of lawyers in Upper Canada (p. 63).

\textsuperscript{60}When his first customer knocked at the door, "I was studying attentively the celebrated case of Bardell vs Pickwick, 2 Dicken's Reports" (ibid, 64).
sent his dog to chase the hogs out of the potatoes and one of the hogs got "chawed up considerable." In revenge, the hog owner trapped and injured the dog. In the new case which was brought to the lawyer, the owner of the dog and potato patch sought legal assistance for the defence case; the prosecutor was the hog owner. This new dispute had begun when the dog owner found a log chain on the road, picked it up and took it home. His son was using the chain when the neighbour came along and claimed it. The son refused to hand it over because his father was not there; he was “off tending court” in a suit about some flour. Then, the prosecutor "puts hot foot to the squire, and swars my boy stole the chain!"

The lawyer was hired to help the son and attended the pre-trial hearing.

The attorney's recollection reveals something of the ambience of the proceedings.

The stuffy and intense atmosphere, the attendance of a number of people, and the informality of the proceedings are evident:

Being late in the autumn, there was a fire in the stove in the room where the justice, a worthy yeoman of the neighbourhood, was sitting. He was seated at a table with some stationery, &c., on which also lay the information and papers already taken in the case. All parties were sitting down, and for some time the conversation turned calmly upon general matters not at all bearing upon the case in hand.... I don't think the prosecutor cordially approved of my presence.... The "logging chain scrape," as it was termed, attracted an increasing audience, whose presence the heat of the stove and limited dimensions of the room rendered unpleasant and inconvenient, almost enough to defeat the ends of justice; but his worship proceeded to try the case with the gaping boors intently gazing over his shoulder upon the evidence he was taking down; but of which they were unable to read a word. Add to this, there was a density of confined and heated air enough to mystify the clearest brain, and to make the position of administrative authority anything but a sinecure.

The magistrate evidently attempted to defuse tension and make the participants more comfortable by chatting with them before he began to hear the case. People wandered around during the proceedings and peered over the magistrate's shoulder. Such informality
may have encouraged participants to freely state what they knew. In contrast to proceedings at the Assizes, the "majesty" of criminal justice administration was noticeably absent.61

The attorney's account continues, providing insight into procedure and the collection of evidence. The presiding magistrate tolerated interjections from persons other than the participants until they began to interfere with the proceedings and to escalate tension:

The information was ... read, stating, of course, among other things, that the prisoner feloniously stole the article in question; that it had been found in his possession, seemed apparent; and the prosecutor seemed to consider this as a sufficient substantiation of his complaint. With frequent promptings from his wife ... the prosecutor identified the chain to be his .... The rest of the evidence was very vague as to whether it was on the prosecutor's premises the night it was missed, or whether it had been left near the bob-sled, or in the road or out of the road. As to proof of the felonious abstraction there was default of evidence on oath. The strong minded woman offered to swear that she believed the prisoner was mean enough to do it, or at all events, if he, the prisoner, wasn't, his father was, but this did not seem to satisfy the worthy magistrate as to the felony. It must not be supposed that the prosecutor and his party had been allowed to give their evidence without interruption from their opponents, as during its progression all sorts of variations of the lie direct and the lie collusive, had been actively exchanged. The magistrate threatened several times to commit the parties, unless more order was observed; but it had very little effect; and the introduction by the hostile parties of irrelevant matters tended to mutual criminations, generally succeeded a temporary lull....

The magistrate was concerned with identifying the chain alleged to be stolen, establishing where the prosecutor had left it and exploring the issue of felonious intent. Participants hurled insults back and forth. The magistrate tried to regain control of the proceedings by

61Douglas Hay has written that the "majesty" of the criminal law was one of three "aspects of the law as ideology" (the others being justice and mercy) which explain why "the many submitted to the few." "Majesty" describes the spectacle of the higher courts; see "Property, Authority and the Criminal Law," in Hay et al., Albion's Fatal Tree: Crime and Society in Eighteenth-Century England (London, 1975), 17-63 (quotation at 26). Paul Craven has noted the distinct absence of "majesty" in the mid-nineteenth-century Toronto Police Court; see "Law and Ideology: The Toronto Police Court, 1850-1880," in Essays in the History of Canadian Law, Volume One, ed. D.H. Flaherty (Toronto, 1983), 248-307.
threatening to take action against the rowdy men and women present, but he was ignored.

The magistrate seems to have allowed witnesses to speak freely, even if the attorney thought that some of their remarks were irrelevant to the case.

Ultimately, the magistrate dismissed the case. In making his decision he seems to have attempted to look beyond the specific instance to the broader context of relations between the two families. Throughout the examination he tried to smooth over the differences between the families and to avoid contributing to the tensions himself. The lawyer continued:

I began to see that both parties were in a state of feud, and were gratified by any frivolous opportunity of annoying each other, and I really could not feel much triumph when the justice dismissed the case, and recommended the prosecutor to seek his remedy in trover.62 "Trover" to the prosecutor seemed unintelligible, and in its nature, as a civil action, not sufficiently annoying; therefore, the decision was unsatisfactory. My client, too, appeared dissatisfied, and wanted to know from the justice "whether he was goin' to get any costs for being dragged up here with his witnesses, and losing so much time just for nothing." But he received a severe lecture from the magistrate, in an upright, homespun way, recommending him to be less litigious, and foment fewer quarrels among neighbours. The prisoner was released from custody, very much to his satisfaction, and the court broke up without being terminated by a committal to the county jail, which ... the amiable partner of the prosecutor hoped would have taken place...

The participants in this case paid no attention to the magistrate's advice. About a week later, the client again called at the attorney's office, trying to get the lawyer to bring an action for false imprisonment against the owner of the logging chain. The attorney declined, but the

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62In other words, he advised him to pursue the case in civil rather than criminal courts if he insisted on prosecuting. Trover is the original form of the modern action in tort for conversion of goods; it was based on a fictitious allegation that the plaintiff had lost the goods and the defendant found them and converted them to his own use (The Concise Dictionary of Law [Oxford, 1983], 372). Clearly by giving this advice the magistrate denied that the chain had been "feloniously stolen."
man found another lawyer who did take the case. At a trial for false imprisonment at the
Assizes the client obtained an award of £15 damages.\textsuperscript{63} Despite his efforts, the magistrate
had been unable to defuse the hostility between the participants. Nevertheless, he had
determined that there was no evidence of felony and dismissed the accused rather than
sending him to trial. Moreover, he had patiently heard testimony from every side and
determined a great deal about the background to the case, which aided in his decision.

Evidence suggesting that the trends evident in this particular case were more general
can be found in the records of the Courts of Quarter Sessions for the Newcastle district,
which contain over fifty examinations, most involving cases of theft.\textsuperscript{64} These are only a
portion of the cases that must have originated in the district. But examinations for larceny
are probably representative of what went on in other instances.

Not one of the surviving records of examinations indicates that the accused was
examined under oath, so presumably the justices were conscious of the inadmissibility of
evidence acquired by forcing the accused to incriminate himself. In the margin of his copy
of Burn's \textit{Justice of the Peace}, Darlington township justice Henry S. Reid noted, "a person
cannot be compelled to produce evidence to criminate himself."\textsuperscript{65} Other Newcastle district
magistrates were also clearly aware of the legal rules involving self-incrimination. When Cobourg justices Richard D. Chatterton and Ebenezer Perry examined Edward Ward, a young shoemaker accused of burglary in December 1839, they “duly cautioned [him] not to say any thing to incriminate himself.” Ward claimed to be innocent.66

At the examination, Newcastle district magistrates seem to have been particularly concerned that the accused clearly understood the charges. The first question the magistrates asked Henry Elliott, when examining him on the charge of stealing carpenter’s tools in July 1827, was: “Do you know the charge against you?”67 At the examination of Henry Hartly of Peterborough, accused of taking a horse and feloniously intending to defraud its owner, Hartly at one point acknowledged that he had taken it. Yet on the admission to bail, magistrate John Brown recorded that Hartly did not understand “the word Felonious intent... being a little intoxicated with liquor.” Brown seems to have gone to some pains to try to explain to Hartly the legal implications of his confession, but the latter was incapable of understanding. Hartly was discharged for want of evidence, but the issue of intent to defraud may also have been important.68 Similarly, John Platt, a magistrate-farmer from the township of Percy, wrote on the backs of several documents “are you content with this[?] we are content with the above.”69 Presumably he wanted to make sure that the accused understood the document’s contents and agreed that the document reflected accurately what

66 Filings, Box 4, env. 9.
67 Filings, Box 3, env. 2.
68 Filings, Box 3, env. 13.
69 For example, on the recognizance of an accused, dated 30 June 1823, in a case of “asult and theratening [sic]” (Filings, Box 2, env. 10).
she or he had said. When Eldon township magistrate John Logie asked John Taylor what he had to say in justification of his conduct in a charge of assaulting a constable, Taylor “pretended not to understand the English language.” Despite his apparent skepticism about Taylor’s inability to understand English, the magistrate called upon James Mcdonald to interpret.  

Examinations did not always include verbatim records of questions asked or specify who asked them. In a few documents, though, the magistrates explicitly noted the defendant’s cross-examination of witnesses. In a case involving an assault on a bailiff, the defendant cross-examined the prosecutor about the conversation they had prior to the alleged assault. The defendant said he had been surprised to find the bailiff seizing his property and had questioned whether he had the authority to enter his premises. On cross-examination, the bailiff admitted that Josiah White had “asked what business he had there and if he had claims against him and if he had liberty to come into the premises.” The bailiff apparently replied that he “had liberty from David White,” who must have been a relation of the accused.  

There are a few examples of prisoners asking questions of witnesses in cases involving theft. When Edward Ward was under examination for burglary in late 1839 he questioned a witness’s testimony, asking whether he had seen him actually use the cart in which the stolen goods had been found. In another case of theft the accused clearly cross-  

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70 Case Files, Box 12; perhaps Taylor spoke Gaelic.

71 Filings, Box 4, env. 7; the magistrates summarily found Josiah White guilty and fined him five shillings.

72 Filings, Box 4, env. 9.
examined the only eye-witness. In December 1818, Samuel Holton was accused of stealing a cheese worth five shillings from a house at night. The prosecutor’s daughter, Hannah Neil, was the only person who saw the thief. During the examination, she said that she was “well convinced” it was Holton who had run off when she alarmed her father. The accused then asked her questions, explicitly denoted “Questions by the prisoner” on the examination record, which Hannah Neil answered:

- Why was the room light? --From a good fire.
- The man that opened the door did he come in as tho’ not afraid? --Yes.
- Did he shut and open the [door] as tho’ afraid? --No.

By questioning the degree of lighting Holton was trying to cast doubt on Hannah Neil’s ability to identify him as the thief. The questions about the attitude of the thief suggest that Holton was trying to implicate someone else, probably someone who lived in the Neil home.

At the time of the theft Hannah’s father ran off in pursuit of Holton and found him sitting in front of the fire with his shoes off at his boarding house, where he had apparently recently arrived. No cheese was discovered there, so there was no material evidence against Holton.

He was acquitted of the charge at his Quarter Sessions trial.\(^73\) For our purposes, it is important that the accused had the opportunity to cross-examine the key witness at the examination so that he could then know what strategy to employ at his trial.

There is not one instance in which the presence of a lawyer at an examination was recorded in the surviving Newcastle district records. This does not mean that lawyers were never present. However, they were probably hired more often to defend clients of serious criminal charges, and virtually no examinations of those accused of serious offences have

\(^{73}\)Case Files, Box 3.
survived. On only three occasions was the presence of a lawyer recorded at a Newcastle District Quarter Sessions trial in this period, although lawyers may have been there whose attendance was not recorded.\textsuperscript{74}

There is evidence indicating that magistrates gave the accused the opportunity to explain the evidence against her or him after it had been presented at the examination, but several of the accused must have thought that the less they said the better off they would be. When asked, many had “nothing to say.”\textsuperscript{75} Others denied the charge without explanation.\textsuperscript{76} Confronted with evidence they could not explain, or perhaps sensing that the magistrates would approve more readily of those who admitted their failings than of those who lied about their innocence, some confessed.\textsuperscript{77} But a significant number tried to explain their actions in a way that they must have believed would make their plight seem more sympathetic to the presiding magistrates. When a deer skin, two sideboard nubs, and a pair of hinges stolen from the house of a magistrate were found hidden in the house of Asa Lapp, Lapp confessed that he had stolen them but explained that he had been intoxicated at the time. The Quarter Sessions grand jury refused to return a bill of indictment against him.\textsuperscript{78}

\textsuperscript{74}Cobourg Quarter Sessions Minute Books (Oct. 1823; Jan. 1826; Apr. 1826).

\textsuperscript{75}For example, Case Files, Box 11 (Jane Hagerman, larceny) and Box 13 (John Rescamps, larceny; John Black, assault on a constable).

\textsuperscript{76}Case Files, Box 11 (James Johnston, larceny); Box 13 (Jane Leary, larceny; John Black, assault).

\textsuperscript{77}For example, Case Files, Box 11 (Joseph Bousette, larceny) and Box 12 (William Phillips, larceny).

\textsuperscript{78}Case Files, Box 11 (Asa Lapp, larceny from a house). The nature of the search may have been the cause of the grand jury’s action. No search warrant is in the file, and it is possible that someone merely ransacked his house seeking the stolen goods, leading Lapp to
number of people accused of theft claimed that they had found the goods, bought them, or had been given them by someone else. When Samuel Johnston was brought in on suspicion of stealing bank notes from Erasmus Fowke’s store, the presiding magistrate noted that “the prisoner denies it and says it was his own money and says ‘send me [to] Gaol.’”\(^79\) Accused of stealing a harness from the barn of an inn at which he had been staying, George Gilroy argued that

> Between Colborne and Grafton I was over taken by a man whom I did not know and he put the harness upon my horse after taking it out of Mr. Vanalstine’s [the prosecutor’s] barn. I objected to take them but he said take them along with you so I took the harness and brought it home.\(^80\)

Defendants charged with assault sometimes tried to explain their actions as well. In 1819 Timothy Kitteredge and his family lived in the cellar of Edward Henderson’s inn in Hamilton township. The innkeeper and his helper, Andrew Donaldson, were charged with assault and unlawfully disturbing the peace after they threw numerous pails of water through the cracks in the barroom floor which soaked Kitteredge, his wife and children, and their furniture. When examined, Donaldson claimed that he had just been washing the floor on Henderson’s instructions.\(^81\) John Taylor explained why he had assaulted a constable in 1835. He said

> that he knew Malone was a Constable, but said he did not know that he was

\(^79\)At the January 1827 Quarter Sessions, Johnston was convicted of larceny and sentenced to three months’ imprisonment and two whippings (Case Files, Box 7; Quarter Sessions Minutes, Jan. 1827).

\(^80\)Case Files, Box 11; Gilroy was discharged for want of prosecution at Quarter Sessions.

\(^81\)Case Files, Box 13 (Henderson and Donaldson).
the man, and pretended he did not know the nature of the warrant - and being asked why he should set upon the Constable when he fell ... and wrest the gun from the Constable, and go away into the woods with it, he the prisoner replied and said that he was afraid that the Constable would shoot him or his wife or children, he could assign no reason for suspecting any thing of the kind. 82

Although it is difficult to believe that such stories helped the defendants’ cases, it is clear that accused people did make statements to explain their side of the story at the pre-trial examination. And in some of the cases mentioned here in which the accused’s explanations seem far-fetched, they were nevertheless not convicted of offences.

Magistrates seem to have heard the testimony of witnesses who appeared on behalf of the defendant at the pre-trial examination. Magistrates were under no obligation to seek out witnesses for the defence; it was the defendant’s responsibility to produce them. When Mary Taylor was accused of stealing a scarf in 1828, her husband and another woman testified on her behalf at the examination and revealed the complex nature of even the simplest commercial transactions:

John Taylor says his wife told him she purchased the Vandack in April from a Mrs. Mum and that she did so he believes. Marey Taylor wife of John Taylor says she purchased it of Mrs. Murn some time last spring on a Sunday and for the same give a shift which shift she delivered to a Mrs. Hawthorn to give Mrs. Mum and that she wore the Vandack publickly through the Village and Elsewhere. Elizabeth Hawthorn says she Received a Bundle said to be a shift from Marey Taylor and delivered the same to Mrs. Mum but does not know on what account. 83

82 Case Files, Box 12. This case is referred to above; it was this Taylor who “pretended” not to speak the English language and had an interpreter provided for him. Despite the incredulity with which the magistrate clearly regarded Taylor’s story, the Quarter Sessions grand jury found no bill against him. Perhaps the jurors believed Taylor. More likely, they suspected the motives of the prosecutor, Constable Michael Malone, who waited a full two months after the alleged incident to make a complaint against the Taylors.

83 Case Files, Box 8 (Mary Taylor).
At Quarter Sessions, the trial jury found Mary Taylor not guilty of stealing the scarf. The corroboration of her evidence by Elizabeth Hawthorn cannot have injured her case and the evidence that she wore the scarf publicly indicated that she had not attempted to conceal it.

In another example, a political discussion at William Roseborough's inn at Port Hope became heated. William Mills pulled a loaded pistol out of his pocket and said "he would shoot the first man who opposed Mr. Moe at the first Election." When a constable tried to arrest him on a warrant, Mills tried to shoot him. At the examination Mills claimed to be innocent and, "having called witnesses who were present in his behalf all of whom clearly provided he was guilty," Mills was fined.\footnote{Filings, Box 3, env. 13. Cheeseman Moe was a Peterborough-area retired naval officer and magistrate who opposed the Family Compact; see W. Kirkconnell, \textit{County of Victoria Centennial History} (2nd. ed., Lindsay, 1967), 108-9.}

Despite the failure of Mills' witnesses to help his case, their presence at the examination indicates that the process did resemble a pre-trial hearing, witnesses for both sides having been considered by the magistrates.

Another factor indicating that the examination resembled a pre-trial hearing was the possibility that magistrates might dismiss cases in which they considered the evidence weak. Although early modern English procedure had considered dismissal in cases of felony beyond the jurisdiction of magistrates, by the end of the eighteenth century this view had changed.\footnote{These changes are described in Beattie, \textit{Crime and the Courts}, 268-81. Note, however, that although magistrates were not supposed to free any suspects accused of felony without bond to appear, they sometimes \textit{did} dismiss alleged felons without any formal action; see C. Herrup, \textit{The Common Peace: Participation and the Criminal Law in Seventeenth-Century England} (Cambridge, 1987), 50.} The first Upper Canadian magistrate's manual explicitly instructed justices to dismiss cases where there appeared to be no evidence:
If, upon considering the evidence which has been given on the part of the prosecution, together with the examination of the accused, there appears to be no case made out against him, the justice should discharge him. But if the evidence against the accused be such, that the justice thinks it should be submitted to a jury to consider and decide upon it, then he should send the case to trial.

The extent to which Upper Canadian magistrates dismissed cases is difficult to determine. According to John Weaver, magistrates rarely discharged anyone brought before them. However, evidence from the court records indicates that the practice of dismissing cases at the pre-trial stage did occur. Ellen Powers, who complained that Hannah Callaghan and Catharine Maloney had assaulted her, called upon Cavan township magistrate Patrick Maguire. On the back of the warrant Maguire wrote: "The complaint on which this summons was issued was investigated before the Magistrate (P. Maguire) and not substantiated, the case was dismissed as the Law directs...." On the bottom of a piece of paper upon which he had recorded details of an alleged theft, Gore district magistrate William McCay wrote: "The above named A. Deforest was apprehended by virtue of my warrant, and upon Examination, no proof of the charge - was discharged." Picton Justice of the Peace D.B. Stephenson dismissed sixteen of the 113 cases which were brought before

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88 Convictions by J.P.s; Box 1, env. 3.

89 AO, MU2847, Smith and Chisholm Papers, V. Justice of the Peace Records, env. 77, 31 Mar. 1832.
him during the period 1834 to 1839. Two were potential felonies, one of theft and one of forgery. Stephenson dismissed the former because there seemed "no felonious intent" and the latter because the "charge [was] not substantiated." Stephenson dismissed several misdemeanour cases, indicating "no proof," "want of proof," or "not proven."

Various signs, then, indicate that pre-trial practices in Upper Canada had taken on the character of judicial hearings by the 1820s or the 1830s. Defendants told their side of the story and magistrates allowed them to produce witnesses. Magistrates did not examine defendants under oath, and they were apparently aware that induced confessions were inadmissible as evidence. Some justices allowed the accused to cross-examine witnesses and thus to shed doubt on their testimony. Magistrates dismissed cases where they considered that there was no evidence against the accused. In Upper Canada, as in England, pre-trial practices had emerged which took into account the rights of defendants before magistrates were explicitly required to do so by statute. Although magistrates and, to a lesser extent, prosecutors possessed considerable discretionary powers, the interests of the accused were safeguarded in significant ways which made the system more fair and discouraged malicious prosecutions.

With regards to evidence, the Newcastle district magistrates seem to have sought exactly the kinds of information one would expect. The bulk of the justice's duties involved assaults, a number of which were legally classified as "riot" because a number of people had

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90 AO, RG22, ser. 86, Picton General (Quarter) Sessions Miscellaneous Records, 1834-1839 (Informations book of D.B. Stephenson). The forgery complaint was against John McDonald (14 Aug. 1834), and that against Henry Allen for theft (14 Jan. 1835). Examples of dismissals for want of proof on assault complaints include those against Valentine Ogden (6 Sept. 1834), Peter Rigo (17 Mar. 1837), and Robert Abercrombie (13 Apr. 1837).
participated in violent acts. When collecting evidence in assault cases, magistrates heard from all the participants and tried to determine who said what to whom and in what order, who struck the first blow, whether weapons were seen and in those possession they were, and how sober (or drunk) the participants were. For example, when investigating a series of assaults in which John Nix and John Lawson were involved in September 1821, magistrate Edward Hatfield clearly orchestrated the pre-trial proceedings, but he allowed each of the participants to explain what he knew of the dispute as he took depositions from at least six people. Hatfield was particularly interested in a stone that one of the participants used to hit another, and in the issue of provocation. One assault occurred following a bee, and none of the witnesses or participants had been sober. Nix had called Lawson a “damned Liar and a Thief,” after which they began to argue. Lawson told Nix “he might kiss his arse,” which was apparently too much for Nix, who struck at Lawson. Gradually it emerged that Nix had missed a keg of whiskey and thought that Lawson had taken it.\textsuperscript{91} Similarly, in collecting evidence for one of the earliest Quarter Sessions cases in the Newcastle District, magistrate Richard Lovekin took depositions concerning violent acts from a number of members of two families, the Lighthearts and Smiths. According to Lucy Smith, Lightheart’s daughter had called her “old Steel’s whore” and several of the Lighthearts had attacked her with clubs. Ruth Long, a black woman who worked for the Smiths, came to the rescue of her employers’ children when the Lighthearts attacked them, and they hit her with clubs and insulted her. Again, Lovekin was apparently interested in who said what to whom, and in the order in

\textsuperscript{91}AO, RG22, ser. 32 (Quarter Sessions Filings), box 2, env. 8. John Nix was convicted of assault at Quarter Sessions and fined, although he was the person who made the initial complaints to Hatfield. There is no record of a trial at Quarter Sessions at this time in which John Lawson was a defendant.
which events occurred.92

While examining people accused of theft, magistrates sought to establish the reliability of eye-witness accounts and to find out how the accused happened to come into the possession of stolen property, as was clear in some of the examples described above. Magistrates sought other kinds of information as well. They asked people accused of theft to account for their whereabouts, to explain what they had done, and asked whether they had seen anyone around the time the offence had been committed.

When Cobourg butcher William Hitchens went to work on the morning of 14 March 1835, he found he had been robbed. He ran to magistrate Ebenezer Perry's to swear an affidavit that meat had been stolen from his slaughterhouse, and named seven men whom he suspected of the crime. While executing the search warrant, Constable William Grigg found several items, including a beef head and some tallow, that cast suspicion on Robert Brown and William Hurst. The butcher's assistant identified some of the goods and in his deposition said that the slaughterhouse had been made so secure it "would not let in a dog." The perpetrators had removed a nailed up piece of door.

At their examination both of the suspects denied they were guilty. Robert Brown was examined first and claimed to have found a nine or ten pound piece of tallow on the ice banks between his house and the slaughterhouse that morning, and he took it home. Afterwards he was told about the theft whereupon he mentioned that he had found the tallow. Perry must have asked Brown what he had been doing the evening before as Brown

92 AO, RG22, Cobourg Quarter Sessions Case Files, Box 1. The events described took place in December 1803. At the trial, three of the Lighthearts were convicted of assault and fined five shillings apiece (Minute books, 10 July 1804).
then stated that he had been home from seven the previous evening until ten o'clock that morning. Perry must have then asked him whether he saw any meat; Brown said he saw no meat, there was no fresh meat in his house last night and he had no knowledge that any had been brought in during the night.

William Hurst repeated the "finding the tallow on the lakeshore" story. Hurst must have been found in possession of more than tallow because he went on to state that he "saw Mr. Grandy's dog" drop a piece of beef weighing four or five pounds, so he took it home. On another fortunate outdoor escapade Hurst found so much meat that he had to make three trips to carry it all home. First he took a beef's head and put it under the bed, then retrieved a fifteen pound lump of tallow, and finally another four or five pound piece of meat. In his statement he said that he met Hitchens in the morning and asked him if he had lost anything; when the butcher replied in the affirmative, "Hurst told him he had found a small quantity of tallow, which he would give him if he came down." Hurst's apparent lie to Hitchens must have destroyed any credibility he might have had left after telling this unlikely tale. Hurst was convicted of larceny at the Assizes and sentenced to two years hard labour in the Kingston Penitentiary.93

These examples show that magistrates attempted to extract information which would be relevant for the trial from the defendants at the examination and from the witnesses when they made their depositions. They often took some pains to get to the heart of the matter, taking depositions from a number of individuals, and letting individuals speak freely what

93Affidavit of William Hitchens, informations of William Grigg and Nicholas Rigg, and examination of Robert Brown and William Hurst, 14 Mar 1835; Cobourg Quarter Sessions Filings, Box 4, env. 1, 1835; Assizes Minute Books.
they had to say. They asked questions of the witnesses, actively shaping the pre-trial examination and the collection of evidence.

**Sending the Case to Trial**

For cases that were to proceed to trial the magistrate, sometimes consulting the prosecutor, decided in which court the trial would take place, with what offence the accused would be charged, and whether the accused would be released on bail or committed to gaol to await trial. As English historian Cynthia Herrup has noted, no case came to court without the coordinated decisions of many individuals: victims, magistrates, sureties, witnesses, and jailers. The road from action through prosecution to conviction, she writes, "ran as if dotted with a hundred independently owned tollbooths...."\(^{94}\) The decisions made at this stage of the pre-trial process had profound effects on the lives of defendants.

In most cases prosecutors and magistrates would have agreed on the court in which the defendant would be tried, taking into account the nature of the offence and the criminal career of the defendant. However, in some cases there was no such agreement and magistrates bowed to the demands of the prosecutor. In July 1830, for example, Peterborough-area magistrate John Hutchison wrote to the clerk of the peace: "I bound the parties over to the Assizes (the prisoner is in gaol) although, I believe it would have been better to the Quarter Sessions."\(^{95}\) Other magistrates followed their own inclinations: William Warren would have bound John Lister (a fellow magistrate) over to the Assizes, he


\(^{95}\)Quarter Sessions Case Files, box 9, file "Elizabeth Ritchie". John Hutchison to Thomas Ward, 9 July 1830.
wrote, "but from some knowledge I have of the transaction I have reason to believe his arrest was done through malice...." Magistrates allowed the circumstances of the case and their knowledge of the principals to determine whether the prosecutors' wishes or their own views would prevail.

If the case was to be tried at Quarter Sessions, the magistrate sent the relevant documents to the Clerk of the Peace; if it was to be tried at the Assizes, he sent them to the Attorney General's Office. These documents would be used to prepare the indictment and possibly to help prosecutors prepare the case. Very occasionally a prosecutor sent a list of witnesses that should be summoned to the trial, perhaps fearing that the justice might miss someone. Most justices sent the paperwork without comment; however, some magistrates could not resist the urge to provide an opinion. Peterborough-area justice John Hutchison wrote to the clerk of the peace about Elizabeth Ritchie, charged with forcible entry: "her conduct to the prosecutor has been implacable and violent in the extreme," and in a postscript he noted, "I omitted to mention that Mrs. Ritchie by twice since committing the same outrage for which she was held to Bail [and] has forfeited her Bail...." The Quarter

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97 In this period, though, crown prosecutors did not appear to expend a lot of energy preparing cases for the prosecution even in serious cases. The Attorney General or Solicitor General travelled with the Assizes and prosecuted cases themselves, often having seen the documentation only briefly or not at all before the trial began. See Paul Romney, Mr. Attorney. At Quarter Sessions trials the magistrates who heard the complaints might actually be on the bench at the trial. It is not known to what extent other magistrates sitting on the bench familiarized themselves with the cases before the Sessions began. Perhaps the chairman might have done so, but it is my impression that they probably proceeded from the reading of the indictment and the list of witnesses in court.

98 Case Files, box 9, "Elizabeth Ritchie," John Hutchison to Thomas Ward, 8 July 1830.
Sessions grand jury found no bill against Mrs. Ritchie.

Magistrates (and prosecutors) also exercised some discretion in classifying the offence, particularly in property cases. As I have discussed elsewhere, there is evidence that down-charging of offences occurred in Upper Canada, and this was probably a more widespread phenomenon than is evident from the fragmentary records. We have no way of knowing how many larceny cases tried at quarter sessions involved offences that might have been sent to the Assizes. The slaughterhouse theft discussed above is a case in point; there was clear evidence that someone had broken into the building and stolen meat. This might have been tried as a more serious offence. Similarly some rapes may have been tried at Quarter Sessions as "assault with intent to commit rape." Because convictions for rape were difficult to achieve because of the problematic nature of evidence and the reluctance of juries to convict, the magistrate and victim may have agreed to down-charge the offence to make it more likely that the offender would be punished.

Because Assizes case files have not survived, we must look for evidence of down-charging in the records of the lower courts. A number of cases tried at Quarter Sessions or even summarily as assaults could probably have been tried at the Assizes had the magistrate and victim wished. Some brutal assaults with weapons which inflicted serious injury on the victim resulted in trials for petty assault. When a pair of boots was stolen from a Picton


100 For example, incidents involving attacks with a sickle, a club, an axe, and a poker, all of which resulted in injury to the victim, were tried summarily; Returns of Convictions, box 1, env. 1, env. 4, env. 7.
shop in 1839, the case was tried as a trespass by a local J.P.\textsuperscript{101}

In Upper Canada, the reasons for down-charging of offences was the same as in Britain; it reduced potentially capital offences to non-capital ones, or reduced the significance of the episode to minimize tensions between the participants. Few people were hanged in Upper Canada for property offences, so down-charging made it more likely that a guilty person would be convicted of some offence, and conviction for a lesser offence dispensed with the drawn-out process of applying for pardon.\textsuperscript{102} In Upper Canada, though, it was also used to reduce non-capital offences to even lesser ones to enable the case to be tried locally and more cheaply.

The magistrate's decision that had a profound \textit{immediate} effect was whether to commit the defendant to gaol or release her or him on bail to await trial. Two main factors entered into the justice's decision: the classification of the offence and the nature of the evidence. For minor offences one magistrate could set bail and it appears that this was the routine practice. When a more serious offence had occurred, bail was by no means automatic; the J.P. had to consider the weight of the evidence. In cases of felony: "[i]f, in the opinion of the justice, the felony is clearly made out against the prisoner, he should on no account be admitted to bail."\textsuperscript{103} Only if the magistrate doubted that the prisoner was guilty of a felony could the accused be considered for bail. Magistrates could not bail those

\begin{itemize}
  \item \textsuperscript{101}Stephenson information book, Sept. 1839.
  \item \textsuperscript{102}The distinction between grand and petty larceny was abolished in Upper Canada in 1837, but even before then the majority of property offences tried at the Assizes were simply denoted "larceny."
  \item \textsuperscript{103}Keele, 1st ed., 272.
\end{itemize}
charged with murder.\textsuperscript{104}

The bail procedure explained above had been adopted by Upper Canadian statute in 1833. Previous procedure had been similar, with justices granting bail if evidence was not overwhelming against the prisoner.\textsuperscript{105} Whereas one justice could commit a prisoner to gaol to await trial, two justices were required to grant bail in felony cases, a provision that had a long history in British judicial tradition.\textsuperscript{106} Therefore, when the examination of the accused had been completed and the presiding magistrate had arrived at the conclusion that bail was appropriate, he had to find another magistrate willing to act with him. Together the two would determine the amount of bail, taking care that "a sufficient amount is required, from good and sufficient sureties, to ensure the appearance of the accused."\textsuperscript{107} The requirement that two magistrates were required to set bail while only one could commit an accused to gaol indicates that bail was held to be the more risky proposition. The safety of the community and the efficiency of the criminal justice system were at stake.

In theory, then, by the 1830s in Upper Canada three kinds of defendants might be committed to gaol to await trial: those who had committed minor offences who refused bail or were unable to raise sureties; those charged with murder; and accused felons against whom the evidence was clear. There was not much room for magisterial discretion except in

\begin{enumerate}
\item \textsuperscript{104}Wm 4, c.2, "An Act relating to the bailing and commitment, removal and trial of Prisoners, in certain cases" [1833]. Where this act is referred to in the text it will be called the "Bail Act of 1833." The first edition of Keele's manual reprints parts of this statute verbatim; 272-3.
\item \textsuperscript{105}Burn, volume 1, 224-5.
\item \textsuperscript{106}Statutes stating this went back to Tudor times.
\item \textsuperscript{107}Keele, 1st ed., 272.
\end{enumerate}
the third kind of case. J.M. Beattie has found that in eighteenth century England people accused of felony were routinely committed to await trial, even those accused of the relatively minor offence of larceny, and even if the evidence against them was weak.\(^{108}\) In Upper Canada it appears that most people charged with property offences that were tried at the Assizes were also committed to gaol to await trial, although it is difficult to draw definitive conclusions in the absence of Assizes case files. But a comparison of the Cobourg gaol calendar of 1830\(^{109}\) with the minutes of the district Assizes of that year reveals that each of the accused on trial for felony had been committed to the gaol to await trial. Two women on trial for murder, Susan Nix and Isabella McIlmoyle, had been in gaol awaiting trial for seven and six months respectively, and were both acquitted at trial. John Butler, convicted of burglary at the Assizes, had languished in gaol for seven months waiting for his trial. Stephen Kenny had spent four months in jail awaiting his trial for robbery; at the Assizes his trial on the lesser charge of larceny was postponed and he was released on bail to await trial the following year. James Barry had been in gaol nearly four months on a charge of shooting a steer; although a true bill was found against him there is no record of the trial. Susan Van Kirk was convicted of larceny and banished; she had been in gaol four months awaiting trial. John O'Brien, charged with an unspecified felony, had been in the district gaol nearly three months since his committal; he pleaded guilty to petty larceny at the


\(^{109}\) A list of prisoners in the gaol does not survive for an earlier date. RG22, ser. 43, Cobourg Quarter Sessions, Gaol records, box 1, 1820-1846, env. 1. The calendar referred to here is not dated but appears to have been drawn up for the use of the assizes court in September; it is signed by the gaoler. RG20, ser. F-9, Cobourg Jail Registers, run from 1834 to beyond the period under investigation here.
assizes and was imprisoned six weeks. These represent all of the cases of felony at the assizes in that session; each of the accused had been committed to gaol to await trial.

Apparently the Newcastle District magistrates committed people accused of serious property offences to gaol to await their trials. Similarly, the Picton magistrate D.B. Stephenson sent a man accused of stealing a heifer to gaol to await trial on a larceny charge. However, he bailed two other people accused of theft, one a man charged with stealing wood from a landing and the other a woman who stole money from a man's pocketbook while he slept.\(^{10}\) Several people acquitted of larceny in the Newcastle District courts had been released on bail to await trial, which suggests that the magistrates exercised their discretion according to the weight of evidence against the accused. At the 1830 Assizes, Thomas Kervin, who was not listed in the gaol calendar, was acquitted of grand larceny. Nicholas Bowers was acquitted of larceny at the Dec. 1837 Quarter Sessions, as were John Sawden in July 1838, Rebecca Keeler in Mar. 1839 and Jane Leary in May 1839.\(^{11}\) None of their names appear in the jail register during those years.

However, others whose names were not listed in the gaol records were convicted of property offences at trial, which suggests that the nature of the evidence may not have been the only factor playing a role in magisterial discretion. At the 1830 Assizes, Joseph Herrington was convicted of larceny and sentenced to three months imprisonment. William Sharp was convicted of "stealing to a value of 7/6." Perhaps the thefts had occurred while

\(^{10}\)RG22, ser. 86, Picton General (Quarter) Sessions, Miscellaneous Records, 1834-1839, Informations book of D.B. Stephenson, Picton. Cases referred to are (in order) those of defendants William Foster, Apr. 1836; Henry Nugent, 23 Sept. 1835; and Catherine Driscol, 7 Mar. 1837.

\(^{11}\)Case Files, boxes 12 and 13.
the court sat and the trials were rushed so the two did not have to wait a year in gaol for trial at the next session. However, it is probably unlikely that more than one such case would turn up at the same session. It is also possible that the jail records are not entirely accurate. But possibly magistrates released some accused thieves on bail because they knew them well enough to trust that they would show up for trial.

Still, committing people to gaol was a regular function that the Newcastle District magistrates performed. Of the 155 magistrates appointed during the period, 64 of them committed at least one person to jail. Cobourg magistrates Richard Dover Chatterton and George Ham committed 30 and 32 people to gaol respectively in the second half of the 1830s. Cobourg and Port Hope magistrates were apparently more inclined to commit accused offenders to jail than were their more rural counterparts who probably preferred the easier option of granting bail. As with most aspects of the operation of the criminal justice system in the district, the system worked differently depending at least in part on where a person lived.

It is also likely that the marginal elements of Upper Canadian society -- pauper

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112 The names of several people sentenced to terms in the district gaol are not in the gaol registers. For example, in Jan. 1835, Elliott Buck was sentenced to a term of 4 months in the district gaol; in May 1835, five men were sentenced to the gaol for riot and assault; and in Oct. 1836, Amanson Ewing was sentenced to 14 days for larceny. None of their names appear in the gaol records. It is possible, but unlikely, that they all absconded. It is more likely that the jailer neglected to enter their names.

113 It is not possible to count the numbers involved in granting bail, because they often appear as recognizances to appear for trial and it is not possible to separate out the recognizances for prosecutors and witnesses from those for defendants. Ninety Newcastle District justices granted recognizances to appear for trial.

114 Ham from 1835 to 1840; Chatterton from 1837 to 1840.
immigrants, the landless unemployed, and those who could not work -- would be more likely to be found in the towns than in the rural countryside. Not only might they find themselves in circumstances where they had to resort to theft to survive, but they lacked influential friends to stand bail or provide sureties if they were caught and so were almost inevitably committed to gaol to await trial. As Robert Shoemaker has written, binding people over in recognizances worked best in communities where people knew each other, and most disadvantaged the poor and less respectable who had no local ties. The same applies to the granting of bail. As John Weaver observes, “many sat for weeks in the damp and awaited trial,” and they were likely to be disproportionately newcomers to the colony.

Conclusion

Close examination of the pre-trial activities of the Newcastle District magistrates shows that in the regular administration of justice, they were far from ignorant about the law or incompetent in the ways in which they carried out their responsibilities. They generally took the appropriate actions in the various kinds of cases brought before them, demonstrated considerable knowledge about the law they were administering, and carried out their duties within the limits of their authority. Moreover, they appear to have understood shifting trends in judicial processes that increasingly took into account the rights of the accused and changed the character of pre-trial hearings from collections of evidence against the accused to judicial inquiries into the nature of the evidence in particular cases. They appear to have

115 Shoemaker, Prosecution and Punishment, 91-92, 118-19, 125, 284.
116 Weaver, Crime, Constables and Courts, 57.
carefully followed rules about confessions, taken pains to ensure that the accused understood the charges, allowed the accused the opportunity to cross-examine witnesses, and permitted the accused to present witnesses and evidence.

Initiating a criminal case was the responsibility of the victim who sought the help of a magistrate in order to make an information and complaint. Rarely did magistrates initiate prosecutions themselves. Many of the complaints that people brought to magistrates proceeded no further than that, which suggests that magistrates must have played a role in encouraging people to settle cases rather than proceed to trial. Where complaints were not backed up by evidence, at least some magistrates dismissed the charges. If prosecutors demanded some action, magistrates, rather than insisting on a trial, might bind over in recognizance to keep the peace people who had committed acts of violence. They might also “down-charge” the offence, classifying it as a less serious offence that could be tried at a lower court, sparing the participants expense and potential hardship. Several aspects of the pre-trial activities of magistrates point to their having played a role in lessening the impact of the criminal law on participants in cases rather than enforcing the law to its fullest extent. Still, magistrates did try hundreds of people summarily and sent hundreds more to trials at Quarter Sessions and, to a lesser extent, the Assizes.
Chapter 4

Summary Justice in Upper Canada

In Upper Canada, Justices of the Peace had the authority to settle a variety of disputes summarily; that is, without the presence of a jury. Most of their summary jurisdiction involved what might be defined as regulatory offences -- violations of liquor licencing laws, failure to perform statute labour on the roads, failure to attend militia training, and so on. However, the scope and nature of the justices’ summary jurisdiction changed significantly with the passage of the Petty Trespass Act in 1834.¹ This Act gave magistrates authority to try summarily cases arising from assaults and petty trespasses. This chapter examines the laws and practices of summary justice in Upper Canada by first outlining the jurisdiction of and guidelines for magistrates in carrying out these duties, and then examining the ways in which they were carried out in the Newcastle District and in Picton.

The Summary Jurisdiction of Upper Canadian Magistrates

The summary jurisdiction of magistrates during the Upper Canadian period is far from straightforward, and likely confused the magistrates themselves. Their responsibilities in many misdemeanours derived from English common law, and this was supplemented by English statutes. As Norma Landau has written, by the early nineteenth century, the law on

¹5 Wm IV, c.4, An Act to provide for the summary punishment of Petty Trespasses, and other offences (1834); hereinafter referred to as “The Petty Trespass Act.”
summary convictions was a “confusing combination” of contradictory precedents. Historians have emphasized that summary powers of magistrates increased over time. By the late seventeenth century their powers were “extensive,” and during the eighteenth century the numbers of offences that could be dealt with by one or two magistrates summarily greatly increased. Upper Canadian magistrates assumed the powers of English magistrates with the reception of English law into the colony, and thereafter Upper Canadian statutes concerned with specific topics also set out summary powers of J.P.s. Not all regulations concerning summary powers were contained in the statutes, however. In addition, courts of Quarter Sessions imposed local regulations which the magistrates had to enforce. Other local organizations, such as Boards of Health, created additional administrative duties for the J.P.

Not only were the summary responsibilities of magistrates nowhere clearly laid out, but it was also unclear how they were to carry out these duties. The procedures J.P.s were supposed to follow were not set out clearly in statutes or anywhere else. As English jurist and historian Sir James Fitzjames Stephen noted:

2The Justices of the Peace, 349.


4However, English magistrates had broad summary powers under the game laws and the poor laws, neither of which had been adopted in the colony. The difference between English and Upper Canadian laws must have contributed to the confusion over summary jurisdiction.
The common character of these acts [giving magistrates summary jurisdiction] was to leave the subject of procedure unprovided for, or provided for in only a very general and insufficient manner. This vagueness led in time to a variety of questions as to the jurisdiction and procedure of magistrates.\(^5\)

Similarly, pre- and post-Revolutionary American magistrates administered justice “according to common sense and the light of nature with some guidance from legislation.”\(^6\)

J.K. Johnson has written that “no strict rules of law” prevailed at the lower level courts of Upper Canada.\(^7\)

Although procedures for petty sessions were not clearly provided for in statutes or anywhere else, there is no doubt of their significance. Historians tend to write about the ways in which magistrates exercised summary powers as if they paid little attention to rules of law or proper procedures. According to Bertram Osborne, a person accused of a summary offence would be taken to the justice’s house “where the proceedings, if such a word can be used to describe the travesty of a trial conducted in secret in the Justice’s parlour, might end in the imposition of a heavy fine or a sentence of imprisonment.”\(^8\) Similarly, Douglas Hay writes that “due process was not always in evidence” in the parlour of the J.P.\(^9\) Greg Marquis points out that the discretionary nature of the operation of the lower courts was


\(^{7}\) J.K. Johnson, _Becoming Prominent_, 62.

\(^{8}\) _Justices of the Peace_, 203.

\(^{9}\) “Property, Authority and the Criminal Law,” 34.
what gave rise to press descriptions of magistrates as ‘cadis.’

For Marquis, the magistrates’ courts were the most important tribunals, “where because of local custom, overworked magistrates and popular expectations, the goal was ‘justice,’ not law.” At these courts, Marquis continues, justice was praised if lenient and criticized if severe.

Gradually procedures for summary justice in England, and probably by extension in Upper Canada, evolved in much the same ways as had the pre-trial hearing over the course of the eighteenth century. By the late 1830s, procedures had been laid down far more clearly than previously. Paley advised that all summary proceedings should proceed from an information or complaint, without which “the justice is not authorized in intermeddling, except where he is authorized by statute to convict on view.” After hearing the charge, it was the magistrate’s duty to dismiss it or proceed to examining it. If the magistrate chose to examine the charge, he had to first summon the accused, as magistrates were “bound to observe the rules of natural justice, – one of which is, that the accused should have the opportunity of being heard, before he is condemned. This is indispensably required in all penal proceedings of a summary nature by justices of the peace.” Furthermore, “where

10 “Doing Justice to ‘British Justice,’” 57.


12 By 1838, Paley’s Law and Practice of Summary Convictions was in its third edition. It is unclear how frequently Upper Canadian magistrates resorted to Paley for advice; however, his book was one of the sources with which H.S. Reid cross-referenced his edition of Burn’s Justice. That there is a copy of the third edition on the shelves of the Great Library of the Law Society of Upper Canada also attests to its having been used in the colony.


justices are exercising a judicial authority, as in hearing and determining a case on summary conviction, their proceedings ought not to be private....”¹⁵ Paley also advised magistrates how to conduct the examination of the defendant:

Although no mode of examination be pointed out by the statutes giving jurisdiction over the offence; yet, as justice requires that the accused should be confronted with the witnesses against him, and have an opportunity of cross-examination, it is required by law, in the summary mode of trial now under consideration, that the evidence and depositions should be taken in the presence of the defendant, where he appears. For though the legislature, by summary mode of enquiry, intended to substitute a more expeditious process for the common law method of trial, it could not design to dispense with the rules of justice, as far as they are compatible with the method adopted. Indeed, it may be useful upon this occasion to notice the general maxim which has been laid down as a guide to the conduct of magistrates in regulating all their summary proceedings, viz. that “acts of parliament, in what they are silent, are best expounded according to the use and reason of the common law.” Unless, therefore, the defendant forfeits this advantage by his wilful absence, he ought to be called upon to plead before any evidence is given, and the witnesses must be sworn and examined in his presence; or if the evidence has been taken down in his absence, and is read to him afterwards, the witness must at the same time (unless the defendant upon hearing the evidence should confess the fact) be re-sworn in his presence, and not merely called upon to assert the truth of his former testimony; for the intent of the rule is, that witnesses should be subjected to the examination of the defendant upon his oath. The oath, also, must be administered to the witness before he is interrogated by the magistrates for he ought to be under the sanction of an oath at the time he gives his testimony.¹⁶

Finally, according to Paley, magistrates were “bound” to hear the evidence, which presumably included the testimony of witnesses speaking for the defendant.¹⁷

¹⁵Ibid, 45. Emphasis in original.

¹⁶Ibid, 49.

¹⁷Ibid, 54.
In 1832, an Upper Canadian statute implicitly tells us what the major procedural problems in the colony were thought to be. There were two parts to the statute: one regularized procedures and the other protected justices from legal actions arising from the ways in which they carried out their summary duties. That there were problems due to confusion over procedures is evident from the wording of the statute. The Act authorized a single Justice to receive the information and complaint and issue the summons or warrant to bring the accused before two justices for trial, and provided magistrates with the authority to enforce the “penalty, fine, imprisonment, costs, or other matter...” (s. ii). Section iii provided that summary convictions “shall not afterwards be set aside or vacated in consequence of any defect of form whatever.”

The Act directed justices to draw up records of the conviction in a particular form, which suggests that record-keeping prior to that time had been haphazard (preamble and s.1).

The other subject covered by the Statute, “to afford such Justices [acting summarily] reasonable protection in the discharge of their duty,” indicates another problem which arose from the absence of clear procedural regulations. Individual magistrates could be sued by those unhappy with their convictions. Section iv begins:

whereas in cases of summary convictions, or the proceedings thereon, it may sometimes happen that Justices of the Peace may, by some irregularity or defect in the form of their proceedings, render themselves liable to actions of trespass, when there was no disposition on their part to oppress the party, and where the guilt of the defendant may have been manifest, and it is reasonable

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18 22 Wm. 4, c. 4, An Act to facilitate summary proceedings before Justices of the Peace, and to afford such Justices reasonable protection in the discharge of their duties.

19 That is, convictions where the defendant had not appealed the conviction, or where the conviction had been confirmed in an appeal, were subject to this rule. Anyone convicted of a summary offence had the right of appeal to Quarter Sessions.
to protect the Justices wherever it shall appear that their proceedings have been grounded upon good causes, and where they have acted without malice.\textsuperscript{20}

The statute discourages such suits by limiting the damages a plaintiff could seek if his conviction was quashed to one shilling "nor any costs of suit." Only if the magistrate was proven to have acted maliciously could this limit be over-ridden. And, in section v, that right was limited still further. If the Justice was able to prove at the trial that the plaintiff was actually guilty of the offence, no damages or costs could be recovered. As W.C. Keele noted in the introduction to \textit{The Provincial Justice}, "in the upright and conscientious discharge of their duty, Justices of the Peace are powerfully protected by the law. They are secured against frivolous and vexatious actions for mere errors in form" by this statute.\textsuperscript{21}

Presumably there had been problems with suits against magistrates that this statute attempted to address.

The passage of the Petty Trespass Act in 1834 extended the magistrates' powers of summary jurisdiction considerably, for it gave individual magistrates the power to try cases of common assault and petty trespass.\textsuperscript{22} This change was undoubtedly intended to reduce the burden of cases at Quarter Sessions and the civil courts in which these offences had previously been triable.\textsuperscript{23} The Petty Trespass Act extended the role of Justices of the Peace

\textsuperscript{20}The "trespass" referred to is probably false imprisonment.

\textsuperscript{21}iii and 277.

\textsuperscript{22}In addition to the Petty Trespass Act, see 2 Vict, c. 4, which was later superseded by 4&5 Vict., c. 25, 26, and 27. Under the Petty Trespass Act, an assault which took place during an attempted felony was beyond the magistrate's jurisdiction.

\textsuperscript{23}The increasing business at Quarter Sessions and the increase in magisterial discretionary and summary powers as a response was a pattern not unique to Upper Canada.
beyond strictly criminal jurisdiction. Thereafter they could assess damages in trespass cases; in effect, they became civil law adjudicators as well as criminal judges.\(^{24}\)

While the Petty Trespass Act gave the magistrates new powers, it limited the amount of penalties they could set to no more than £5. The impact of available punishments under summary powers in Upper Canada was not as harsh as that granted to eighteenth- and nineteenth-century English magistrates who administered the poor laws and the game laws summarily and who could sentence offenders to prison for lengthy periods. Australian magistrates had the authority to discipline convicts summarily; an 1814 decree limited the number of lashes that a single magistrate could order to fifty.\(^{25}\) So although the ability to

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\(^{24}\) John Weaver has also pointed out that the Petty Trespass Act created a “blurring” between civil and criminal actions; *Crimes, Constables and Courts*, 29. According to Norma Landau, the aim of prosecutors in assault cases brought before Quarter Sessions in eighteenth-century Middlesex was not to punish the defendant, but to obtain compensation: “These indictments were, in essence, civil suits.” “Indictment for Fun and Profit: A Prosecutor’s Reward in Eighteenth-Century Quarter Sessions,” *Law and History Review* 17, 3 (Fall 1999), 508 *et seq*. That distinction between civil and criminal proceedings may not have been as pronounced as it is now is a point I suggested in “Violence, Law, and Community in Rural Upper Canada,” 363-4.

require people to pay fines upon conviction may seem harsh, it seems far less so when considered in comparative colonial perspective.

In addition to fining persons convicted of assault, magistrates under the Petty Trespass Act could require people convicted of wilfully damaging property to pay “reasonable compensation” not to exceed £5 to the victim. Prosecutions for offences punishable under the Act had to be initiated within three months of the offence. Appeal to Quarter Sessions was possible. The Act was to continue in force for four years, apparently as a trial; it was later made perpetual by 2 Vict. c. 4.

Again, procedural information is not included in the statute, with the exception that magistrates were required to transmit records relating to their convictions to Quarter Sessions (s. xix). The stipulation that convictions were not to be quashed for want of form was repeated in this Act (s. xx). Despite the significant increase in summary jurisdiction that this statute represents, the ways in which magistrates were expected to carry out these new duties remains unclear. The first edition of Keele's Provincial Justice was published in the year following the Petty Trespass Act, and Keele repeats its provisions virtually verbatim.26 On the question of whether the accused should be allowed the presence of a lawyer at a summary trial, Keele stated that “it is reasonable, that a party upon his trial should have professional assistance.”27

It is likely that the emerging rules that applied in the pre-trial hearing in more serious cases, outlined in the preceding chapter, applied as well in summary cases. It was not until


27Ibid, 274.
the magistrate had heard the evidence of witnesses and cross-examined the accused that he
would have been certain whether the case should be tried summarily or sent to trial
elsewhere. A circular from the Clerk of the Peace to the Home District magistrates advised
that once the examination had been concluded, the magistrate would have to decide:

whether the case is one which the Law requires to be disposed of summarily,
or whether it should be sent to a higher tribunal. If the former, the Magistrate
will adjudge the amount of the Penalty to be imposed (under the limitations
of the Statute) together with the costs, which should be recorded on the
proceedings, together with the period of imprisonment to be awarded, in case
of non-payment of Fine and Costs.²⁸

In fact, the expanding summary jurisdiction of magistrates may have been partially
responsible for increasing concern about procedures, although I have found no evidence to
support this speculation.

Evidence from the court records suggests that magistrates did not readily distinguish
pre-trial hearings in more serious cases from summary hearings and carried out both in much
the same ways. In the trial of David Bell, Asa Wilson and Edward Fyke for riot and
housebreak in 1839, the magistrates read the charge, invited the complainant to make a
statement on oath, gave each of the accused the opportunity to ask questions of the
complainant, and allowed them to say whatever they liked in their own defence.²⁹
According to the complainant William McKye, the three accused had broken open his door
with a rail between 10 and 11 o’clock on a Saturday night. After breaking in and nearly
injuring one of the victim’s children with the rail, the accused shouted insults at the family,

²⁸George Gurnett circular, 1844, p. 5; Thomas Mossington Papers, AO, MU5895.

²⁹Cobourg Quarter Sessions Records, Returns of Convictions, AO, RG22, ser. 38,
box 1, env. 10. The records do not make clear whether the charge was trespass or assault or
riot, or any combination of the three. Two magistrates tried the case.
in particular calling Mrs. McKye a liar. Then they must have left. When McKye confronted the three the following day, Fyke “used insulting and filthy language and appeared to defy and bully” him.

During the hearing, David Bell interrupted McKye’s statement, denying the charge of breaking into the house, but McKye insisted that they had. McKye said that he had not actually seen them break in, but “could have no doubt as he saw Bell standing there when the Door flew open.” McKye carried on to say that he pushed Bell away after the man called Mrs. McKye a liar, and “bid Bell begone but did not strike him.”

The magistrates must have asked Edward Fyke if he wanted to ask any questions of his prosecutor because they noted: “Fyke has no particular questions to ask but states that anger at a Dog of the plaintiffs induced them to act in the manner charged.” He explained they had been out at a “wood bee and thought they were a little high.” Another witness then stated that Bell and Fyke had been in his house on Sunday evening, and Fyke had talked of the attack and said that he “was sorry he had not done more.” Again, the accused were invited to participate: “Bell has no questions to put to the witness. E. Fyke admits that if Plaintiff took the law he (Fyke) said he was sorry they had not done more as they were in Drink. Wilson has nothing to say.” At this point the proceedings were concluded with the magistrates convicting the three and assessing penalties according to the apparent culpability of the defendants. David Bell was fined 12/6, Asa Wilson 7/6, and Edward Fyke 25 shillings. In this case, apparently, the less said the better: the silent participant received the lowest fine. As this trial demonstrates, though, each of the accused was permitted to ask questions of the witnesses and to explain his actions as best he could. The magistrates did
not apparently distinguish procedure at a summary proceeding from that of a pre-trial hearing in any meaningful way.

**The Impact of the Petty Trespass Act**

Following the passage of the Petty Trespass Act, summary hearings before magistrates became a common means of settling disputes arising from assaults and trespasses. The convenience of summary trials outweighed any concerns about their constitutionality:

The power of infliction of penalties by summary conviction has been found necessary for carrying into execution many laws made for the public benefit, and although this power had been considered as a departure from the security to liberty and property granted by Magna Charta, by which it is established that none ought to be tried or condemned but by their peers, yet it has been adopted as necessary from the increasing [sic] number of laws occasioned by the increasing wants of a more advanced state of society, because it gives a speedy remedy against individuals for some breach of the law, often trivial, and can be had at small expense, and without loss of time, by the summary proceeding before the Magistrate.\(^\text{30}\)

The Act offered distinct advantages to the participants: the dispute was generally settled quickly, and the outcome did not weigh particularly heavily on the convicted person, as small fines were the punishment most often inflicted.\(^\text{31}\) The participants were not put to great expense, because they did not have to travel to the judicial centre of the district to attend trial at the more formal courts of Quarter Sessions or King’s Bench. Therefore, many disputes were settled with a minimal amount of disruption in the community. Although the


\(^{31}\)Of course, many people would have found even a small fine difficult to pay.
extension of summary powers further centralized authority in the hands of magistrates, there were limits to their jurisdiction, limits to their power of punishment, and the right of appeal to Quarter Sessions.

Summary justice became a regular feature of criminal justice administration in the Newcastle District during and after 1834. Magistrates and victims of minor offences apparently seized the opportunities newly available under the Petty Trespass Act. More than three hundred people were convicted summarily of minor offences during the years 1834 to 1840, about two thirds for assault, as Table 4-1 demonstrates. If there was an average of 30,000 people in the district during these years, about 1 person in every hundred was convicted of a summary offence under the Petty Trespass Act.

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32 It is not possible to comment on the frequency of petty sessions before the passing of the Petty Trespass Act because their records have not survived. Those for Lower Canadian petty sessions have not survived in great quantities either; see Fyson, “Criminal Justice, Civil Society and the Local State,” 292-3.

33 The population of the district in 1835 was approximately 25,000, and in 1840 it was approximately 35,000. About half the people in the district at any given time were age 16 or under.
Table 4-1

Numbers of Cases and Persons Convicted of Summary Offences.

Newcastle District, 1834-1840

<table>
<thead>
<tr>
<th></th>
<th>Cases</th>
<th>Persons Convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percentage</td>
</tr>
<tr>
<td>Assault</td>
<td>188</td>
<td>61.2%</td>
</tr>
<tr>
<td>Trespass</td>
<td>76</td>
<td>24.8%</td>
</tr>
<tr>
<td>Assault &amp; Trespass</td>
<td>18</td>
<td>5.9%</td>
</tr>
<tr>
<td>Threatening</td>
<td>4</td>
<td>1.3%</td>
</tr>
<tr>
<td>Other</td>
<td>21</td>
<td>6.8%</td>
</tr>
<tr>
<td>Total</td>
<td>307</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Magistrates did not administer the Act uniformly throughout the district, however. Those in two townships were most likely to conduct summary trials: magistrates in Hope and Darlington townships convicted 88 and 71 offenders respectively under the Act during these years. In other townships, magistrates convicted summarily far less frequently and in some they did so very seldom indeed.\textsuperscript{35} These differences cannot be accounted for simply by population figures. Hamilton township, for example, contained the district capital of

\textsuperscript{34}These figures were tabulated from the Convictions by Justices of the Peace records of the Cobourg Quarter Sessions (AO, RG22, Series 38, Boxes 1 & 2).

\textsuperscript{35}The numbers of persons convicted summarily in other district townships are as follows: Clarke 32; Ops 29; Otonabee 24; Hamilton 22; Mariposa 15; Cavan 14; Emily 13; Murray 11; all others fewer than 10.
Cobourg and was as heavily settled as the neighbouring township of Hope, yet Hamilton township magistrates convicted only 22 persons summarily during the same period that their neighbours in Hope convicted 88. Magistrates (and victims) in certain places must have been more keen to settle disputes in this way and prosecutors to save themselves the costs and trouble of prosecution in the district courts.

Of the 116 magistrates whose names appeared on the commission of the peace in 1835 and 1837, just over half of them (59) availed themselves of their new powers under the Petty Trespass Act by summarily convicting petty offenders. Magistrates from all over the district did so, although their patterns of behaviour varied somewhat. John Lister of Darlington township, at the westernmost edge of the district, convicted 60 persons summarily, and in fact dealt with most complaints brought before him in this fashion. Moreover, he usually acted alone. John Tucker Williams of Port Hope participated in the summary conviction of 80 persons, but he incorporated summary duties into a broad range of judicial services and when trying cases summarily he usually acted with other magistrates. Magistrates in Cobourg, Port Hope and Clarke township tended to try cases in pairs, while in Darlington and Cavan townships single magistrates almost always presided over summary trials. In the Peterborough area, larger groups of magistrates tended to gather to try cases summarily; six or seven magistrates in petty sessions often tried even the most insignificant cases. Possibly they were anxious to demonstrate their authority, or to share responsibility for the outcome of summary trials. An individual magistrate's unpopular verdict in a summary trial might make him a local target of criticism.\(^{36}\)

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\(^{36}\)See also Lewthwaite, “Violence, Law and Community in Rural Upper Canada,” in which an unpopular summary conviction initiated a series of events which culminated in the
If the purpose of the Petty Trespass Act was that minor offenders be tried quickly, it was certainly a success. It was not uncommon for trials to take place on the same day that the offence had occurred. More than half of those convicted were tried within one week of the offence. Most of the rest were settled within a month. Only a handful were tried after a lapse of four weeks or more and most of these involved the removal of property.

Presumably some detective work had been required in order for the victim to figure out what had happened.

Another impact of the Petty Trespass Act was that people with few resources had the opportunity to obtain redress for wrongdoings much more easily than previously, and they used it. The criminal justice system therefore became more open to “marginalized” elements of society. Native people, women, and poorer individuals went before magistrates to make complaints against others, where they might have been reluctant to risk the expense and inconvenience of taking a case to the higher courts.

Summary justice laws enabled natives whose property had been damaged by white men the opportunity to seek compensation for their losses. For example, after Thomas Manning broke John Tonshee’s cutter, Tonshee complained to magistrates John Darcus and G.E. Bird, who sentenced Manning to pay Tonshee twelve shillings sixpence. Joe Soper, a native man, went to J.P. Thomas Carr after discovering that someone had broken into his house in “the Indian village.” The magistrate fined James Dixon, “a man of bad character” removal of Burford township John Weir from the London District bench. Some English magistrates were reluctant to hold petty sessions in their own districts for similar reasons, “anxious to keep at some remove from those on whom they sat in judgement”; R. Quinault, “The Warwickshire County Magistracy and Public Order, c. 1830-1870,” in R. Quinault and J. Stevenson, eds., Popular Protest and Public Order: Six Studies in British History, 1790-1920 (London: Allen and Unwin, 1974), 181-2.
in Carr’s judgement and a suspect in a nearby robbery in the village, £5, £2 of which he
ordered paid to Joe Soper.37

Women also used the opportunities provided by summary proceedings to seek
redress for property damage that men had done to them, and to take men (and the occasional
woman) before the magistrates for assaulting them. For example, Mary Tienin and Jane
Orton each sought compensation for the loss of a pig, and Elizabeth Chaplin and Nancy
Clarke each for the killing of a dog.38 Two of the four women were explicitly identified as
widows. While the loss of a pig might lead to hardship for most Upper Canadians, it would
have been particularly devastating for a widow of small means, whose single pig likely
represented the only animal protein that she could hope to consume in a year. Similarly, the
loss of a dog, particularly when it had been shot, as was the case in the above examples,
threatened the safety and security of women living alone or with young children. At least
the award of compensation might permit the purchase of a replacement pig or dog, and thus
make a real difference in the lives of the poor single women who chose to take such cases
before the magistrates.

37Returns of Convictions, box 1, env. 11, 1840(1); env. 4, 1836(1). According to
David Murray, blacks in Niagara used the system of summary justice to prosecute people for
Similarly, Don Fyson has found that blacks and natives in Lower Canada used the system to
prosecute people for minor offences; “Criminal Justice, Civil Society and the Local State,”
370-1.

38Ibid., env. 7, 1837(2); env. 9, 1838(2); env. 10, 1839; env. 11, 1840(1).
Some women who had been physically threatened or assaulted by men also used the summary services of magistrates. Sarah Vail, a "spinster," complained that Henry Brown had beaten her, and he was fined 10 shillings. Margaret Taylor, a farmer's wife, went before the magistrates to complain that John Gay had assaulted her; he was fined £5. John Carrel, a Cobourg maltster, struck and shook Mary Welch by the shoulders; the magistrates fined him 5s. When three boys assaulted widow Lucinda McIlroy, she went to a magistrate who fined the boys 10s each. While the numbers of women who prosecuted cases at summary trials before magistrates was not large, some women did choose to use the service to recover lost property or punish assailants.

Some people also used the system of summary justice to deal with recalcitrant family members. Again, the availability of inexpensive, accessible, and local justice provided another option for people who were unable to control the behaviour of family members by other means. Moreover, these types of cases were unlikely to attract a great deal of public attention if settled in the magistrate's parlour, which might have increased the attraction for those not particularly anxious to air their dirty laundry in public. James Alexander Jr. terrified his miller father and the rest of his family with his "shocking temper and violent threatenings." After coming to his father's house drunk and swinging a club, with which he

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39 Donald Fyson has made similar observations about women prosecutors in Montreal District; see "Women as Complainants before the Justices of the Peace in the District of Montreal, 1779-1830," paper presented to the annual meeting of the Canadian Historical Association, St. Catharines, June 1996.

40 Ibid, env. 1, 1834; env. 4, 1836(1); env. 5, 1836(1).

41 The number of women who prosecuted cases was 21, which is 6.25% of the total of 336 cases tried summarily under the Petty Trespass Act between 1834 and 1840 inclusive.
struck people and broke several pieces of furniture, James Sr. brought his son before the magistrates, who fined him £2, which he did not pay and ended up in gaol. When John Taylor’s two sons James and Gilbert assaulted their father, they were fined £5 each, and appealed the conviction. Mary Hodgson wounded Jonathan Hodgson, for which she was convicted and ordered to pay him £1 for his injury.\(^4^2\)

Occasionally the wife of an abusive husband or a servant or apprentice who had been beaten by an employer brought the perpetrators before the magistrates for summary trial. J.P. John Logie fined John McCallum 10s and bound him over in recognizance to keep the peace for a year and specifically “to be of good behaviour to his wife” Catherine, whom McCallum had on several occasions “in a cruel barbarous and inhuman manner beat abused and ill treated....” Two Cobourg magistrates fined saddler’s wife Charlotte Whittaker 5s for assaulting her husband’s apprentice, William Ward. In such cases the victim may have made the complaint directly to the magistrates, or concerned neighbours or the magistrates themselves may have intervened to try to help a victim of abuse.\(^4^3\)

People representing every gradation of the social spectrum in the Newcastle District used the summary justice system. The occupation or status of the victim/prosecutor was inconsistently recorded, so it is not possible to quantify the use of summary trials by the various strata of Upper Canadian society. However, it is possible to make broad

\(^{42}\)Box 1, env. 8, 1838(1); env. 10, 1839; env. 6, 1837.

\(^{43}\)Information about both of these cases is in env. 7, 1837(2). Elsewhere, I recounted the story of Julia Higgins, a servant who had been badly beaten by her female employer. After people found her nearly naked and shivering in the road, a magistrate fined the employer £5; see Lewthwaite, “Violence, Law and Community in Rural Upper Canada,” 357-8.
generalizations. Men were invariably classified by occupation, except for two "Indians."

By far the most commonly stated occupations were yeomen (69 defendants and 37 prosecutors) and labourers (66 defendants and 29 prosecutors). "Gentlemen" were represented both as prosecutors and as defendants, as were merchants/shopkeepers and men of a wide range of skilled and semi-skilled occupations: cooper, carpenter, tailor, brewer, shoemaker, baker, distiller, miller, farmer and cabinet maker. Innkeepers and tavern keepers appeared as both prosecutors and defendants, as did "minors." Bailiffs appeared as both, and constables only as prosecutors, generally charging people with assaulting them. Other occupations represented among prosecutors only were harness maker, surveyor, chair maker, auctioneer, hostler, saddler's apprentice, member of the Cavalry, fisherman and waggon [sic] maker. Among defendants only were butcher, mason, blacksmith, barber and hairdresser, maltster, tanner, currier [sic], and painter. Women were classified by marital status: "widow," "spinster," or "married woman."

Elite involvement in the lower level of criminal justice administration was negligible. Men identified as members of what might be classified as "elite" groups, consisting of gentlemen, Esquires, merchants, and district magistrates, were prosecutors in only 14 cases which were tried summarily (4.2% of the total), half for assaults and half for trespasses. Five elite members were convicted by J.P.s for assaulting their social "inferiors" for assault, and two for trespass. By far the bulk of the cases which appeared before magistrates involved farmers, tradespeople, and labourers. The system could hardly be described as a tool for elites to control the lower orders, although a few cases did fit that description. Summary proceedings resembled more a "people's court" to which ordinary Upper Canadians took their complaints against their neighbours.
Offences triable under the Petty Trespass Act seem to have been interpreted fairly broadly. Magistrates tried summarily a number of assaults that involved weapons and could have resulted in serious injury to the victim. For example, James Keefe pointed a gun at John Blezard, an offence for which he was fined £4. Cobourg butcher William Ketchum was convicted of assaulting “gentleman” George Pierce Marsh, having thrown him down and kneeled on his chest to keep him there, and taken out a knife which he brandished and with which he threatened to stab Marsh, and “forcibly detaining” him for more than an hour. Cobourg barber Thomas James struck Joseph Burrell in the head with an axe helve. Josias Hughes of Emily township struck John Goodliffe several blows on the arm and shoulder with a poker and a piece of wood. In addition to these incidents, victims of offences tried summarily reported being struck by or threatened with weapons such as a club, a sickle, an axe, stones, a pair of tongs, and a quart decanter. They complained of being bitten, kicked and punched. These assaults took place in their homes, in the roads, in taverns, and in their fields or barns as they went about their business on their farms.

The offence of petty trespass also seems to have been interpreted very broadly. Most of the offences which resulted in summary conviction could be classified as “trespass upon property,” which included damage to gates, fences, furniture, windows, or crops (the latter usually by animals). The “removal” of trees, wood, grass, hay, and potatoes also resulted in summary convictions. The “removal” or killing of livestock or pets such as sheep, cows, pigs, oxen, dogs and even horses was another regular charge. Acts which could be classified as “trespass upon the person” included the nineteenth-century equivalent of traffic offences;

[44] Returns of Convictions, Box 1, envs. 1, 3, 4, 7.
there were several cases involving collisions between vehicles like sleds and carts, and two men were fined for “driving furiously” through the streets of Peterborough, injuring a man. Virtually any offence that involved injury or damage to person or property could be defined as trespass.

Some incidents summarily tried as trespasses could have resulted in more serious charges at higher courts. Several cases involved attempts to break and enter into other peoples’ houses. James Regan and Patrick Russell were convicted after trying to break into Thomas Walker’s house, and James Dixon was convicted of breaking into Joe Soper’s house.\(^{45}\) Several more cases involved thefts: “took a two horse sleigh,” “abstracting letters from the box,” and in at least two cases, “took a cow.”\(^{46}\) The records of Picton magistrate D.B. Stephenson reveal that he tried summarily as trespass a case of “carrying away a pair of boots from a shop”, and one of “taking” a promissory note.\(^{47}\) The loose definition of trespass also allowed for the punishing of offenders where there was general agreement that an offence had taken place, even if nobody was quite certain what to call it. In one such case, a child had been left at a neighbour’s house for an extended period without the resources to provide for it, leaving him “to trespass on the said John Cunningham to the great injury, spoil and damage of his private and personal property.”\(^{48}\)

\(^{45}\)Returns of Convictions, env. 1, 4.

\(^{46}\)Returns of Convictions, Box 1, env. 2, 3, 6.

\(^{47}\)AO, RG22, ser. 86, Picton Quarter Sessions Records, Information and Complaints Book of D.B. Stephenson, 8 Sept. 1838, 30 Apr. 1839.

\(^{48}\)Returns of Convictions, Box 1, env. 2.
An advantage to the Petty Trespass Act for prosecutors was that they could get compensation for damages, so it is hardly surprising that trespass cases became common. In such cases magistrates often asked the victim to assess the value of the damages. Witnesses were asked to verify that certain items belonged to the prosecutor, or to witnessing the extent of the damage. The amount of damages assessed fluctuated accordingly. Darlington township magistrate John Lister assessed damages within the full range of the limits that he was allowed. His punishments ranged from paying damages of 2/6 for ordering someone to take a hoe, to £4/3/4 for taking a wagon. In one case, the value of damages was discovered to have been inflated after the penalty had been established. Peter and James Dalton, convicted of maiming a cow, were initially required to pay £2 each, but “the penalty was mitigated to 10s in consequence of proof that the cow was not injured to the extent stated.”

Despite the apparent popularity of the Petty Trespass Act among victims of minor offences, not all magistrates were enthusiastic about their new responsibilities. When magistrates Henry Munro and Asa Walbridge of Clarke tried a case of trespass in May 1835, they sentenced two men to pay ten shillings each to the man whose pine trees they had cut down and taken away, and they noted: “We did not take our full costs as they were the first cases commenced and tried in the Town and being quite a concern we read the Summary Punishment Act and hope we shall not be troubled in future with any more actions of trespass.”

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49Ibid., Box 1, env. 11.
50Returns of Convictions, Box 1, env. 3.
Despite the objections of Munro and Walbridge, actions for trespass were too useful for people to ignore. Whenever changes made the judicial system more accessible to people, they seized the opportunity to use it. This was true in the civil as well as the criminal courts.

In the Peterborough area, magistrate Thomas Need waxed enthusiastically in January 1836:

> Among other signs of the growing importance of the township, a court of requests was now opened for the recovery of small debts. I took some pains in having it established, for it seemed to afford security both to debtor and creditor, and to save vexatious law expenses, for no attorney is allowed to practice in these courts, and the award of the presiding commissioners is always final.

One year later he was less optimistic:

> The court of requests was held to day, for the second time in our Township; I was much disappointed to find the business considerably on the increase, and a great deal of knavery attempted by parties summoned; indeed its establishment, instead of proving a security to the settlers, threatens to be a vast injury, by tempting store keepers to give credit inconsiderately, and consumers to obtain goods without regarding the means of payment. When redress was difficult and expensive, the trader was cautious for his own sake; but now he appears to give credit without hesitation, relying on the court for recovery. People also thus brought before a court of law acquire a litigious spirit, and I cannot help regretting extremely the haste with which several of us concurred in promoting the establishment of it in our neighbourhood.\(^5\)

There are indications that the Newcastle District magistrates came to consider the practice of awarding compensation for damages somewhat problematic. In the first few years after the passing of the Act, the usual practice in actions of trespass was to award compensation and costs to the plaintiff. After a few years, however, an alternative practice emerged. It became common for the magistrate to assess damages or a penalty to be paid not directly to the complainant (who would still get costs if the case was proven), but to the pathmaster, surveyor, or treasurer of the township or the district.

This shift implies that magistrates must have come to consider that the potential of being awarded damages encouraged prosecutors to pursue actions for trespass. If damages were not commonly granted, fewer complainants could be expected to bring cases before them. They undoubtedly hoped to discourage aggrieved persons from initiating cases for very minor offences and from initiating malicious prosecutions. Also, this change, insignificant though it may appear, seems to indicate a potentially more important change in the dynamic of the trespass trial. Now it was necessary for the complainant to convince the magistrate that she or he had suffered damages sufficiently significant to warrant compensation. Previously, the magistrates seem to have taken the complainant’s word for that. In other words, magistrates must have been inquiring more closely into the circumstances surrounding these cases of trespass in order for them to make such distinctions. Finally, this change gave magistrates even more discretion in trespass cases, and their decisions could make a great deal of difference to the participants in them.

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52 Tabulated from Returns of Convictions.
People who felt wrongly that they had been wrongly convicted summarily could appeal their conviction to Quarter Sessions, but this appears not to have been common practice. Of the 336 people convicted summarily under the Petty Trespass Act from 1834 to 1840, only 13 (under 4% of the total) appealed. Three of those were magistrates themselves, convicted after the Port Hope town meeting of 1836 erupted in a riot. The convicting magistrate was involved in the fray himself and was a rather notorious figure in Port Hope. Of the remaining ten who appealed their convictions, two had been convicted of trespass and eight of assault. George Perry immediately appealed his conviction on a trespass charge of “stealing a cow” as “contrary to law and evidence.” When magistrate Asa Wallbridge convicted Thomas Reel of assault, Reel also immediately appealed, stating “the cause and matter of such appeal are that I am not guilty of the said offence, and that the Decision...was contrary to law and justice.” The three magistrates convicted of riot appealed “on the grounds of illegality and unjustness...from beginning to end, the complaint having been improperly made, the said John Brown having been equally concerned...in the supposed trespass and having sat in judgment thereon, the Evidence address’d not proving the Complaint and the damages being extravagant, excessive and unjust....” Despite the

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53 Information Returns of Convictions; cases are as follows (names refer to convicted people): Box 1, env. 4 (Kingsmill, Smart and Williams), 5 (Bryant), 6 (Perry; Reel; Flood), 7 (Watson; Reed), 10 (Taylor and Taylor), 12 (Jones), 13 (Allan).

54 The relations among magistrates in Port Hope is the subject of more detailed discussion in Chapter 6.

55 Returns of Convictions, Box 1, env. 6 (Percy; Reel) and 4 (Kingsmill, Smart and Williams).
grievances of these individuals, most of those convicted of summary offences appear to have accepted the decisions of the magistrates.

The Petty Trespass Act also permitted magistrates to try summarily cases arising from disturbances that interrupted religious services.56 David Murray has written about the problems magistrates encountered when trying to administer regulations concerning the sabbath and disturbance of religious worship.57 Magistrates in the Newcastle District do not seem to have taken it upon themselves to enforce this section of the Petty Trespass Act with any regularity. Only three people were convicted under this section of the Act and two of those were convicted together after an incident that was complained of by a member of the public. In Oct. 1836 John Jenkinson and John Byes were fined 5s each for “making violent noise and disturbance before the Scotch Kirk in Cobourg.” The only other conviction occurred in Oct. 1835 when Carlos Shearman was fined 2s/6d for disturbing a religious congregation in Clarke township “by using contemptible [sic] language.” No prosecutor was named, which may indicate that a J.P. acted on his own initiative. However, Shearman was given two months to pay the fine, which suggests that the presiding magistrate did not regard the offence as particularly outrageous.58 That the magistrates of the Newcastle District apparently chose not to attempt to enforce with zeal a moral Christian order on the population might indicate that such offences rarely occurred in the district. However, it is

56Section VI of the Act permitted magistrates to try cases where religious worship had been disturbed or interrupted “by profane discourse, by rude and indecent behaviour, or by making a noise” in or near the place of worship. The maximum fine allowable was £5.

57“Enforcing a Christian Moral Order.”

58Returns of Convictions, Box 1, env. 4 and 6.
more likely that they chose to act in such cases only when an outraged worshipper insisted, realizing the danger inherent in flexing the muscle of their authority too strongly.

The Work of an Individual Magistrate in the 1830s: D.B. Stephenson of Picton

The records relating to summary justice in the Newcastle District are incomplete. We have the returns of convictions of the Newcastle District’s magistrates, but there is no information on cases that were dismissed or settled in some way other than conviction. One document from a neighbouring district magistrate does shed light on trends in the disposition of cases by an individual justice. Picton magistrate D.B. Stephenson kept a book in which he recorded every information he took between August 1834 and June 1839. This was a bound volume of printed forms with space for two informations per page. For each entry, he recorded the names of the complainant and the defendant, the offence, and the date upon which the offence occurred. In some instances there are details about the offence and on the back of the page he often, but not invariably, recorded the outcome of the case.59

Stephenson dealt with 113 cases of various types in the period of almost five years during which he kept this record book. By far the bulk of the cases were those in which Stephenson had summary jurisdiction after 1834. The most numerous category was assault cases, for which he took 44 informations. Next in popularity were trespass cases, of which he dealt with 31. Of the 113 cases for which he took complaints, only eight resulted in the

\[59\] AO, RG22, ser. 86, Picton General (Quarter) Sessions, Miscellaneous Records, 1834-1839, informations book of D.B. Stephenson. Although this document is not from the Newcastle District, it is the only surviving document that contains all the informations taken by one magistrate during the period. Also, Prince Edward County is not far from the Newcastle District.
defendants being bound over to stand trial at Quarter Sessions or the Assizes. Five of these were cases involving theft, over which he had no summary jurisdiction, and two were cases involving serious assaults. In addition to the cases mentioned already, he took complaints in five cases for violations of master and servant laws, four for fraud or forgery, three involving violations of statute labour, three for threatening, two for violating the sabbath laws, and one each for swearing, destroying public property, blocking a road, inaccurate assessments, and selling liquor without a licence. The range of complaints demonstrates clearly the great range of expertise expected of the local magistrate despite his lack of legal training.

The ways in which the cases break down in terms of outcome is the subject of Table 4-3.
Table 4-3

Outcome of Cases in D.B. Stephenson Informations Book

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Assault*</th>
<th>Trespass</th>
<th>Other petty</th>
<th>Theft</th>
<th>Other felony</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine/damages</td>
<td>18**</td>
<td>14</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Settled</td>
<td>4</td>
<td>5</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discharged</td>
<td>9</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Recog to Assizes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Recog to Q.S.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Recog - not specified</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>No information</td>
<td>7</td>
<td>5</td>
<td>1</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>No return</td>
<td>3</td>
<td>4</td>
<td>4</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Escaped</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jailed</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Recog to keep peace</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Distress warrant</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Process not issued</td>
<td></td>
<td>1</td>
<td>2</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*two imprisoned for default later  
** this includes threatening

This tabulation of the information in the Stephenson record book reveals that in cases relating to property offences (theft and trespass), the magistrate was unlikely to dismiss the defendant. In only one case of theft and two of trespass were the defendants dismissed, whereas nine defendants in assault cases were released in such a manner. Defendants in trespass cases were much more likely to be fined than discharged, the ratio being about 6:1; in assault cases, the defendants were only twice as likely to be fined as discharged. In cases over which justices had summary jurisdiction, there seems to have been some effort to settle
cases without proceeding to trial: 4/44 cases of assault and 5/32 cases of trespass were settled. This was also the case in two of five cases involving violations of master and servant laws. Although the evidence is incomplete, it does suggest that Stephenson tried to encourage participants in disputes to settle them by means other than proceeding to trial.

Of the total of 113 cases, twelve, or about 10%, involved women participants. Women were defendants in only two of the cases and prosecutors in ten. Women appear to have been more likely to take the initiative in proceeding against wrongdoers than they were to be taken before the courts themselves. One woman was bound over in recognizance to trial at the Assizes for theft. The other involved an assault prosecution by a man bearing the same surname as the woman, and this case was settled.

Women prosecuted for a diverse range of offences: assault, threatening, trespass and fraud. Two of these cases appear to have involved wife abuse. One woman prosecuted a man with the same surname for assault; he was fined but did not pay and was sent to jail for three days in default. Another woman complained of being threatened by her husband; he was bound over in recognizance to keep the peace for one year. In the other cases in which a woman prosecuted for assault, one defendant escaped, one was dismissed, and we have no information for the last. Another woman complained of being threatened by a man; he too was bound over to keep the peace. Of the trespass cases, there was no return for one, one was dismissed, and the third, in which a woman complained that a man had maimed her horse, the defendant was fined £2/20, presumably the value of the horse, plus costs. We have no information about the outcome of the fraud cases. Despite the absence of much information about these cases they do reveal at least that women used the services of magistrates, both to protect their persons and their property.
Fines or assessments of damages were generally greater in trespass cases than for assaults. We have information about the fines in 16 assault cases, and in 11 trespass cases (we have no information for two of each type of case.) Of the 16 fines for assaults, 12 were under five shillings and only four were greater. Of the 11 trespass fines or assessments, only three were for amounts under five shillings; five were for amounts between five shillings and one pound; and three were for amounts greater than £1. This pattern indicates that people were not particularly inclined to initiate legal proceedings for minor trespasses in which damage was minimal. Alternatively the pattern might indicate that cases of minor trespass were more likely to be settled than to proceed to trial. In only two of the cases did the defendant end up in jail and that was for default in payment of fines.

The only instance in which Stephenson committed a person to jail directly was a case involving a violation of master and servant laws. John Kelly was sentenced to one month in jail after a written document had been produced stating that Kelly had agreed to serve Timothy McGuire for one year and when questioned “absolutely refused” to return to his employment. Two other such cases were dismissed: one due to the non-appearance of the prosecutor and the other because Stephenson judged it “unproven.” Two other such cases were “settled by parties,” which may have meant that the charges were dropped once the defendants agreed to resume employment or some other type of settlement agreement had been reached.

The extent to which English master and servant laws applied in Upper Canada was not entirely clear. The English laws, which dated from Elizabethan times, were cited in.

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60 This subject is discussed more fully in Paul Craven, “The Law of Master and Servant in Mid-Nineteenth-Century Ontario,” in David H. Flaherty, ed., Essays in the
Upper Canadian magistrate's manuals, but they appear not to have been administered to the fullest possible extent. In an appendix in a contemporary guide for immigrants, the question "Are there any laws peculiar to the colony, regulating contacts between masters and servants?" was answered: "There are severe ones, but I believe conventional practice supersedes them in most cases." It appears that the regulation of master-servant relations remained primarily in the private sphere in Upper Canada because such cases appear to have been only rarely brought before the courts. This pattern may have resulted from the relatively scarce labour supply and high wages which for most of the colonial period forced employers to go to some lengths to retain the services of their employees. Not until the 1830s is there evidence that magistrates became involved in master-servant cases. That decade saw an influx of landless poor immigrants which increased the labour supply and may have led to a deterioration in employer/employee relations. The massive immigration of potentially disorderly landless paupers may also have alarmed authorities who began to prosecute such cases to try to inculcate a respect for authority.

The Stephenson sample of five master-servant cases is a very small one and therefore conclusions must be tentative. The only information I have come across is from the Newcastle District jail registers. In Aug. 1838, Richard Cleary was imprisoned for 18 days for "not sewing his master," and in Jan. 1839, William Farrell served a month in the district

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gaol for the same offence. In the time of unrest following the rebellion it might be expected that a more rigorous prosecution of master-servant laws might take place.

Finally, Stephenson also tried various kinds of nuisance cases. Two cases involving violations of the Sunday labour laws resulted in fines. In three cases of violations of statute labour requirements, two were issued distress warrants and one was absent so there was no return. We have no information on the outcome of the only case of swearing, in which a person swore at a bailiff. There was no return on the other nuisance cases involving a blocked road and an inaccurate tax assessment. The liquor licensing violation was not returned, a licence having been obtained.

The Stephenson informations book shows the range of judicial activities that a small-town magistrate in the 1830s performed. People sought his help in dealing with serious offences as well as minor ones, but the bulk of his judicial work involved settling disputes that arose over petty offences. He appears to have made an effort to encourage settlements between the parties, but where those efforts failed he tried many offences himself and also discharged several people brought before him on criminal charges. Few offenders brought before him went to trial at the higher courts. All in all, Stephenson appears to have administered justice in a reasonable way.

**Conclusion**

Evidence from the Newcastle District court records suggests that the character of summary hearings before J.P.s does not fit the standard historiographical view. These trials

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62 AO, RG20, ser. F-9 at dates mentioned.
were not held in secret with no attention to due process. Rather, the district magistrates carried out these trials in ways which were similar to pre-trial hearings, allowing the accused to explain her or his actions and hearing witnesses for both parties. The magistrates acted on the complaints of others, and did not go around looking for people to charge with offences. If an accused person felt victimized by the actions of J.P.s, an appeal to Quarter Sessions was possible. When magistrate John Brown convicted three other magistrates for riot after the Port Hope town meeting in 1836, in which Brown himself had been implicated, the three accused appealed immediately.

The Petty Trespass Act extended the powers of magistrates considerably, but the people in the Newcastle District and in Picton do not seem to have been overly concerned about the potential abuses of that concentration of power. Rather, the legislation provided an opportunity for settling disputes quickly and cheaply, and summary trials quickly became a regular feature of criminal justice administration in some places. That the pattern of use varied from place to place and from magistrate to magistrate demonstrates the flexibility inherent in the system, which could be adapted to suit local expectations. Similarly, the shift in the way in which trespass was punished shows that the response of magistrates to the ways in which their neighbours were using these courts. Moreover, summary justice offered people who might not otherwise have had the resources the opportunity to take those who had victimized them before the justice system. Natives, women, and those at the lower levels of the social scale took offenders before magistrates seeking justice. Judging from the fact that appeals were relatively few, it appears that most people were satisfied with the actions of justices in summary trials.
Evidence on summary trials shows that the inhabitants of this frontier district were remarkably litigious. About one of every hundred inhabitants (including children) were convicted of summary offences during these years. Most cases were dealt with at the local level. The Stephenson book shows the range of services that people sought from their local J.P.s, but it also shows that few of the cases proceeded to a level higher than the individual magistrate. Despite what might be regarded as a high level of petty crime, or a remarkably high level of reporting of petty crime, magistrates appear to have dealt with such offenders fairly leniently.
Chapter 5

Courts of Quarter Sessions

This chapter explores the workings of the Courts of Quarter Sessions in the Newcastle District. It begins by describing procedures at Quarter Sessions and goes on to examine the size and composition of the district bench at Quarter Sessions, the criminal trials that took place there, and the punishment of convicted offenders.¹

Procedure at Quarter Sessions

Courts of Quarter Sessions provided the foundation for local government in Upper Canada. They were also courts at which minor criminal offences, that is, offences no greater than simple larceny, were tried.² Quarter Sessions were held in the judicial centre of each district four times a year -- in January, April, July and October. Each session tended to last two to four days, although a session could continue for some time with adjournments. Occasionally special sessions were held to deal with urgent local matters. The magistrates of the district collectively formed the bench at Quarter Sessions. One of their number performed the function of chair.

¹The sources upon which this chapter is based consist principally of the records relating to the Cobourg Quarter Sessions at the Archives of Ontario. The Minute Books (series 29) are complete to 1831, after which we must rely upon Draft Minutes (series 30) and Case Files (series 31) to reconstruct, albeit incompletely, the business of the courts.

²Keele, Provincial Justice, 412. As Keele noted, the jurisdiction of Courts of Quarter Sessions had changed over time; by 34 Edw III, c. 1, it had extended “to the trying and determining all felonies and trespasses whatsoever. But now they ought not to try any greater offence than that of simple larceny....”
Because this study concerns the roles of magistrates in the administration of criminal justice, there is not a great deal of information herein about the administrative functions of Quarter Sessions, which in any case have been discussed by others. However, it is important to be aware that the administrative and judicial functions of Quarter Sessions were not separated neatly. In between criminal trials, the courts dealt with whatever administrative business was at hand. When grand juries were ready to report their findings on an indictment or a presentment, they came in and did so. When all the participants were ready for a criminal trial, the trial jury was sworn in and the case heard. In between, the magistrates set tax rates, passed bylaws, tabled and discussed district accounts, allocated funds for roads and bridges, and so on. Such flexibility must have expedited the business of the courts.

At least two magistrates were required to order the sheriff to call a session, which had to be done at least fifteen days before it was to begin. It was then the sheriff's responsibility to proclaim the session, summon the jurors and inform all of the local officials: the Clerk of the Peace, sheriff or deputy, coroners, constables, and gaolkeeper. The sheriff also had to inform jurors and those bound by recognizance to appear to answer charges, prosecute or provide information when to appear. The smooth operation of

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3 The most comprehensive study of this subject remains Aitchison, "Development of Local Government in Upper Canada."

4 According to David Murray, next to criminal cases the Niagara District Court of Quarter Sessions spent more time on poor relief than any other issue; "The Cold Hand of Charity," 201. Quarter Sessions were not courts of civil jurisdiction. District Courts handled civil cases, and Courts of Requests tried small claims.

5 Keele, Provincial Justice, 411-12. Sheriffs usually called more jurors than were required to make sure that a sufficient number showed up for court; for example, in 1832 the
Quarter Sessions thus depended upon the actions of magistrates and other officials. If the magistrates failed to provide the Clerk of the Peace with recognizances of participants, the clerk would not have accurate information to present to the sheriff, who would not know whom to inform to attend the court.⁶

From 1807 Quarter Sessions took place in the district courthouse at Cobourg.⁷ The courtroom was crowded at the outset of each session. In addition to the assembled magistrates and district officials shuffling papers and talking amongst themselves, those called to the grand jury and trial jury were present, as well as a number of people there to participate in trials as prosecutors, witnesses and defendants. Some defendants were brought from the district gaol and were under guard. Although Quarter Sessions might not have

sheriff called an average of 24 men to each Quarter Sessions to act as grand jurors, and an average of 40 to act as petit jurors; RG22, ser. 40, Cobourg Quarter Sessions Praecepts, Box 3, env. 2.

⁶ This section relies principally upon Keele’s manual and the Quarter Sessions Minute Books. Memoirs and newspaper accounts did not record details of the relatively mundane activities at Quarter Sessions. The Cobourg Star account of 19 April 1831 is unusual in even mentioning the lower court: “The Quarter Sessions for this District were held at the Court house in Amherst last week. There was a great deal of business which detained the Court the entire week, but none of much public interest.”

⁷ The January 1807 session was the first held in the district courthouse. Prior to that date, Quarter Sessions rotated between several settled townships, including Murray, Hope, Haldimand, Hamilton and Cramahe. Originally the judicial centre of the district was to be the town of Newcastle on Presqu’ile Harbour in Murray township, at the southeast corner of the district. Difficulties of travel in that part of Lake Ontario, demonstrated most dramatically by the sinking of the Speedy en route to the district Assizes in 1804, led to a change in 1805 which made Amherst, the name of which was later changed to Cobourg, the district centre. Quarter Sessions Minute Books; Brendan O’Brien, Speedy Justice: The Tragic Last Voyage of His Majesty’s Vessel Speedy (Toronto: The Osgoode Society, 1991), 65, 119-20. A second district courthouse was constructed in the early 1820s; see Marion MacRae and Anthony Adamson, Cornerstones of Order: Courthouses and Town Halls of Ontario, 1784-1914 (Toronto: The Osgoode Society and Clarke Irwin Inc., 1983), 53-6.
provided as great a public attraction as the Assizes, people not directly involved in cases certainly attended: friends and family of both accused persons and prosecutors were there to support their side.\(^8\) There would have been a great deal of commotion as people arrived and greeted one another, bantered about the forthcoming business, commented on the attire or demeanour of a participant, and exchanged insults.

The first sign that business was about to proceed was a rather forceful call to order from the bailiff, who stood and announced: “Oyez! Oyez! Oyez! The King’s [or Queen’s after 1837] justices do strictly charge all manner of persons to keep silence, while the king’s commission of the peace for this district is openly read, upon pain of imprisonment.” As the crowd quieted down, the clerk of the peace stood and read the commission, which officially opened the proceedings. Then the clerk read the heir and devisee act.\(^9\) After that, the court got down to business. The clerk directed the sheriff to return the praecpt and the list of grand and petty jurors which the sheriff had drawn up before the session. The grand jurors

\(^8\)The pomp accompanying the opening of the Assizes in eighteenth-century England is described in Beattie, *Crime and the Courts in England*, 316-7. That the Upper Canadian Assizes attracted a considerable following is suggested by E.T. Coke’s difficulty at finding accommodation in Kingston in 1832: “The town and uncomfortable inns were crowded to excess, owing to the assizes and the bishop’s visitation occurring together....”; *A Subaltern’s Furlough...* (London, 1833), 318. In places, Quarter Sessions also attracted a crowd; at Turkey Point on Lake Erie, a constable was stationed at the bar by 1807 to maintain order in the courtroom, particularly to keep “unauthorized persons” from interfering with the proceedings; MacRae and Adamson, *Cornerstones of Order*, 22.

\(^9\)The heir and devisee commission adjudicated claims to land by heirs and devisees of individuals who had original rights to grants of crown land, or rights to purchase such lands. That this act was read at every Quarter Sessions indicates the central importance of land transactions to every Upper Canadian settler. The Heir and Devisee Commission records are in AO, RG40. The clerk was ordered to read this act by 45 Geo III, c. 2, s. 14 (1805). In addition to the heir and devisee act, other statutes or documents which affected judicial business were sometimes read at the outset of Quarter Sessions. In April 1803, the clerk read the new commission of the peace, and in October 1804, two Orders in Council.
were sworn in; first the foreman, then the rest, three at a time. They had to swear to keep what they heard and talked about secret and to perform their duties impartially: “you shall present no one for envy, hatred, or malice; neither shall you leave any one unpresented for fear, favour, or affection, or hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding.” The clerk of the peace then went over the list of grand jurors one more time, asking them to call out “sworn” if they were sworn, to make sure that no one had inadvertently neglected to take the oath.10

After all the grand jurors had been sworn, the chairman delivered his charge to the grand jury. This charge mirrored proceedings at the Assizes, at which the Judge, often the Chief Justice, addressed the grand jury, taking the opportunity to comment on the state of crime and morality in the colony and to remind all those present of their responsibilities to uphold law and order.11 The charge at Quarter Sessions was similar in intention and content. At the opening of the April 1835 sessions, chairman John Steele outlined the importance of the law and those who carried out its mandates to the maintenance of order and constitutional balance in Upper Canada. After emphasizing that the jury trial was the

10 Those who neglected or refused to turn up for grand or petty jury duty were fined, unless they presented a valid excuse for their absence; Keele, Provincial Justice, 414-5. At times jury absenteeism posed a problem. For example, in Apr. 1835, 22 jurors were fined 10s each for not appearing as petit jurors. Absentee grand jurors were usually fined even more heavily. In Apr. 1833 five men were fined 40s after failing to show for grand jury duty. RG22, ser. 22, Cobourg Quarter Sessions Orders, Box 1, env. 11 and 13.

“bulwark of our glorious constitution,” Steele went on to make more general remarks. “The law of the land,” he said,

extends its fostering care to our lives, liberties and possessions .... obedience to the law is an unceasing obligation and is the bond of union which cements society together and keeps undisturbed the happiness of the whole community -- without Law, there would be no order, anarchy and wild confusion will spread universal ruin and misery.

Steele went on to caution those in the courtroom about the dangers of heeding “the sin and greedery [sic] and grievances and complaints of the disaffected,” undoubtedly a warning to avoid falling into the abyss of reform. He concluded with a rousing burst of rhetoric:

let justice be administered impartially to all classes, and the oppression of the most powerful, will not prevail against the rights of the meanest subjects -- unbounded confidence in the wise and just administration of the Laws, will constitute our greatest and best protection. Every one of us in our respective spheres of life are bound to assist each other in doing all we can to promote the public good, and we cannot do this more effectually than by upholding our excellent Laws, and keeping inviolate our free institutions.¹²

The bailiff was then sworn to attend the grand jury, and to deliver whatever documents the court required -- without altering them on the way. Edified and inspired and conscious of the weight of their duty, the grand jury retired to a room just off the courtroom. There the prosecutor in the first case was called to come forward or forfeit her or his recognizance. The prosecutor and witnesses were sworn to tell the truth before the grand jury, who then heard the evidence and decided whether it was sufficient to send the indictment forward for trial. The grand jury usually heard the evidence for several cases in succession, then its members returned to court to present the bills of indictment, and then

¹²AO, MU 2883, John Steele Papers, envelope 3, 1835-40; draft of address to grand jury, April 1835.
they retired to examine more.13 Throughout the session, then, the grand jury traipsed in and out of the courtroom at intervals.

When the grand jury returned an indictment as a “true bill,” a trial could proceed. The clerk arraigned the accused, read the indictment aloud and asked if the prisoner pleaded guilty or not guilty. Sometimes the accused pleaded guilty, after which sentencing took place; however, he or she usually pleaded not guilty. Then the Clerk of the Peace asked the accused if she or he was ready for trial. Often the defendant was not; many cases were not tried the first time they appeared before the court. Sometimes the reason for traversing the indictment was cited in the minutes: the defendant or a crucial witness was ill or out of town, or the accused required further time to prepare the case. For example, when Lewis Lewis faced trial for selling liquor without a licence in July 1821, one of his witnesses was absent and the case was traversed. At the October 1821 session, James Moore, accused of assault, said “he is not ready to take his trial.” Sick witnesses caused cases against John Brown in 1820 and Guy Soper in 1823 to be respited. Cameron McGregor faced trial for assault in April 1828, but was himself ill and unable to attend the trial.14 Often, though, cases were traversed with no explanation stated in the Minute Books, and the participants were routinely bound over in recognizance to attend the subsequent session.

If the accused indicated that she or he was ready for trial, the clerk called the petit or trial jury. From the pool of jurors who had shown up for petit jury duty, twelve were sworn

13Keele, Provincial Justice, 415-6. Early in the period, there were sessions at which there were no indictments for the grand jury to consider; for example, in October 1807, January 1808, January 1810, and April 1810 the Minute Books record “no business” for the grand jury.

14Examples from Quarter Sessions Minute Books at dates specified.
in as jurors for a particular trial. Unlike the situation in late-eighteenth-century England, a separate trial jury was sworn in for each trial, although membership in the juries at the same sessions overlapped somewhat.\(^{15}\) The prisoner had the opportunity to challenge the members of the jury before they were sworn. Although this happened fairly frequently at the Assizes, jury challenging does not appear to have been noted in the Quarter Sessions minutes so we cannot be certain how often accused persons availed themselves of this opportunity. Theoretically, though, if a sworn enemy of a defendant was slated to appear on his trial jury he was not doomed to be convicted on malice. The jury members were then sworn to give “a true verdict ... according to the evidence.” Again, the clerk went over the list one more time, asking each member to answer “sworn” after his name was read.\(^{16}\)

After the jury was sworn in, the clerk read the indictment with the prisoner at the bar and relayed the plea of not guilty at the arraignment. Witnesses were then sworn in, heard and examined; they had to swear the familiar oath to tell “the truth, the whole truth, and nothing but the truth.” The court examined witnesses “as well for the King as for the prisoner.”\(^{17}\)

It is not entirely clear how often lawyers appeared at Quarter Sessions, or what roles they performed at Quarter Sessions trials. Unauthorized persons were not permitted to act

\(^{15}\)As Beattie notes, into the late eighteenth century, “a small group of men ... heard all the cases over the several days the court was in session”; Crime and the Courts in England, 395. This appears never to have been the practice in Upper Canada.

\(^{16}\)Keele, Provincial Justice, 416

\(^{17}\)Ibid., 417
as attorneys at the Sessions, and district officials were prohibited from practising there.18

During much of the period, the roles which defence attorneys could perform partly depended on the nature of the offence. A person charged with misdemeanour could have the full benefit of defence counsel. However, a person charged with a felony such as larceny was not entitled to full defence by counsel until the passage of the Felon’s Counsel Act in 1836.19

Until that time the prisoner’s counsel was “never allowed to address the jury in the prisoner’s behalf” in cases of larceny or felony.20

The Newcastle district minute books do not indicate whether or not a lawyer appeared for the defendant in each case. There are only three references in the minute books to lawyers at the Cobourg Quarter Sessions. In October 1823, when on trial for assault, Harvey Wood “by his Attorney Marcus F. Whitehead says he is not guilty.” Wood was convicted and fined five shillings. In January 1826 a new trial was ordered in Peletiah Soper’s assault conviction “on a motion of Mr. Boulton counsel for the Defendant”; at the new trial in April he was found not guilty. When magistrate John Brown was convicted of assault in April 1826, a new trial was ordered because of “the apparent deafness of one of the Jurors on Motion of Mr. Boswell Counsel for the Defendant.” Brown was convicted and

18Ibid., 412. Keele cites the statute 22 Geo II, c. 46, s. 12 of which states that no person shall act as solicitor at the sessions unless “admitted and enrolled according to law.” Section 14 of the same statute prohibited clerks of the peace, under-sheriffs and their deputies from practicing at the sessions.

196 William IV, c. 44 (1836), An act to allow persons indicted for felony a full defence by Counsel, and for other purposes herein mentioned. In the same year a similar statute came into force in England; Beattie, “Scales of Justice,” and May, “Reluctant Advocates,” discuss its impact.

20Keele, Provincial Justice, 417.
fined twenty shillings at the subsequent session.\textsuperscript{21} Although these are the only instances in which the presence of lawyers was explicitly noted in the Newcastle District Quarter Sessions Minutes, lawyers may have acted more regularly, their presence not having been noted by the clerk. If patterns of lawyer attendance elsewhere held true in Upper Canada, there were likely many more instances of lawyers than are recorded in the Quarter Sessions Minute Books. In the Montreal District Quarter Sessions in Lower Canada during a similar period, Donald Fyson has found that defence counsel represented about 10\% of defendants in assault cases.\textsuperscript{22}

At the trial, the prosecution first presented its case, after which the prisoner's counsel could address the jury and call witnesses on her or his behalf. If the defendant had no lawyer in court, the chairman asked whether she or he had anything to say or any questions to ask.\textsuperscript{23} The extent to which defendants themselves asked questions or spoke in their own defence is not revealed in the documents. Verbatim transcripts of Quarter Sessions trials do not appear in newspapers because they generated little public interest due to the minor nature of the offences tried there. However, it is not unreasonable to assume that some defendants participated actively in their trials. Many were not ultimately convicted and in some of those cases no defence witnesses seem to have testified on behalf of the accused. Unless the prosecuting witnesses presented conflicting or unbelievable testimony, one assumes that the defendant must have made some statement to present a defence which the jury found

\textsuperscript{21}Cobourg Quarter Sessions Minute Books at dates cited.

\textsuperscript{22}Fyson, "Criminal Justice, Civil Society and the Local State," 300-1.

\textsuperscript{23}Keele, Provincial Justice, 417.
plausible. Similar rules to those which applied at the pretrial hearing were likely in force at the trial. At the pretrial hearing the accused was not required to testify under oath because self-incrimination could not be forced. Nevertheless, the records contain several examples of defendants explaining how stolen goods came into their possession, or why they got involved in a fight. Moreover, pretrial hearing records demonstrate that defendants did indeed question witnesses. Although the experience of speaking in court must have been more intimidating than making a statement in front of a magistrate in his house or place of business, it is likely that the defendant took the opportunity if she or he had something significant to say.

When all the evidence had been presented and the case was closed, the chairman performed a role similar to that of the judge at the Assizes, summing up the evidence for the jury and commenting upon it, "shewing the consistency and inconsistency of any part of it, and the bearing it has upon the 'guilt' or 'innocence' of the prisoner." The jury then retired to consider the case, and the bailiff was sworn to keep its members isolated until the verdict was reached: "You shall swear you will keep every person of this jury together in some private and convenient place, without meat, drink, lodging or fire (candle excepted) -- you shall not suffer any person to speak to them or any of them, neither shall you speak to them yourself, unless it be to ask them, whether they are agreed upon their verdict, without leave
of the court. — So help you God.” Presumably jury discomfort would speed up the proceedings.

When the jury decided the case its members trooped back into court and announced their verdict, which was duly recorded. The sentence was then pronounced. The procedure for deciding the sentence is not clear; presumably there must have been some discussion among the presiding magistrates as to the appropriate punishment where discretion allowed. There were upper limits on the punishments which could be meted out at Quarter Sessions. Costs of the trial were paid by the participants; if the case resulted in conviction the perpetrator paid; if it resulted in acquittal the prosecutor paid unless he could prove he had reasonable grounds for initiating the case, in which case the costs were borne by the district.

24 Keele, *The Provincial Justice*, 417. Beattie notes that in early modern England, trial juries did not always leave the courtroom to deliberate; in fact, they usually remained seated in the court and quickly arrived at their verdicts; Crime and the Courts, 395-9. Although Upper Canadian juries may have arrived at their decisions in similar ways in some cases, it is more likely that they left the courtroom to deliberate. Early courtrooms had rooms for that purpose; see, for example, MacRae and Adamson, Cornerstones of Order, 12-13, 33-35, and 54, at which floor plans for pre-1840 courtrooms have clearly delineated rooms for the petit jury. The Cobourg courthouse built in the 1820s had two jury rooms and one for the grand jury (54).

25 Keele, *The Provincial Justice*, 414. Although it is evident that costs were borne by the defendant if found guilty of an offence, it is by no means clear what the regular practice was in assigning costs of trials where the defendant was acquitted. Quarter Sessions records do not specify who paid the costs in most such cases. However, there are examples of the court ordering costs to be paid by the prosecutor; for example, in AO, RG22, series 31, Cobourg Quarter Sessions Case Files, box 2, case against George Allan; box 3, case against Michael Freese; box 4, cases against Daniel Altenburgh and Matthew Borland; and box 5, case against David Wickham and Charles Arkland. All were assault trials. When Hannah Vail was acquitted of assaulting Rhoda Young in April 1816, the costs were paid by the district; Case Files, box 2.
When all the indictments had been heard by the grand jury, its members were released. When all the trials had been conducted, the session was adjourned. Quarter Sessions generally lasted three or four days. Usually no more than five or six trials took place in one day, but bills of indictment were returned and bench warrants might be issued for several other cases during the day. Criminal trials cannot have been very long, but it is not possible to be more specific than that. On Apr. 12, 1833, the last day of the spring Quarter Sessions, 6 criminal trials took place with a total of 22 witnesses, and a variety of other criminal justice business was dealt with as well. And of course local government business also occupied the court between trials as well as between sessions.

Size and Composition of the Bench

Of the 76 men appointed to the magistracy in the Newcastle district before 1835, 67 (88.2% of the total) sat on the bench at Quarter Sessions at least once. Although this appears to be a significant proportion, many of them attended only a handful of sessions, some no more than one. The numbers of magistrates on the bench at the sessions varied from two to nineteen. In the fall of 1825, only two magistrates attended, and several

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26 Keele, Provincial Justice, 419.

27 Quarter Sessions Minutes.

28 Because attendance information is not available for the period after 1835, the discussion of these patterns stops at 1834. To explore changes over time, the period is divided into three sections: 1803 to the summer of 1818, fall 1818 to the summer of 1829, and fall 1829 to 1834. These time divisions correspond to the issuing of new commissions of the peace. From 1803 until 1818 the number of magistrates remained constant at about 16. Beginning with the 1818 commission, numbers began to increase, and there were two subsequent commissions shortly thereafter, in 1821 and 1823. The 1829 commission remained in force during the rest of the period for which records are complete.
sessions, most in the early period, record three. After 1830 the justices at Quarter Sessions sometimes, but not invariably, numbered in the teens. The largest number recorded at Quarter Sessions before 1835 was nineteen, on three occasions. The following table shows the average number of J.P.s on the bench at Quarter Sessions during the three time periods, and the proportion that number represents of the total number of magistrates in the district at the time. Although the average number attending the sessions increased over time, the percentage of available magistrates attending declined considerably.

Table 5-1

Numbers and Percentages of J.P.s at Cobourg Quarter Sessions, 1803-1834

<table>
<thead>
<tr>
<th>Years</th>
<th>Range*</th>
<th>Average # JPs at QS</th>
<th>Av. # as % of Total # JPs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1803 - June 1818</td>
<td>3-13</td>
<td>6.7</td>
<td>41.9%</td>
</tr>
<tr>
<td>July 1818 - June 1829</td>
<td>2-19</td>
<td>10.2</td>
<td>30.2%</td>
</tr>
<tr>
<td>July 1829 - end 1834</td>
<td>3-19</td>
<td>11.9</td>
<td>22.5%</td>
</tr>
</tbody>
</table>

*"Range" reflects the lowest and highest numbers of magistrates attending any session during this period. Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Minutes (Rough), 1808-1841.

In the early period, an average of close to seven J.P.s attended each session, and they represented more than two-fifths of the total number on the district bench. In the 1820s, an average of just over ten justices were present, but their proportion of the total pool dropped to less than one-third. In the early 1830s, an average of about twelve J.P.s sat on the bench at the district sessions, and again their proportion of the whole dropped, this time to between

29April, 1827; July, 1830; and October, 1830.
one-quarter and one-fifth. Only one in four or five magistrates attended each sitting in the early 1830s.

Seasonal variations within this overall pattern are displayed in Table 5-2 below.

Table 5-2  
Seasonal Patterns of Attendance at Quarter Sessions  

<table>
<thead>
<tr>
<th>Years</th>
<th>Winter</th>
<th>Spring</th>
<th>Summer</th>
<th>Autumn</th>
</tr>
</thead>
<tbody>
<tr>
<td>1803-6/1818</td>
<td>6.6</td>
<td>7.4</td>
<td>7.5</td>
<td>5.5</td>
</tr>
<tr>
<td>7/1818-6/1829</td>
<td>11.0</td>
<td>12.3</td>
<td>9.8</td>
<td>7.7</td>
</tr>
<tr>
<td>7/1829-1834</td>
<td>8.3</td>
<td>15.5</td>
<td>13.3</td>
<td>10.3</td>
</tr>
<tr>
<td>Average</td>
<td>8.4</td>
<td>10.5</td>
<td>9.4</td>
<td>7.0</td>
</tr>
</tbody>
</table>

Figures calculated from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841.

More magistrates tended to sit on the bench in spring and summer sessions than on those in autumn and winter. The October sessions were usually the most poorly attended. Autumn is the busiest season in an agriculturally-based society such as that of Upper Canada, and many of the magistrates engaged in farming or ran shops or businesses which bought locally-produced goods or exchanged them for imported products. Winter transportation problems might explain the lower than average turnout during that season's sessions.

Within these general patterns, some magistrates attended Quarter Sessions more regularly than did others. Table 5-3 shows the numbers of individual magistrates who
attended Quarter Sessions during each of the three periods, and the regularity of their attendance.

Table 5-3

<table>
<thead>
<tr>
<th>Regularity of Attendance at Quarter Sessions*</th>
</tr>
</thead>
<tbody>
<tr>
<td># attending &gt; ½</td>
</tr>
<tr>
<td>1803-1818</td>
</tr>
<tr>
<td>3 (13%)</td>
</tr>
<tr>
<td># attending 1/4 - ½</td>
</tr>
<tr>
<td>9 (39%)</td>
</tr>
<tr>
<td># attending &lt; 1/4</td>
</tr>
<tr>
<td>11 (47.8%)</td>
</tr>
</tbody>
</table>

*These calculations include only those JPs who attended Quarter Sessions at least once during these time periods. Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841.

Throughout the period a core group of magistrates attended Quarter Sessions very regularly. The number composing this group increased slightly over time, but not nearly as greatly as did the overall numbers of J.P.s. A larger group of magistrates attended with some regularity, and an even larger group attended infrequently. In the later period, however, the number who attended between one-quarter and one-half of the sessions outnumbered those who attended only occasionally.

In each period, a core group of magistrates who attended Quarter Sessions regularly might be presumed to have dominated the proceedings. Their leadership might have been

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30F.H. Armstrong found a similar pattern in the Western District, in which “a small group of stalwarts who turned up with great regularity year after year” ran Quarter Sessions; “The Oligarchy of the Western District of Upper Canada, 1788-1841,” reprint in Historical Essays on Upper Canada: New Perspectives, ed. J.K. Johnson and B.G. Wilson (Ottawa: Carleton Library, 1989), 525. David Murray emphasizes that the magistrates “represented continuity in the application of the law and the administration of local government”; “The Cold Hand of Charity,” 181.
more significant for administrative purposes than in criminal justice matters, as juries played a decisive role in individual trials. Nevertheless, these experienced J.P.s undoubtedly led the courtroom proceedings, shaped the way the trial was conducted, and played significant roles in deciding punishment for offenders. Two magistrates particularly were fixtures at the Cobourg Quarter Sessions throughout almost the entire Upper Canadian period, both of whom lived in Cobourg. Elias Jones missed only about a dozen sessions from the time he was appointed in 1803 until the end of 1834, when complete records cease. Jones chaired several committees as well. 31 Zaccheus Burnham missed only two sessions from 1818 to 1834, a remarkably consistent record of attendance. 32 With the exception of Jones and Burnham, the composition of the core group shifted somewhat over time.

Throughout the period, those who attended Quarter Sessions most frequently were more likely to live in Cobourg and Port Hope than elsewhere in the district, although some magistrates from other places did attend regularly. The domination of Quarter Sessions by “town” magistrates increased over time. In the period 1803-1818, eight of the fifteen most frequent attenders hailed from the two principal towns; after 1818, this proportion increased to ten of fifteen. The other regular attenders came from the other lakefront townships. Still, the essentially rural nature of the district prevented the takeover of Quarter Sessions by magistrates from one place, as tended to occur in urban settings. Quarter Sessions in

31Biographical information on Elias Jones can be found in Guillet, The Valley of the Trent, 59, 234, 292-3, 332; Guillet, Cobourg, 1798-1948, 7, 26; R. Fleming, Eldon Connections (Eldon, 1975), 11, 13, 30-31, 45.

Montreal were dominated by magistrates from the city, and few from outside it ever bothered to attend.\textsuperscript{33}

The back townships were not well represented at Quarter Sessions. Only a handful of magistrates from those townships attended Quarter Sessions regularly. John Hutchison of Peterborough and John Huston of Cavan township made concerted efforts to attend Quarter Sessions. Charles Rubidge of Otonabee also attended quite regularly, a remarkable feat because his travel to Cobourg was made more difficult by the considerable obstacle of Rice Lake.\textsuperscript{34} Other magistrates from the back townships attended Quarter Sessions irregularly, probably when they had other business which brought them to Cobourg. Surveyor Richard Birdsall, for example, appeared six times at Quarter Sessions in the early 1830s.\textsuperscript{35}

The increasing domination of Quarter Sessions by "town" magistrates over time was accompanied by a pattern of appointment which increasingly spread magistrates throughout the entire district. Although Cobourg and Port Hope were heavily represented by magistrates, by the end of this period there were magistrates in every inhabited township of the district. It is interesting to speculate why rural magistrates were less inclined to attend

\textsuperscript{33}Fyson, "Criminal Justice, Civil Society and the Local State, 84-5. That some magistrates chose to exercise their authority in Quarter Sessions while others chose to use other venues is not unique to the Canadian colonies. In Kent in the 1740s, 41% of active magistrates never attended Quarter Sessions; Landau, Justices of the Peace, 242.

\textsuperscript{34}Rubidge held several appointments which might have brought him to Cobourg regularly; he was an emigration agent and a crown land agent.

\textsuperscript{35}Birdsall had married a daughter of Zaccheus Burnham, so attendance at court may have presented the opportunity for family visits as well. The most useful sources of biographical information on Richard Birdsall are Alan G. Brunger's biographical sketch in the Dictionary of Canadian Biography, Vol. VIII, 91-2; and J.L. Graham, Asphodel: A Tale of a Township (Hastings, Ont.: Township of Asphodel, 1978), 13, 15-16, 90, 119-20, 166.
Quarter Sessions than were their counterparts in the towns, and why a declining proportion of the total number of magistrates attended those courts. Undoubtedly ease of transportation was an important factor which deterred rural magistrates from attending Quarter Sessions; however, it was probably not the only one. Much of the administrative business of Quarter Sessions was not of great interest to “country” J.P.s. They may have felt inclined to show up only when a subject of local interest was slated for discussion, such as the location of a road in their township. It is also possible that the “town” magistrates who frequently attended Quarter Sessions and knew intimately the workings of local government and judicial administration might have patronized or intimidated their rural counterparts who were less familiar with the proceedings. Rather than play a humiliatingly minor role or appear as an ignorant country bumpkin in comparison to prominent local figures, they simply stayed home. In their neighbourhoods, at least, they were regarded as the experts. Others may have avoided Quarter Sessions for political reasons. Those with reform leanings were unlikely to have been comfortable in the bastion of torydom which was Quarter Sessions, dominated as it was by enthusiastic tories such as Burnham and sheriff Henry Ruttan.  

Finally, those who were appointed later in the period may have found it difficult to assert themselves at Quarter Sessions, at which an experienced group of men who

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36See T. Ritchie, “Henry Ruttan,” Dictionary of Canadian Biography, Vol. X, 636-7; Johnson, Becoming Prominent, 223-4; C. Read and R.J. Stagg, eds., The Rebellion of 1837 in Upper Canada: A Collection of Documents (Ottawa: The Champlain Society, 1985), fn. 94 on page 290, for biographical information on Sheriff Ruttan. This pattern of attendance might be partially attributable to the growing tensions between agrarian and commercial interests, and between early arrivals to the colony and more recent arrivals from Britain, but evidence to support such theories is not easy to find.
had been magistrates for some time had entrenched themselves in leadership roles. They focussed on performing leadership roles themselves in their own communities.

That transportation was not the only factor is also suggested by the fact that some Cobourg and Port Hope J.P.s attended Quarter Sessions only occasionally, and some not at all. Richard Dover Chatterton of Cobourg was appointed to the district bench in 1837, and although an active magistrate, there is no evidence that he ever sat on the bench at Quarter Sessions. 37 John David Smith of Port Hope was active as a magistrate for twenty-five years, during which he attended Quarter Sessions only seventeen times, an average of fewer than one session per year. 38 These developments suggest that magistrates chose to fulfil the duties of their office in different ways. Some chose to be heavily involved in district administration and criminal justice administration at Quarter Sessions, while others chose to eschew participation in local government and instead focus on providing magisterial functions to the people in their neighbourhoods. Others, however, did both.

**Criminal Trials at Quarter Sessions**

The number of criminal trials at Quarter Sessions and the number of defendants involved in them increased over time, as Table 5-4 shows:

37 Records for this later period are incomplete, though, and it is possible that Chatterton did attend but the record of his presence no longer exists.

38 John David Smith was one of the Port Hope magistrates with reformer sympathies, which may explain his sporadic participation in Quarter Sessions.
Table 5-4

Number of Cases and Defendants at Quarter Sessions by Decade

<table>
<thead>
<tr>
<th>Date</th>
<th>Number of Cases</th>
<th>Number of Defendants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1803 - 1810</td>
<td>25</td>
<td>28</td>
</tr>
<tr>
<td>1811 - 1820</td>
<td>140</td>
<td>187</td>
</tr>
<tr>
<td>1821 - 1830</td>
<td>252</td>
<td>308</td>
</tr>
<tr>
<td>1831 - 1840</td>
<td>257</td>
<td>389</td>
</tr>
<tr>
<td>Total</td>
<td>674</td>
<td>912</td>
</tr>
</tbody>
</table>

Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.

That the criminal business of the courts increased over time is hardly surprising, as the district underwent a marked population increase during the course of this period.\(^{39}\) But throughout, a large proportion of inhabitants appeared at Quarter Sessions. If one compares the number of defendants to the maximum population of the district during the same decades, an average of one person of every 63 inhabitants appeared as a defendant at Quarter Sessions, a ratio that seems remarkably high.\(^{40}\)

\(^{39}\)In 1825 there were about 10,000 people in the district; this figure increased to about 15,000 by 1830. That figure more than doubled during the ensuing decade; by 1840 there were about 35,000 people in the district. These figures are from Morgan Jellett, Index to the By-Laws...of Northumberland and Durham... (Cobourg, Ont., 1857).

\(^{40}\)In the first decade of the century, the ratio is 1:82; in the 1810s it is 1:30; in the 1820s, 1:50; in the 1830s, 1:90 – altogether the average is 1:63.
That the number of criminal trials at Quarter Sessions failed to keep up with the
dramatic population increase of the 1830s might be explained by changes in the criminal
justice system which provided for alternative means of settling disputes. As discussed in the
previous chapter, after 1834 magistrates had the authority to try cases involving petty
trespass and assault summarily. The availability of this option rerouted many cases which
otherwise might have been taken to Quarter Sessions. Although the petty trespass act did
not diminish the criminal trial workload of Quarter Sessions, it may have prevented that load
from increasing yet further. Also, the towns of Port Hope and Cobourg were incorporated in
1834 and 1837 respectively. Thereafter, Police Boards in those towns handled some
criminal business which otherwise might have appeared at Quarter Sessions, primarily
nuisances and public order offences including assault.\(^4\)

The criminal trials which occupied Quarter Sessions primarily arose out of incidents
of violence — assault, riot, and a few cases of attempted rape. Throughout the entire period,
about 70% of cases tried at and offenders appearing before Quarter Sessions involved acts of
violence. This pattern is similar to that in the Montreal District of Lower Canada in the early

\(^4\)Port Hope was incorporated by the statute 4 Wm IV, c. 26 and Cobourg by 7 Wm.
IV, c. 42. The statutes provided for the election of Boards of Police, who took over some
aspects of criminal justice administration in those towns. The operations of these Boards are
not discussed in detail here because they were not directly linked to the functions of
magistrates, although a handful of magistrates were among their number. The records of
these local courts are in the Archives of Ontario: MS518, Port Hope Minutes, 1834-1840;
and MS618, Cobourg Council Minutes, 1837-1840. See also H.R.S. Ryan, "Echoes from
the Minute Books: Notes on the Proceedings of the Board of Police of Port Hope, 1834-
1849," \textit{Ontario History} 42, 4 (1950):165-77. A general discussion of the phenomenon of
elected Boards of Police, which preceded the later development of police magistrates, is
Greg Marquis, "The Contours of Canadian Urban Justice, 1830-1875," \textit{Urban History
nineteenth century, in which 67% of the Quarter Sessions cases involved violence.\textsuperscript{42}

Larceny, misdemeanours, and nuisances were far less prominent in the court's schedule and larceny cases were far fewer than those in early modern English jurisdictions.\textsuperscript{43}

### Table 5-5

**Numbers of Cases and Defendants at Cobourg Quarter Sessions, by Offence**

**Aggregate Figures, 1803-1840**

<table>
<thead>
<tr>
<th>Offence</th>
<th>No. of Cases</th>
<th>% of Cases</th>
<th>No. of Defts.</th>
<th>% of Defts.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent offences</td>
<td>464</td>
<td>68.8</td>
<td>659</td>
<td>72.3</td>
</tr>
<tr>
<td>Larceny</td>
<td>90</td>
<td>13.4</td>
<td>104</td>
<td>11.4</td>
</tr>
<tr>
<td>Misdemeanours</td>
<td>45</td>
<td>6.7</td>
<td>57</td>
<td>6.3</td>
</tr>
<tr>
<td>Nuisances</td>
<td>44</td>
<td>6.5</td>
<td>57</td>
<td>6.3</td>
</tr>
<tr>
<td>Not specified</td>
<td>31</td>
<td>4.6</td>
<td>35</td>
<td>3.8</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>674</strong></td>
<td><strong>100.0</strong></td>
<td><strong>912</strong></td>
<td><strong>100.1</strong></td>
</tr>
</tbody>
</table>

Figures calculated from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.

\textsuperscript{42}Fyson, "Criminal Justice, Civil Society and the Local State," 288.

Within this general pattern, there were some changes over time, as Table 5-6 demonstrates. What is most interesting here is the growing percentage of both cases and defendants involving larceny in the 1830s. Cases involving offences other than larceny or violence were increasingly settled elsewhere; fewer of them showed up at Quarter Sessions during the 1830s. Prosecutions for violent offences remained almost the same in the 1830s as they had in the 1820s, but they involved a larger number of defendants.

The increase in larceny cases over time warrants some discussion. It is not likely that the increase can be accounted for only by population increase, although that was undoubtedly a factor. It is more likely that the increase in larceny cases represents a real increase in property crime, although a greater likelihood to report such offences may have played a part. Beginning in 1825 with the immigration of pauper Irish under the Peter Robinson scheme, but particularly in the 1830s, greater numbers of destitute immigrants from the British Isles arrived in the colony, many ill and lacking skills which might have enabled them to find employment. English historians have documented the increases in property crime that accompanied times of economic hardship and there is no reason to

44John Weaver has found a similar pattern in the Gore District in which committals for property offences increased in the 1830s; Crime, Constables and Courts, 43. In Lower Canada during a similar time period, trials for property offences increased over time in the superior courts. In his study of the courts in the District of Quebec, Jean-Marie Fecteau found that before 1815 offences against the person dominated, but the numbers of property offences increased dramatically in the 1820s and 1830s. However, this pattern was not mirrored in the lower courts. Fyson, “Criminal Justice, Civil Society and the Local State, 285-8. Fyson refers to Fecteau’s Un nouvel ordre des choses: la pauvreté, le crime, l’Etat au Québec, de la fin du XVIIe siècle à 1840 (Montreal: VLB, 1989).

assume that Upper Canadian patterns were different. Moreover, as the district developed over time, more opportunities for theft from shops and places of business emerged.

Of 113 people who spent time in the district gaol on charges of theft, 45 were of Irish origin. Thirty of 93 men gaol for theft were Irish, while 15 of the 20 women gaol for theft were Irish. Hannah Cowan, a 34-year-old “spinster” who had been born in Ireland, found work as a domestic servant in the district. She was caught with 64 yards of cotton belonging to her employer, and although at first she denied any knowledge of how this cloth came into her possession, she later admitted that she had taken it but said that she had intended to cut off a small piece to make sheets and put the rest back. The cloth, she said, had been found before she had been able to return it. Evidence from another former employer demonstrated that Hannah had developed the habit of pilfering from those who gave her employment, and she was convicted and sentenced to one month in the district gaol. Jane Hagerman and Margaret Wade, both Irish-born married women, were sentenced to terms in the Cobourg gaol for stealing from shops.

Many of those charged with theft appear to have been newcomers to the district and it is possible that local prejudices against “strangers” may have been responsible in part for


47RG20, ser. F-9, Cobourg Jail Register, 1834-40.

48Quarter Sessions Case Files, Jail Records.
the increase in prosecution of theft. When innkeeper Alexander Stewart Allen went looking for articles that had disappeared from his house, they were "found in possession of a stranger," Dennis Duvaines, who was sentenced at Quarter Sessions to be imprisoned one month and exposed in the stocks on two occasions for an hour each time. Irish-born labourer Michael Hoary, was convicted of stealing goods from a house and a coat from a blacksmith’s shop, and was sentenced to be whipped twice at 39 lashes for each offence and to be imprisoned three months for each offence.

There is another possible explanation for increases in trials for property offences at Quarter Sessions in the 1830s which is purely structural. In 1837 the distinction between grand and petit larceny was abolished. After the passing of that Act, all non-capital property offences could have been tried at Quarter Sessions rather than the Assizes, which might account for the increase in trials for property offences taking place in the lower of the two courts. In other words, there might have been no increase in the overall number of trials for larceny, but a shift in the courts where such trials took place. However, Quarter Sessions larceny trials increased over time before the passage of this act, so its impact cannot be solely responsible for the shifting patterns of property trials.

49 That criminal courts operated most harshly against “outsiders” or “strangers” is a phenomenon well documented in criminal justice historical literature. English historians have particularly noted a “xenophobia” against the wandering poor; see, for example, Ingram, “Communities and Courts,” 128-133.

50 Case Files, Box 10.

51 Case Files, Box 11.

52 7 Wm IV, c.4.
Table 5-6

**Numbers of Cases and Defendants at Cobourg Quarter Sessions, 1803-1840**

<table>
<thead>
<tr>
<th></th>
<th>1803 - 1810</th>
<th></th>
<th>1811 - 1820</th>
<th></th>
<th>1821 - 1830</th>
<th></th>
<th>1831 - 1840</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Cases</td>
<td>Defendants</td>
<td>Cases</td>
<td>Defendants</td>
<td>Cases</td>
<td>Defendants</td>
<td>Cases</td>
<td>Defendants</td>
</tr>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Assault &amp; Riot</td>
<td>15</td>
<td>60</td>
<td>18</td>
<td>64.3</td>
<td>100</td>
<td>71.4</td>
<td>146</td>
<td>78</td>
</tr>
<tr>
<td>Larceny</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1.4</td>
<td>2</td>
<td>1.1</td>
</tr>
<tr>
<td>Misdemeanour</td>
<td>7</td>
<td>28</td>
<td>7</td>
<td>25</td>
<td>13</td>
<td>9.3</td>
<td>13</td>
<td>7</td>
</tr>
<tr>
<td>Nuisance</td>
<td>2</td>
<td>8</td>
<td>2</td>
<td>7.1</td>
<td>14</td>
<td>10</td>
<td>14</td>
<td>7.5</td>
</tr>
<tr>
<td>Not specified</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>3.6</td>
<td>11</td>
<td>7.9</td>
<td>12</td>
<td>6.4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>25</td>
<td>100</td>
<td>28</td>
<td>100</td>
<td>140</td>
<td>100</td>
<td>187</td>
<td>100</td>
</tr>
</tbody>
</table>

Figures calculated from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes, 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.
Not all of the cases which appear in the Quarter Sessions records ended in trial.\(^{53}\)

The grand jury found no bills of indictment against some of the defendants, and in other cases, the outcome was something other than a trial. Either the dispute was settled or withdrawn, the defendant absconded or escaped, the prosecutor did not show up, there was an error in the indictment and it was quashed, or the outcome was not recorded in the court records.\(^{54}\)

Table 5-7

**Defendants at Cobourg Quarter Sessions for whom No Trial Resulted, 1803-1840**

<table>
<thead>
<tr>
<th>Offence</th>
<th># Defts</th>
<th># No Bill</th>
<th>% No Bill</th>
<th># Other Outcome</th>
<th>% Other Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault &amp; riot</td>
<td>659</td>
<td>59</td>
<td>7.6</td>
<td>88</td>
<td>13.4</td>
</tr>
<tr>
<td>Larceny</td>
<td>104</td>
<td>7</td>
<td>6.7</td>
<td>13</td>
<td>12.5</td>
</tr>
<tr>
<td>Misdemeanour</td>
<td>57</td>
<td>3</td>
<td>5.3</td>
<td>5</td>
<td>8.8</td>
</tr>
<tr>
<td>Nuisance</td>
<td>57</td>
<td>1</td>
<td>1.8</td>
<td>2</td>
<td>3.5</td>
</tr>
<tr>
<td>TOTAL</td>
<td>877</td>
<td>61</td>
<td>7.0</td>
<td>108</td>
<td>12.3</td>
</tr>
</tbody>
</table>

Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.

The grand juries at Quarter Sessions found "no bills" of indictment against 61 defendants in total, or seven per cent of the total number of defendants. This is quite a small

\(^{53}\)In the following discussions of Quarter Sessions cases which look at patterns of cases by offence in greater detail, I have excluded those cases and defendants for whom no charge was specified. They tended to be no bills, or cases which were dismissed because the prosecutor did not appear.

\(^{54}\)The breakdown of the total "other" outcomes is as follows: unknown-36; prosecutor absent-28; compromised/withdrawn-19; quashed/error in indictment-17; escaped/absconded-8. Incidents of quashed indictments all occurred after 1821.
proportion, although it does appear in other jurisdictions that grand juries found true bills against the majority of the defendants who appeared before them.55 Although the percentage was not large, it was higher in the 1810s and 1820s than in the 1830s. In the 1810s, grand juries found no bills for fourteen, or eight per cent of the total of 175 defendants appearing before them, all of whom appeared on charges relating to violence. In the 1820s, grand juries found no bills for 25 of the 291 defendants, or 8.6 per cent of the total. Of these, 21 defendants were charged with assaults, three with larceny, and one with misdemeanour. In the 1830s, the proportion dropped to 5.7%, or 22 per cent of 384 defendants, fifteen of whom were charged with assaults, four with larceny, two with misdemeanour, and one with nuisance.

A number of factors could explain this pattern of high rates of indictment by grand juries at Quarter Sessions. Magistrates might have weeded out cases where the evidence seemed weak or the prosecution malicious before the cases went to trial. Parties might have settled, or potential prosecutors might have dropped the prosecution. Alternatively, in some cases based on weak evidence, other options than a trial may have been exercised. As the above table also demonstrates, other outcomes than a trial were recorded for 108 defendants against whom grand juries found indictments, or an average of over twelve per cent of the total number of defendants. Other outcomes were particularly marked during the 1830s. In that decade, they represented 24.3% of the total number of defendants in cases involving assaults, 15.5% of larceny cases, and 11.8% of misdemeanours, for an overall average

55 For example, grand juries at Surrey Quarter Sessions from 1660-1800 found true bills against 83.1% of those who appeared before them for property offences, and 74.3% of those charged with assaults; J.M. Beattie, Crime and the Courts in England, 402. Still, the figures for the Newcastle District are considerably higher even than these.
during that time period of 21.1% of the total defendants. Some of these cases were settled or withdrawn, by what process is not entirely clear. Altogether, then, close to twenty per cent of defendants whose cases were brought before Quarter Sessions were not brought to trial, either because grand juries found no bills against them, or because there was some other outcome in their cases.

When defendants ended up in trials, the trial jury was more likely to convict them than to acquit them. Overall, trial juries acquitted 32.8% of defendants appearing at Quarter Sessions trials, and convicted 67.2%. However, there was a larger rate of conviction for offences involving assaults than other types of offences: juries convicted 72.4% of defendants in such cases and acquitted only 27.5%.\(^\text{56}\) Juries convicted less than 60% of defendants accused of larceny, misdemeanour, and nuisance. Table 5-8 shows these patterns.

\(^{56}\)At the Surrey Quarter Sessions and Assizes between 1660 and 1800, trial juries convicted 55% of those on trial for assault and 49.7% of those on trial for property offences. At Quarter Sessions, juries convicted 64.9% of people on trial for non-capital property offences. Beattie, Crime and the Courts, 411, 425. In late-eighteenth-century Halifax superior courts, about half of all defendants were convicted at trial; Jim Phillips, “Women, Crime, and Criminal Justice in Early Halifax, 1750-1800,” in Essays in the History of Canadian Law, Vol. V: Crime and Criminal Justice, ed. J. Phillips, T. Loo, S. Lewthwaite (Toronto: University of Toronto Press and The Osgoode Society, 1994), 179.
Table 5-8

**Trial Jury Verdicts by Offence, 1803-1840**

<table>
<thead>
<tr>
<th>Offence</th>
<th>#defts at trial</th>
<th># Not Guilty</th>
<th>% Not Guilty</th>
<th># Guilty</th>
<th>% Guilty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault &amp; Riot</td>
<td>521</td>
<td>144</td>
<td>27.6</td>
<td>377</td>
<td>72.4</td>
</tr>
<tr>
<td>Larceny</td>
<td>84</td>
<td>37</td>
<td>44.0</td>
<td>47</td>
<td>56.0</td>
</tr>
<tr>
<td>Misdemeanour</td>
<td>49</td>
<td>28</td>
<td>57.1</td>
<td>21</td>
<td>42.9</td>
</tr>
<tr>
<td>Nuisance</td>
<td>54</td>
<td>23</td>
<td>42.6</td>
<td>31</td>
<td>57.4</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>708</strong></td>
<td><strong>232</strong></td>
<td><strong>32.8</strong></td>
<td><strong>476</strong></td>
<td><strong>67.2</strong></td>
</tr>
</tbody>
</table>

Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.

Over time, rates of conviction tended to drop, except for defendants in larceny cases, as Table 5-9 demonstrates. This pattern might be explained by changing roles of magistrates at the pretrial stage. Possibly magistrates actively weeded out cases based on weak evidence in the earlier part of the period, and increasingly relied on the courts to make such decisions as time went on, but there is no concrete evidence to demonstrate that that was occurring. Alternatively, cases involving violence might have been regarded as less serious over time. However, cases involving larceny were increasing over time, and might have been regarded more seriously, with some alarm in fact. Still, the rates of conviction for larceny at Quarter Sessions were quite low, a surprising trend given the unease that elites experienced with rising pauper immigration and concern about the social order.
Table 5-9

**Trial Jury Verdicts at Cobourg Quarter Sessions by Offence and Time Period**

<table>
<thead>
<tr>
<th></th>
<th>1803 - 1810</th>
<th></th>
<th>1811 - 1820</th>
<th></th>
<th>1821 - 1830</th>
<th></th>
<th>1831 - 1840</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not Guilty</td>
<td>Guilty</td>
<td>Not Guilty</td>
<td>Guilty</td>
<td>Not Guilty</td>
<td>Guilty</td>
<td>Not Guilty</td>
<td>Guilty</td>
</tr>
<tr>
<td>---------------</td>
<td>------------</td>
<td>--------</td>
<td>------------</td>
<td>--------</td>
<td>------------</td>
<td>--------</td>
<td>------------</td>
<td>--------</td>
</tr>
<tr>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
</tr>
<tr>
<td>Assault &amp; Riot</td>
<td>3</td>
<td>16.7</td>
<td>15</td>
<td>83.3</td>
<td>29</td>
<td>22.1</td>
<td>102</td>
<td>77.9</td>
</tr>
<tr>
<td>Larceny</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>100.</td>
</tr>
<tr>
<td>Misdemeanour</td>
<td>1</td>
<td>16.7</td>
<td>5</td>
<td>83.3</td>
<td>4</td>
<td>36.4</td>
<td>7</td>
<td>63.6</td>
</tr>
<tr>
<td>Nuisance</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>100.</td>
<td>4</td>
<td>28.6</td>
<td>10</td>
<td>71.4</td>
</tr>
<tr>
<td>TOT</td>
<td>4</td>
<td>15.4</td>
<td>22</td>
<td>84.6</td>
<td>37</td>
<td>23.4</td>
<td>121</td>
<td>76.6</td>
</tr>
</tbody>
</table>

Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.
Although male defendants predominated at Quarter Sessions, women were by no means absent from the courts. Altogether, 63 women defendants appeared at Quarter Sessions; that represents 6.9% of the total number of defendants.\(^5^7\) That is a lower proportion of the total than historians have found for other jurisdictions.\(^5^8\) The numbers of women defendants increased over time, although they were never very high.

The kinds of offences for which women were brought before the courts varied, but the greatest proportion involved acts of violence, assault or riot, which paralleled the pattern with male defendants. However, over time the pattern shifted from predominantly violent offences to roughly equal numbers charged with larceny and with violent offences, as Table 5-10 demonstrates:

\(^{5^7}\)Some of them did not actually appear before the magistrates at Quarter Sessions, the outcome of their cases being something other than a criminal trial, as is discussed herein.

\(^{5^8}\)In late-eighteenth-century Halifax superior courts, women accounted for 14.9% of all defendants, a greater proportion charged with property offences than other types of offences; Phillips, "Women, Crime and Criminal Justice in Early Halifax," 178. In the Montreal District between 1800 and 1830, between 10 and 15% of defendants in Quarter Sessions cases were women; Fyson, "Criminal Justice, Civil Society and the Local State," 386.
Table 5-10

Offences with which Women were Charged at Cobourg Quarter Sessions, 1803-1840

<table>
<thead>
<tr>
<th>Offence</th>
<th>1803-1810</th>
<th>1811-1820</th>
<th>1821-1830</th>
<th>1831-1840</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault &amp; Riot</td>
<td>3</td>
<td>6</td>
<td>17</td>
<td>13</td>
<td>39</td>
</tr>
<tr>
<td>Larceny</td>
<td></td>
<td></td>
<td>14</td>
<td></td>
<td>18</td>
</tr>
<tr>
<td>Misdemeanour</td>
<td></td>
<td>2</td>
<td>3</td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>Nuisance</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>3</td>
<td>6</td>
<td>23</td>
<td>31</td>
<td>63</td>
</tr>
</tbody>
</table>

Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Quarter Sessions Case Files, 1801-1841.

Women were more likely to be charged with violent offences in which they participated with other people, generally husbands or family members, than they were for acts of violence they carried out individually. Of the 39 women charged with assault or riot, 25 of them (or 64.1% of the total number of women defendants) fit this description, having allegedly acted violently in company with others in 17 incidents.\(^{59}\) For example, the Darlington township families the Lighthearts and the Smiths appear to have been in a state of feud in the early nineteenth century. At one of the first Newcastle District Quarter Sessions, four members of the Lightheart family were convicted of riot and assault on Lucy Smith and her black woman servant, Ruth Long. During their series of altercations, Elizabeth Lightheart called Lucy Smith “old Steele’s whore,” Lightheart’s wife and children attacked Lucy Smith with clubs and dogs, Francis Smith hit Ruth Long with a club,

\(^{59}\)This pattern follows that in early modern England, where many women joined their husbands in assaults arising from conflicts with neighbours and actively defended their family’s interests; J.M. Beattie, “The Criminality of Women in Eighteenth-Century England,” Journal of Social History 8 (1975): 80-116.
Elizabeth and Phoebe Lightheart attacked Smith's children and when Ruth Long tried to come to their rescue, they hit her with a club. Lucy Smith's husband complained that Daniel Lightheart had ordered his children to violently attack the Smith children whenever the opportunity arose, and his wife and hired help too. The Lighthearts were each fined 5 shillings. Lucy Smith was bound over in recognizance to keep the peace as were the Lighthearts, which implies that she was not held entirely blameless for the state of bad relations between the families.60

Another example involved the husband and wife team of Flora and John Taylor, a formidable couple who not only acted together to protect their interests, but enlisted the help of several of their neighbours as well. The Taylors arrived in Ops, a northern township at the southwest corner of Sturgeon Lake in the Kawartha region, in 1835. Soon afterwards, John Taylor caught cholera and although he survived, his precarious state of health prevented him from working, which rendered his family's prospects dismal. Flora Taylor took over an empty shanty nearby and "commenced selling grog."61 They were in desperate straits. According to the deposition of one of her neighbours, Flora said "that if she could earn a goon by the prostitution of her body ("backside") she would most willingly do it, as she was never more in need."62

60 AO, RG22, ser. 31, Cobourg Quarter Sessions Case Files, box 1.

61P.A. Russell notes that a "common entrepreneurial venture for women" came in providing food and lodging, and that keeping a "lowly tavern" seems to have been viewed as "a sort of pension, especially for widows." Attitudes to Social Structure and Mobility, 59.

62Petition of Flora McDonald alias Taylor, N.D. 1836; deposition of Christian Campbell, 22 March 1836; Quarter Sessions Case Files, box 12. The series of documents upon which this reconstruction is based appear in boxes 11 and 12, relating to the cases herein described.
The Taylors' precarious existence was deeply threatened, then, when they were charged with keeping a disorderly house and violating the liquor licencing laws. They were in danger of losing their only source of livelihood and might possibly be fined; if they could not pay, which is likely, they might be sent to gaol where they could languish for a long time. Flora Taylor devised a strategy to protect herself and her family. The person who had initiated the disorderly house charge was a local minister, Reverend Alexander Campbell. Flora Taylor enlisted the help of her neighbours to discredit and threaten Campbell. Flora Taylor and her friend Flora Campbell each accused the minister of attempted rape. A man known as “the Fiddler” threatened that if Reverend Campbell did not leave the neighborhood, his house would be burned and his family destroyed.

While the men and women of the neighborhood initially went along with this plan, they seem to have later developed doubts and changed their minds. Even Flora Taylor eventually admitted that she had falsely accused Rev. Campbell of trying to rape her. The men seem to have become afraid of Flora Taylor; when she tried to have a word with one of them, he said: “I will not go out with such a bad woman as you are, lest you raise a bad report of me, as you have done of others.”

When the constable came to execute a warrant on the Taylors for the disorderly house charge in late November 1835, they resisted. They shut the door against constable Michael Malone and when he tried to force it open, John Taylor confronted him with an axe and refused to come out. Malone stumbled and fell down, and John and Flora Taylor jumped on him, John Taylor keeping him down with a knee against his chest while Flora

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63 Case Files, box 12, deposition of Donald Campbell, 23 Mar. 1836.
Taylor lay across his legs. John Taylor got hold of Malone’s firearm. Some other people, attracted by the commotion, came along and the constable commanded one of them to assist him in the king’s name. Alexander McAlpine refused to help and said “the gun ought to be broken and put up his arse.” John Taylor ran off into the woods, taking Malone’s firearm with him. Taylor was later brought before a magistrate, by what means is not clear.

The tone of the examination indicates that the magistrate was skeptical of Taylor’s account of his behaviour that day. When asked what he had to say in justification of his conduct, “he pretended not to understand the English language.” The magistrate arranged for an interpreter. Taylor said that he knew Malone was a constable, but that he did not know that the man who came to his house that day was Malone. He accounted for his actions by saying that he “was afraid that the Constable would shoot him or his wife and children,” although he could not say why this thought occurred to him. The magistrate sent John Taylor to gaol to await his trial; Flora Taylor had a breast-feeding child and so was bound over in recognizance to attend, “as an act of humanity.” The Taylors had allegedly threatened the constable’s life and he said he was so terrified that he went to Toronto to await the trial, rather than stay home.

Three court cases emerged at Quarter Sessions relating to these disputes. Flora Campbell, the friend of Flora Taylor, pursued her case against the Reverend Alexander Campbell for attempted rape; the grand jury found no bill against him. The constable

64 Case Files, box 12, examination of Michael Malone, 21 Jan. 1836; deposition of Michael Malone, 22 Jan. 1836.

65 Case Files, box 12, examination of John Taylor, 21 Jan. 1836; recognizance of Flora Taylor, 21 Jan. 1836; statement of Michael Malone from Toronto, 17 Mar. 1836. This case was also referred to above in the section on pretrial examination.
prosecuted the Taylors for assaulting him in the execution of his duty; the grand jury found no bill against them, despite their apparent confession. Perhaps the confession was wrongfully obtained and provided the basis for the grand jury's decision. Or, perhaps the grand jury was suspicious of Malone's motives, as he apparently waited several months before pursuing the prosecution. Alexander Campbell in turn prosecuted the Taylors and their neighbours (there were nine defendants in the case) for "conspiracy to deprive him of his good name and reputation by falsely accusing him of assaulting Flora Taylor and Flora Campbell with intent to ravish them, and falsely charging him with the offence." The trial jury found them not guilty.  

Although nobody was convicted of any offence in this series of disputes, they provide a glimpse into the lives of women and men struggling to survive in a back township in the 1830s, and show that women as well as men fought physically and through the law to protect themselves and their families. Similar factors might explain why women were increasingly charged with larceny in the 1830s.

What other historians have referred to as the "chivalrous" treatment of women by the courts does not appear to have applied to the Newcastle Quarter Sessions for women charged with violent offences. Women were not convicted of offences at a rate significantly lower

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66Case Files, box 12.

67See also the discussion of Mary Greneau's use of the law to pursue her interests in Katherine M.J. McKenna, "Lower Class Women's Agency in Upper Canada: Prescott's Board of Police Records, 1834-1850," unpublished paper, May 1996.

68In late-eighteenth-century Halifax, juries convicted women at the same rates as men; Phillips, "Women, Crime, and Criminal Justice," 179. In eighteenth-century England, however, juries convicted women at somewhat lower rates than men for noncapital property offences and assaults; see Beattie, Crime and the Courts, 437.
than the average rate shown earlier in this section. Of the 22 women whose assault or riot cases ended up going to trial, 15 (68%) were convicted and 7 (32%) were acquitted. However, the rates of conviction for larceny were lower than the average, but not significantly. Fourteen women were tried at Quarter Sessions on charges of larceny; six of them were convicted (42.9%) and 8 (57.1%) acquitted. No women were convicted of other offences.

What is interesting is that the proportion of women whose cases ended in other outcomes than no bill or trial is greater than their proportion of the overall number of defendants. Of the 108 defendants whose case ended up with an other outcome, eighteen of them were women; that is, 17% of the total, whereas women represented less than 7% of the total number of defendants. So, chivalry may have operated outside the criminal trial itself. Four women were released when prosecutors neglected to appear to pursue the charges against them. Although this number is not large, it represents 14.3% of the defendants for whom that outcome was reported. Similarly, three of the nineteen defendants whose case was not pursued to trial because the complaint was withdrawn were women. That is 15.8% of the total. Prosecutors appear to have been less insistent on pursuing a case to trial in which the defendant was a woman. Grand juries were slightly less likely to bring bills of indictment against women than men; 7 of the 63 women charged with offences had their cases dispensed with at that stage, which represents 11% of the total. Grand juries found such results in an average of 7% of cases overall.

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69This pattern is partly explained by the larger proportion of women who were charged with offences after 1821, particularly in the 1830s where records are incomplete.
Not all of the women who appeared at Quarter Sessions were defendants. Many women appeared as witnesses in criminal trials, and several of them had been the victims of an offence. Donald Fyson has noted that in the lower courts of Montreal District in Lower Canada, women were a small but consistent part and were more likely to appear as prosecutors than defendants.\textsuperscript{70} Altogether, 46 women prosecuted cases at Quarter Sessions in the Newcastle District, all but two of them for incidents involving violence.\textsuperscript{71} Five of them had been victims along with their husbands. Some women prosecuted groups of men and/or women for alleged attacks, as was the example described above when Lucy Smith prosecuted the Lightheart family. Eight women prosecuted other women for assaults. However, most of the women complained of attacks by men; thirty-one women prosecuted men for such offences.\textsuperscript{72}

That figure includes six cases of attempted rape, including Flora Campbell’s prosecution of Reverend Alexander Campbell discussed above. In two other cases, the grand jury found no bill against the accused, and in one case the outcome is unknown. One woman successfully prosecuted a man for attempted rape. Sarah Burridge, a farmer’s wife

\textsuperscript{70}Fyson, “Criminal Justice, Civil Society and the Local State, 384-89; see also his “Women as Complainants before the Justices of the Peace in the District of Montreal.”

\textsuperscript{71}Calculations were derived from Case Files, which specify the name of the person against whom the offence was committed. The Filings contain additional complaints by women which have not been included in these calculations. Donald Fyson found a similar pattern in the Montreal District where the “overwhelming majority” of complaints by women involved violence; “Women as Complainants.” I consulted this article on Fyson’s web site at Laval, and there are no page citations in it.

\textsuperscript{72}Again, this figure is similar to that found by Fyson in the Montreal District, in which 72% of women prosecuting for violence had been the victims of attacks by single men; “Women as Complainants.”
from Murray township, prosecuted Patrick Jordan, whom the jury found guilty. The magistrates sentenced him to one month in gaol and a £5 fine in October 1826. In the two other cases than Flora Campbell’s in which no bill resulted, two women charged a schoolteacher with attempted rape, possibly in an attempt to discredit his character in the same way that the two Floras tried to discredit Alexander Campbell.

Although Quarter Sessions trials involved far more men than women, some women were able to use the courts for their own purposes, to charge men or other women with offences. Moreover, the records of the lower courts shed light on the lives of poor or labouring women, who emerge as real characters acting in whatever ways they can to support themselves and their families, even by means of questionable legality. That some did so indicates a degree of popular legitimacy of the law and its institutions; it was the law and the courts, as well as other means, that Flora Taylor sought to maintain her liquor licence and thereby her family’s livelihood.

Not only women of the “lower orders” used the courts for their own purposes. In fact, people from every group in Upper Canadian society from labourers to gentlemen used the Newcastle District Courts of Quarter Sessions as a means of settling disputes arising from acts of violence. It is not possible to quantify the patterns of prosecutors and

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73Case Files, box 6.

74Ibid.

75Donald Fyson found similar patterns in the District of Montreal; “Criminal Justice, Civil Society and the Local State,” 378-84. While Fyson admits the system was used by elites for their own purposes, he concludes that Quarter Sessions business had “little to do with class conflict” and notes that the popular classes also used the courts for their own purposes; 378, 384.
defendants by occupational group because that information was not consistently recorded in
the Minute Books or the Case Files. However, the information in the court records makes it
is possible to conclude that non-elites used the courts frequently to prosecute violent
offenders, and that some farmers or working people even prosecuted members of elite
groups for assaulting them. For example, Jeremiah Chase, a Cobourg distiller, successfully
prosecuted gentleman Richard Wright for assaulting him in a bar room. Similarly, the
illiterate Francis Blake prosecuted gentleman and later magistrate Adam Henry Meyers for a
similar offence. After “gentleman” Leonard Walden Meyers assaulted farmer’s wife Phoebe
Smith, she complained to a magistrate and at Quarter Sessions Meyers was convicted and
fined. Samuel Heath prosecuted magistrate Richard Bullock, who was convicted and fine
£4. Occasionally members of elite groups were both prosecutor and defendant in assault
cases, such as that in which Charles Ruttan, Esquire, was convicted of assaulting John Logie,
Esquire. Both were magistrates.76

The shift in criminal trials to include greater numbers and a greater proportion of
larceny cases in the 1820s and particularly in the 1830s also had repercussions at the pre-trial
stage. If a magistrate made an error during the pre-trial process which resulted in a case of
assault not proceeding to trial, it was probably not of great consequence to the participants,
who could work out another kind of settlement to their dispute. However, a prosecutor in a
larceny trial lost the opportunity to recover property and punish and thus discourage thievery
if a magistrate’s sloppy or erroneous record-keeping resulted in a quashed indictment.
Prosecutors in larceny cases were keen to see the case proceed to conviction, and were

76Case Files, box 7, box 4, box 1, box 8, box 13.
willing to do whatever they could to achieve that end, even if it meant taking matters into
their own hands. Anne Langton was one who complained that newly appointed magistrates
in the back townships were "utterly incompetent":

When John [her brother] went recently to Ops about the robbery of the
contents of our boxes, he had himself to draw out the warrant for the
magistrates to sign, & to dictate in every particular what steps were to
be taken, having in the first place lost time in seeking another
magistrate, because the one at hand, sensible of his own
incompetency, had expressed reluctance to act.77

When a jury found Mary Kane not guilty of stealing broadcloth from an innkeeper because
there was an error in the indictment, and the grand jury withdrew the indictment against Jane
and Catherine Thom for allegedly stealing silk and ribbons from the shop of James Bethune
(who was also a magistrate) because of an error in the name of the prosecutor, undoubtedly
not only the innkeeper and Bethune but other magistrates, businessmen and property-
owners, were far from pleased.78 Magistrates who performed their pre-trial duties
incompetently endangered the entire social order if their sloppy work enabled thieves to
escape punishment.

There were geographic patterns to cases tried at Quarter Sessions, in addition to the
patterns already described. Cases arising from offences which had occurred in and involving
defendants and prosecutors who lived in the lakefront townships, particularly Hamilton and
Hope, dominated at Quarter Sessions, as Table 5-11 demonstrates.

Langton (Toronto: Clarke Irwin & Co., 1950), 162.

78Case Files, box 11.
Table 5-11

Townships of Origin of Quarter Sessions Cases and Defendants

<table>
<thead>
<tr>
<th>Location</th>
<th>Cases</th>
<th>Defendants</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percentage</td>
</tr>
<tr>
<td>Hamilton/Hope</td>
<td>335</td>
<td>49.6%</td>
</tr>
<tr>
<td>Other lakefront</td>
<td>240</td>
<td>35.6%</td>
</tr>
<tr>
<td>Back townships</td>
<td>78</td>
<td>11.6%</td>
</tr>
<tr>
<td>Unknown</td>
<td>22</td>
<td>3.3%</td>
</tr>
<tr>
<td>Total</td>
<td>675</td>
<td>100.1%</td>
</tr>
</tbody>
</table>

Compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.

Naturally these patterns can partly be accounted for by general population patterns; the lakefront townships were settled earlier and had larger concentrations of population than the back townships by 1840. Also, residents of Hope and Hamilton townships did not have to travel very far to court.

However, within these geographic patterns are variations between townships with similar population figures, as the map displays below. The five lakefront townships other than Hope and Hamilton, and Cavan, located north of Hope, each contained between 2500 and 3000 people in 1840, but there are striking differences in the frequency with which their inhabitants used the Courts of Quarter Sessions. People from the western lakefront townships were more likely to pursue cases at the district courts: from Haldimand, 129 defendants involved in 82 cases; from Cramahe, 64 defendants involved in 60 cases, and from Murray, 82 defendants involved in 54 cases. In contrast, people who lived in
Darlington and Clarke, located east of Hope, sent only 28 defendants involved in 22 cases and 31 defendants involved in 22 cases respectively. Cavan sent 21 defendants involved in 17 cases. It appears that population and distance from the district centre were not the only factors which influenced victims of offences to pursue cases to Quarter Sessions.

It is unlikely that inhabitants of Darlington and Clarke committed significantly fewer offences than those in Murray. It appears, then, that other factors in addition to distance from the district centre and population were at work. Local factors must have also played a role, and township magistrates must have been involved in them. Although the victims of offences had some say over the ways in which disputes were settled, it is likely that many took the advice offered them by the magistrates. There were, after all, options other than sending cases to trial at Quarter Sessions which were apparently exercised with greater frequency in some localities than in others. The inhabitants of Darlington township and those who lived in the vicinity of Peterborough frequently used the option of summary trials once it became available. The magistrates there must have encouraged this method of dispute settlement. Cobourg Quarter Sessions records contain numerous documents recording the initiation of legal proceedings which were not followed through to trial. Similarly, Cavan township J.P. John Huston recorded the complaints of dozens of people, few of which ended up in trials.

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79 This subject was discussed in greater depth in Chapter 4 above.

80 Particularly in the Filings (AO, RG22, Series 32), which contain more than four boxes of such material from the period 1803-1840.

81 Trent University Archives, B-71-006, Cameron Collection, Series 1, John Huston Papers, Sub-series C, J.P. Records. The names of the defendants in the complaints taken by Huston were cross-referenced with the Minute Books from the Assizes and Quarter Sessions,
The differing propensity of people from various townships to send cases to Quarter Sessions probably reflects a similar phenomenon to that described earlier in the discussion of J.P. attendance at the Sessions: some magistrates saw themselves as active participants in the district courts and, as such, were likely to encourage disputes to be sent to trial there. However, other magistrates considered their roles differently. They preferred to attend the Sessions infrequently or not at all, and to exercise their authority in the vicinity in which they lived and worked rather than at the district centre. They might be regarded as “community-based” magistrates.

Although Quarter sessions cases came more often from the lakefront townships, particularly Hope and Hamilton, the essentially rural nature of the district during this period prevented the Quarter Sessions being taken over by urban interests, as occurred elsewhere where larger towns emerged. In the Montreal District of Lower Canada, for example, people from outside the city “virtually stopped” using the Quarter Sessions.82 Fyson notes that prosecutors were willing to take offenders before the criminal justice system at the level of the justice, but no further. He attributes this pattern to attitudes, higher urban levels of crime, and the weaker institutions of the state in the countryside.83 Despite the difficulties of taking cases to Quarter Sessions, though, many Newcastle District inhabitants, even those

and with the Case Files and Returns of Convictions. Of 33 complaints, one was settled by summary jurisdiction, and one by trial at Quarter Sessions. There are two others which have gone to trial, but information is so sparse that we cannot be certain the references are to the same case.

82Fyson, “Criminal Justice, Civil Society and the Local State,” 344-347.

83Ibid, 347-54.
from considerable distances from the judicial centre of the district, chose to pursue cases there.

**Punishment**

Although some magistrates, particularly the chairman of Quarter Sessions, may have helped to shape the course of the criminal trial, it was the trial jury that ultimately decided whether to convict or acquit the defendant. The decisions of magistrates at Quarter Sessions which most powerfully influenced the lives of individuals were those involving punishment. Magistrates exercised considerable discretion over punishment, although there were limits prescribed by law to the severity of punishments that could be assessed by the court. The magistrates relied heavily upon fines as punishments, but they chose to exercise every option available to them. They sentenced some people convicted of assaults to terms in the district gaol, or fined them in addition to sending them to prison. They sentenced people convicted of larceny to "shaming" or corporal punishments, to pay fines, or to serve terms in the district gaol or Kingston Penitentiary after its construction in the 1830s, or to a combination of these punishments. During the period under discussion, trends in punishment for larceny were beginning to shift somewhat from "community-based" punishments including whipping and the pillory to the more institutional punishment of prison terms; however, this shift was by no means complete by 1840. Changing ideas and forms of punishment were by

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84 An 1837 statute allowed Quarter Sessions to send people to Kingston Penitentiary for up to two years; 7 Wm. IV, c. 6, An Act to provide more effectually for the punishment of certain offences....
no means unique to Upper Canada, but followed developments in Britain and the United States.\textsuperscript{85}

Generally, punishments became somewhat harsher in the 1820s and 1830s than they had been earlier, although fines for violent offences were particularly steep in the 1810s. Social factors undoubtedly played a role in sentencing patterns. During the unrest of the 1810s, violent offences which might otherwise have seemed relatively innocuous were regarded as potentially serious threats to society and punished more harshly. Similarly, the immigration of large numbers of paupers from Britain in the 1830s led to concerns about crime and social order, and magistrates began to punish people convicted of larceny with greater severity. While these broader social patterns influenced the thinking of magistrates about crime and punishment, they also took into account other factors relating more specifically to the offences and the offenders when making decisions about sentencing. The nature of the offence was one important factor; others include the gender, social status, age, ethnicity, character and past criminal behaviour of the convicted person; the identity of the victim; and the degree of provocation or relative culpability of participants. The section discusses trends in the punishment of violent offenders, and then of those convicted of larceny.

The punishment function of magistrates at Quarter Sessions predominantly involved decisions about punishing persons who had assaulted others. As we saw earlier, 79% of

\textsuperscript{85}Transitions in punishment during this period followed patterns in England and the United States. Developments in England are discussed in Beattie, Crime and the Courts, chapters 9-10; the impact of these developments in Upper Canada is summarized in Weaver, Crimes, Constables, and Courts, 196-202. A more detailed account is Peter Oliver, 'Terror to Evil-Doers': Prisons and Punishments in Nineteenth-Century Ontario (Toronto: University of Toronto Press and The Osgoode Society, 1998), 3-135.
persons convicted at Quarter Sessions had committed some kind of violent offence. The bench most often fined the guilty party, but occasionally combined fines with gaol sentences or sentenced the convicted person to a term in the district gaol only. The magistrates also bound many violent offenders over in recognizance to keep the peace in addition to other sentences, but it is not possible to quantify the extent to which they did so due to inconsistent recording of that information. Table 5-12 demonstrates the overall pattern of punishments for violent offences.

Peter King has pointed to an increase in the use of imprisonment as punishment for assaults in England. King sees this development as evidence of a shift in official attitudes from regarding assaults as private matters to matters of public interest.\textsuperscript{86} Evidence from the Newcastle District court records suggests that this attitudinal change had not occurred in any meaningful way in the district if conviction patterns are the only factor examined. As Table 5-12 shows, there was an increase over time in the proportion of people convicted of assault sentenced to gaol only, but by far the majority of sentences for assault or riot involved the payment of a fine. Only 11 people throughout the whole period received gaol sentences for violent offences, although 7 of them do date from the 1830s. Magistrates appear to have experimented with combination sentences in the 1810s and 1820s, but the vast majority (83\%) of people sentenced for assaults during the period were fined.\textsuperscript{87} However, when


\textsuperscript{87}By way of comparison, only 4\% of those convicted of all offences at the Middlesex Quarter Sessions in the period 1660-1725 received a sentence other than a fine. Quarter Sessions in England and in Ontario relied very heavily on fining as a punishment. Shoemaker, \textit{Prosecution and Punishment}, 156, 161.
magistrates did sentence violent offenders to gaol, the length of sentence tended to increase over time. Three people were sentenced to one month each in gaol for violent offences in the 1810s, and one for two weeks in the 1820s. In the 1830s, one was sentenced to a month in gaol, and six for three months each. And if other sorts of evidence are taken into account, it does appear that authorities regarded certain types of violence more harshly as time went on.

Where magistrates punished violent offenders with fines only, the amount of the fines varied somewhat over time. In the first decade of the nineteenth century, most fines were small sums: 64% amounted to five shillings or less. During the 1810s, however, the amount of fines took a dramatic jump; over half of the violent offenders who were fined had to pay considerable sums of over one pound sterling. Although the percentage of people required to pay higher fines dropped in the 1820s and 1830s, larger fines remained an option which the magistrates exercised regularly. Except for the decade of the 1810s, the district magistrates fined few violent offenders large sums over £5. Table 5-13 shows these patterns.
Table 5-12

Sentences for Violent Offenders at Cobourg Quarter Sessions Trials, 1803-1840

<table>
<thead>
<tr>
<th>Sentence</th>
<th>1803-1810</th>
<th></th>
<th>1811-1820</th>
<th></th>
<th>1821-1830*</th>
<th></th>
<th>1831-1840</th>
<th></th>
<th>Total</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Fine only</td>
<td>14</td>
<td>93.3%</td>
<td>81</td>
<td>79.4%</td>
<td>142</td>
<td>83.5%</td>
<td>76</td>
<td>84.4%</td>
<td>313</td>
<td>83.0%</td>
</tr>
<tr>
<td>Fine + gaol</td>
<td>1</td>
<td>6.7%</td>
<td>18</td>
<td>17.6%</td>
<td>24</td>
<td>14.1%</td>
<td>7</td>
<td>7.8%</td>
<td>50</td>
<td>13.3%</td>
</tr>
<tr>
<td>Gaol only</td>
<td>--</td>
<td>--</td>
<td>3</td>
<td>2.9%</td>
<td>1</td>
<td>0.6%</td>
<td>7</td>
<td>7.8%</td>
<td>11</td>
<td>0.8%</td>
</tr>
<tr>
<td>Total</td>
<td>15</td>
<td>100.0%</td>
<td>102</td>
<td>99.9%</td>
<td>170*</td>
<td>100.0%</td>
<td>90</td>
<td>100.0%</td>
<td>377</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

During the 1820s, there were three additional cases in which the outcome was unknown, representing 1.8% of the total. This figure was not included in the table. Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.
Table 5-13

Amount of Fines where Persons Convicted of Violent Offences Sentenced to Fine Only

<table>
<thead>
<tr>
<th>Amount</th>
<th>1803-1810</th>
<th></th>
<th>1811-1820</th>
<th></th>
<th>1821-1830</th>
<th></th>
<th>1831-1840</th>
<th></th>
<th>Total</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>5s or less</td>
<td>9</td>
<td>64.3%</td>
<td>11</td>
<td>13.6%</td>
<td>69</td>
<td>48.6%</td>
<td>27</td>
<td>35.6%</td>
<td>116</td>
<td>37.1%</td>
</tr>
<tr>
<td>6s-19s</td>
<td>2</td>
<td>14.3%</td>
<td>20</td>
<td>24.7%</td>
<td>19</td>
<td>13.4%</td>
<td>23</td>
<td>30.3%</td>
<td>64</td>
<td>20.5%</td>
</tr>
<tr>
<td>20s-&lt;£5</td>
<td>3</td>
<td>21.4%</td>
<td>27</td>
<td>33.3%</td>
<td>48</td>
<td>33.8%</td>
<td>18</td>
<td>23.7%</td>
<td>96</td>
<td>30.7%</td>
</tr>
<tr>
<td>£5 +</td>
<td>--</td>
<td>--</td>
<td>23</td>
<td>28.4%</td>
<td>6</td>
<td>4.2%</td>
<td>8</td>
<td>10.5%</td>
<td>37</td>
<td>11.8%</td>
</tr>
<tr>
<td>Total</td>
<td>14</td>
<td>100.0%</td>
<td>81</td>
<td>100.0%</td>
<td>142</td>
<td>100.0%</td>
<td>76</td>
<td>100.1%</td>
<td>313</td>
<td>100.1%</td>
</tr>
</tbody>
</table>

Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.
Where magistrates sentenced violent offenders to terms in the district gaol in addition to fines, the punishment tended to increase in severity over time, both in the length of the gaol sentence and the amount of the fine. In the early decades, some offenders were gaoled for only a few hours or days, while by the 1820s, they were sentenced to a few weeks or even months in the gaol at Cobourg. Table 5-14 shows these patterns.

Table 5-14

<table>
<thead>
<tr>
<th>Punishments of Violent Offenders Sentenced to Fine + Gaol</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence</td>
</tr>
<tr>
<td>------------------------------------------</td>
</tr>
<tr>
<td>Up to 1 week + small fine</td>
</tr>
<tr>
<td>Up to 1 week + med. fine</td>
</tr>
<tr>
<td>1-2 weeks + small fine</td>
</tr>
<tr>
<td>1-2 weeks + med. fine</td>
</tr>
<tr>
<td>1-2 weeks + large fine</td>
</tr>
<tr>
<td>1-2 weeks + very lg. fine</td>
</tr>
<tr>
<td>1 month + med. fine</td>
</tr>
<tr>
<td>1 month + large fine</td>
</tr>
<tr>
<td>1 month + very large fine</td>
</tr>
<tr>
<td>&gt;1 month + large fine</td>
</tr>
<tr>
<td>&gt;1 month + very lg. fine</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

The fine sizes correspond to the categories in Tables 5-10 and 5-11: that is, a fine of five shillings or less is defined as a “small” fine; 6-19 shillings as “medium,” 20 shillings to four pounds nineteen as “large,” and five pounds or larger as “very large.” Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.
The declining number and proportion of "combination" sentences in the 1830s might be explained by a number of factors. Many petty assault cases were being diverted from Quarter Sessions and tried summarily after the passage of the Petty Trespass Act in 1834. Also, the gaol may have been crowded with prisoners awaiting trial and serving sentences for larceny, so there was no room for additional prisoners who could be dealt with in other ways.

These patterns have been described in some detail to demonstrate that the Newcastle district magistrates used their fairly broad discretion in sentencing violent offenders. They used every option in a sliding scale of punishments from negligible to harsh. Punishments ranged from a nominal fine to a stiff fine and several months in gaol. The factors which entered into their decision-making about punishing violent offenders appear to have been general social trends, the nature of and severity of the offence, the identity of the victim, the gender of the accused, and the relative culpability of people in assaults in which more than one person participated. Other factors such as the ethnicity, age, ability to pay, and the character and criminal record of the accused may have influenced magistrates in determining punishment, but definitive statements about decision-making are not possible because evidence in the records is incomplete or lacking.88

88Robert Shoemaker has identified some of these factors in determining the size of fines; Prosecution and Punishment, 156-65. According to Shoemaker, courts used large fines as a means of encouraging defendants to negotiate with prosecutors rather than proceed to trial (160). In fact, the same kinds of factors undoubtedly entered into decision-making about punishments as entered into decision-making about pardons; on that subject, see Beattie, Crime and the Courts, 439-49; Jim Phillips, "The Operation of the Royal Pardon in Nova Scotia, 1749-1815," University of Toronto Law Journal 42 (1992): 401-47. Beattie has found that small fines were common punishments for assault before the late eighteenth-century, but that magistrates increasingly assessed heavier penalties by 1800 -- higher fines and imprisonment -- because of changing attitudes towards violence; "Violence and Society
Justice William Campbell explained some of the factors that entered into the calculation of fines assessed at the Assizes for people convicted of violent offences, and there is every reason to assume that similar factors would have entered into magisterial decision-making. In a letter to the Lieutenant Governor’s Secretary, Justice Campbell explained how he had arrived at a sentence for several “emigrants” upon their conviction under the Riot Act at the Perth Assizes in 1824:

The usual punishment for riot, is fine and imprisonment — to adapt that punishment in the present instance to the situation of these Prisoners in such manner as would best answer the ends of public justice, was a matter of some difficulty — it was essential in the present state of this settlement, that these Emigrants should be duly impressed with a sense of the enormity of their conduct, — a slight fine, so far from answering that purpose would have a contrary tendency — a heavy fine they are unable to pay — a nominal fine with long imprisonment would rather have the effect of punishing a District void of funds, than of operating as such to men of their description. Confiding therefore in His Excellency’s clemency, I have ordered each of those four men to be fined Ten pounds, with an imprisonment of two months, and farther until [sic] the fine be paid. This, I hope will have the effect of inducing a more orderly conduct, and greater respect for the laws hereafter, and if the Governor should be pleased to remit the fines it cannot fail to have the further effect of attaching these men to His Majesty’s Government from a principle of gratitude for an act of grace so important to people in their situation.... [W]hatsoever favour His Excellency might be disposed to shew them, would have the better effect by being done on their petition and on the recommendation of their Magistrates.89

Campbell’s letter concluded by asking pardon for the liberty of these suggestions.

In addition to personal characteristics and the situation of the prisoners, magistrates were influenced by broad social trends in their decision-making about punishment, as the quotation from Justice Campbell’s letter suggests. Decisions about punishment had to take

89William Campbell to Hillier, 31 Aug. 1824; Sundries 36010-3.
into account the effect that such decisions would have on those punished, whether they would alienate them from or attach them to the laws and the regime. The decade 1810-19 was one of great anxiety in the fledgling colony of Upper Canada, whose inhabitants faced much uncertainty and threats of invasion during the War of 1812. That anxiety probably caused legal officials to regard acts of violence as potentially of greater threat to the social fabric than they had previously and than they did subsequently, which would explain the stiff fines assessed violent offenders during that decade. With a nervous populace on the lookout for enemy agents, increasingly suspicious of those whose behaviour did not comply with expected norms, acts of violence likely seemed threatening and deserving of harsh punishment. Once the war ended and anxiety eased, punishments for violence became less harsh.

Similarly, anxiety over social change and immigration in the late 1820s and particularly in the 1830s caused officials to fear that Upper Canada was spiralling downwards to ruin. As J.M. Beattie has noted, Upper Canadians believed that crime was a serious problem, despite the fact that it appears that serious crime was not a problem at all.

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Social anxiety caused magistrates and other officials to attack social problems at what they saw as their roots, which they usually did by increasing control over the behaviour of the poor, either by imposing new measures of social control, using new regulations and new institutions, and by using the means already at their disposal which they may not have used to the full extent of their powers before.\footnote{See, for example, Weaver, \textit{Crimes, Constables, and Courts}. Weaver argues that fears triggered by immigration were largely responsible for many innovations in the criminal justice system after 1840, which replaced the community-based amateur with professional bureaucracies.} This social anxiety was likely one of the reasons why magistrates punished certain kinds of violent offences more harshly in the 1830s than they might have earlier, and is indicative of the kind of pattern that Peter King describes for England.

While broad social factors influenced magistrates’ general thoughts about punishment, aspects of the particular offence and offender more readily explain the punishments they assessed in individual instances. They appear to have taken the severity of the offence and the identity of the victim into account. People who disfigured or badly injured others in fights tended to be punished with large fines. For example, Reuben Crandell bit off the ear of another man and was fined £5 upon his conviction; James Shields was fined the same amount for biting off Abraham Hartly’s nose. The magistrates sentenced Peter Nix to 30 days in gaol and a 40 shilling fine in 1823 for knocking George Selick in the skull with an oar, the blow knocking him out of a canoe and into the water, where he nearly drowned. David Bagley attacked Michael Sweetman with a knife and cut him; he was fined...
£5 and sentenced to one month in gaol. Not surprisingly, magistrates sentenced those who inflicted serious injuries on others to harsher punishments.

Magistrates punished men convicted of attempted rape harshly, although there were only two convictions for that offence at Quarter Sessions during the entire period. Patrick Jordan was sentenced to one month in gaol and a £5 fine upon his conviction for attempting to rape Sarah Burridge, a farmer's wife, in 1826. The magistrates sentenced John Turnbull to one and a half months in gaol and a £6/5 fine upon his conviction for attempting to rape Elizabeth Welch, a married woman, in the same year. These punishments were far harsher than average, which indicates the distaste with which magistrates regarded the offence, despite the reluctance of juries to convict.

Magistrates tended to punish men who assaulted officers of the law with stiff fines as punishments. A number of people assaulted constables or bailiffs while they were engaged in official business, behaviour that magistrates naturally frowned upon and sought to discourage. They fined Jediah Irish £5 upon his conviction for assaulting a constable; he had also wrested a horse and bridle away from the constable, who had taken them via a writ of execution. David White committed much the same kind of offence, and the magistrates fined him £10 and bound him over in security to keep the peace for twelve months. Patrick Fox struck a bailiff with a sword several times; the magistrates fined him 40 shillings and

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93Case Files, Box 3 (1819); Box 12 (1838); Box 5 (1823); Box 9 (1832).

94Trials for rape took place at the Assizes; there were several during the period.

95Case Files, Box 6 (1826); Box 7 (1826).
sent him to gaol for six months. John Black served two months in gaol for assaulting a constable.96

Some violent attacks appear to have taken place during charivaris, and J.P.s punished them severely. David Greer was a victim of one such attack. Ten or twelve men took him from his bed at an inn at about midnight in September 1814 and carried him “some times on a Rail and some times on Horse back,” beat him, and left him, bruised and with broken ribs, tied up in the woods some distance from town. The magistrates fined five convicted men £5 each for the offence. Roswell Seaton and several other men, some with their faces blackened, broke into a house and rode one man on a rail. Seaton was fined £2/10; three others £1/5, and three five shillings each.97

Another factor which entered into magistrates’ decision-making was the identity of the accused. It does not appear that the relative class or status of the victim and the offender had much of an impact on punishments; “ordinary” people were fined relatively small amounts for assaulting their “betters,” as was discussed earlier. However, if the magistrates regarded a victim as particularly vulnerable, the punishment was not light. For example, in 1806 the magistrates fined Isaac Abbe 30 shillings, a very large sum for that period, for

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96Case Files, Box 1 (1813); Box 3 (1817); Box 11 (1835); Box 13 (1839). I discuss the subject of assaults on legal officials in “Violence, Law, and Community in Rural Upper Canada,” 367-8.

assaulting Clement Neff, "an infant." Similarly, they fined a man who was convicted of assaulting a widow and a male of the same surname (her son?) £6 in 1832.98

One personal characteristic which undoubtedly influenced the magistrates in decision-making about punishment was gender. Men were punished more severely than women, although they may have committed more brutal assaults than women did. Almost half of the women convicted of violent offences had to pay small fines, a lower percentage than the overall rate of 37.1%. No women were required to pay very heavy fines, and no women were sentenced to gaol for violent offences.

Table 5-15

<table>
<thead>
<tr>
<th>Amount of Fine</th>
<th># Women Convicted</th>
<th>% Women Convicted</th>
<th>% of Total Convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Five shillings or less</td>
<td>7</td>
<td>46.7</td>
<td>37.1</td>
</tr>
<tr>
<td>Six to 19 shillings</td>
<td>3</td>
<td>20.0</td>
<td>20.5</td>
</tr>
<tr>
<td>£1 to £4/19</td>
<td>5</td>
<td>33.3</td>
<td>30.7</td>
</tr>
<tr>
<td>Five pounds or more</td>
<td>0</td>
<td>0</td>
<td>11.8</td>
</tr>
<tr>
<td>Total</td>
<td>15</td>
<td>100.0</td>
<td>100.1</td>
</tr>
</tbody>
</table>

Factors in addition to gender may have played a role in magistrates' decision-making. Six of the women convicted of assaults had attacked other women in assaults which appear to have

98Case Files, Box 1; Box 9.
been minor. In two cases females assaulted constables; one was fined £2, the other only ten shillings. The nature of the offence likely played an important role in the magistrates’ decisions about punishment of women as well as decisions about men. Seven women convicted of assault or riot had been involved in acts of violence with other people, usually family members; the males were often seen as ringleaders and punished more severely than their female relatives.

The relative culpability of individuals involved in group violence was a factor that magistrates took into account in assault and riot cases involving only men as well as those in which men and women participated. Some of the examples above have already alluded to this phenomenon. In addition, William Orr paid a 20 shilling fine and served two weeks in gaol; James and John Caesar and William Morrison each paid the same fine but served one week each in gaol, and Thomas Leadbeater paid a fine of 20 shillings but served no gaol time for a “riot and assault” upon James Dickey in 1821. Magistrates sentenced James Walker to two weeks in gaol, and David Harris to pay 10 shillings, for an assault on Thomas Beaver. John and Cornelius Dean and James Loughlin served three months in gaol each for assaulting Calvin Rowson and damaging his house; two other participants were fined 10 shillings and served one month in gaol.99

If certain people charged with violent offences came to look very familiar to the magistrates at Quarter Sessions, they might expect to be punished more harshly. Francis Lightheart was fined five shillings the first time he appeared at court for having been involved with two women family members in an assault on two women neighbours. About

99 These examples appear in Case Files, Box 5 (1821-2); Box 6 (1825-6); and Box 11 (1835). There are numerous others.
a decade afterwards, Francis Lightheart asked James Wilson if he had any boards at the mill. Wilson said he had some in his barn that Lightheart could have “if he would settle with him for some peas and the trouble about the mare.” Lightheart replied, “I’ll pay you,” and punched Wilson a couple of times. The magistrates sentenced him to 18 hours in gaol and a ten shilling fine. A few years later, Thomas Powers complained that Francis Lightheart had come up to him on the road as he was hauling logs to the sawmill, “seased [sic] him,” and hit him. Powers threatened to go to a magistrate and complain, upon which Lightheart said that he would give him something to go for, and fell upon him so violently that he had to be rescued by a passerby. For that he was fined £5 and had to find security to keep the peace for 12 months.\footnote{Case Files, Box 1 (1803-4 and 1813-14); Box 2 (1817)} That Lightheart must have been quick-tempered and violent seems obvious. Magistrates undoubtedly took into account previous convictions when punishing him for subsequent ones. However, the nature of the offence was undoubtedly a factor in these cases as well.

Patterns of punishment for property offenders convicted at Quarter Sessions follow much the same pattern as punishment for violent offenders: punishments tended to become somewhat harsher over time. However, the type of punishment for larceny changed over the course of the period. Whereas the magistrates employed a range of punishments for larceny, by the 1830s the range was narrowing. The “shaming” or corporal punishments of whipping and setting the convict in the stocks or pillory in a public place were used less frequently, and the punishment of choice was a term in the district gaol and sometimes in the new option of the Kingston Penitentiary.
Table 5-16

Punishment for Larceny at Cobourg Quarter Sessions, 1803-1840

<table>
<thead>
<tr>
<th>Punishment</th>
<th>1811-1820</th>
<th>1821-1830</th>
<th>1831-1840</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Whipping only</td>
<td>2</td>
<td>100</td>
<td>1</td>
<td>7.7</td>
</tr>
<tr>
<td>Whipping + gaol term</td>
<td>3</td>
<td>23.1</td>
<td>2</td>
<td>6.3</td>
</tr>
<tr>
<td>Stocks/pillory + gaol term</td>
<td>2</td>
<td>15.4</td>
<td>3</td>
<td>9.4</td>
</tr>
<tr>
<td>Gaol term + fine</td>
<td>4</td>
<td>30.8</td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>Gaol term only</td>
<td>3</td>
<td>23.1</td>
<td>19</td>
<td>59.4</td>
</tr>
<tr>
<td>Kingston Penitentiary</td>
<td>8</td>
<td>25.0</td>
<td></td>
<td>8</td>
</tr>
<tr>
<td>Total</td>
<td>2</td>
<td>100</td>
<td>13</td>
<td>100.1</td>
</tr>
</tbody>
</table>

Figures compiled from AO, RG22, ser. 29, Cobourg Quarter Sessions Minutes, 1801-1831; ser. 30, Cobourg Quarter Sessions Minutes (Rough), 1808-1841; ser. 31, Cobourg Quarter Sessions Case Files, 1802-1841.

Gender played a role in decision-making for larceny offences as well as for violent offences. While women were convicted of larceny and sentenced to gaol terms, not one woman was sentenced to the corporal or “shaming” punishments of whipping or being put in the stocks or pillory; neither were women sentenced to terms in the Penitentiary for larceny.

Eight men were sent to Kingston Penitentiary, which was the harshest option for punishment available to the Newcastle district magistrates in the 1830s. All were convicted of larceny. Other than that and the fact that they were all male and all labourers, they seem to have shared little in common. They were of different ethnic backgrounds: one was French Canadian, two born in England, two in Ireland, two in Upper Canada, and one in the United...
States. The age at trial is known for six of them; they ranged from 16 to 52 years old. One was 29, two were 45 and one 52.¹⁰¹

The nature of the offence probably played an important role in decision-making about punishment. Joseph Bousette, who the magistrates sent to Kingston Penitentiary for five years, the most severe punishment handed out at the Newcastle district Quarter Sessions, had stolen a gun and powder, a watch and some clothing from a house, the value of which together totalled about £20. The value of the goods stolen was undoubtedly a factor in that case, and in that of Thomas Jacobs, who stole two oxen worth £15. Three of the men stole money or bank notes, regarded as a potentially serious threat in an emerging commercial economy. Three stole other types of goods; one a buffalo robe worth 25 shillings, one some goods from a house, and another oats from a barn. In the latter case William Phillips was probably sent to Kingston Penitentiary as the culmination of a crime spree; he had previously been sentenced to the district gaol for four other thefts.¹⁰²

Although whipping and the pillory were still used by the magistrates before the opening of the Kingston Penitentiary in 1834, they ceased to be used thereafter. Historians have pointed out the appeal of the penitentiary as offering variable sentences, and of the hope of reforming offenders into productive members of society.¹⁰³ Undoubtedly such factors influenced the Newcastle district magistrates as well who were willing to send people

¹⁰¹Case Files, Box 11, 12, 13; Cobourg Jail Records.

¹⁰²Ibid.

to the Penitentiary, although they preferred to send them to the district gaol whenever possible.

**Conclusion**

Not all of the district magistrates participated equally in Quarter Sessions, which were dominated by some magistrates, primarily from Cobourg and Port Hope, most of whom maintained close links with the colonial authorities at York. As time went on, a smaller percentage of the available pool of magistrates chose to participate in Quarter Sessions. This was undoubtedly partly due to settlement patterns; as settlement extended into the remoter areas of the district, magistrates in those townships would have been able to attend Quarter Sessions only with great difficulty. However, others may have chosen to distance themselves from close association with the regime that sitting on the bench at Quarter Sessions implied. Some attended occasionally, only when matters of interest to themselves or their localities were being discussed.

If the agents of a local "compact" appeared to dominate Quarter Sessions, at least there was an element of popular participation in the trials there that prevented the court’s being commandeered for political purposes. The grand jury considered bills of indictment for criminal cases, and also commented on matters of local concern such as the state of the district gaol. And it was not the magistrates themselves but the trial jurors who collectively decided on the guilt or innocence of each defendant. Despite the importance of trial jurors as representatives of their communities, jury duty was apparently considered onerous and many paid a fine rather than show up to spend three or four days in court.
As was the case with summary justice, there seems to have been a remarkably high level of litigiousness in the district. On average, one of every 63 inhabitants, including children, found themselves charged with a criminal offence at Quarter Sessions. The settlers of this district were willing, even eager, to use the formal justice system against those who had transgressed against them. If one considers the efforts to which magistrates appear to have gone to discourage people from proceeding to trial, that ratio represents only a fraction of the complaints actually made before J.P.s. The vast majority of offences for which people were charged at Quarter Sessions involved acts of violence—assaults and riots. Over time, though, larceny charges increased in number and in proportion of the business of the court.

Although there was a general willingness to resort to the courts, not all people did so with the same propensity. People from certain townships were more likely to use the courts than inhabitants of other townships. Distance from the judicial centre of Cobourg played a role, but other factors were also influential. Fewer cases went to Quarter Sessions from Darlington township, which was reform in sympathy, and from Clarke, which was evenly divided, than from Cramahe or Murray, which were about the same distance from Cobourg and had similar populations in 1840.\(^{104}\) Local magistrates probably diverted many cases from the district courts by trying them summarily under the Petty Trespass Act.

People of all social groups used the courts to prosecute others for acts of violence. On occasion people of the “lower orders” prosecuted members of elite groups for assault. As was the case with summary punishment, assault trials resembled a “people’s court,” in which people of all kinds of backgrounds prosecuted each other for violent offences.

\(^{104}\) Political character of the townships is from Squar, *The United Counties*, 161.
Larceny trials tended to involve propertied people prosecuting non-propertied people, although it would be dangerous to ascribe too high a status to prosecutors like the innkeeper who charged Hannah Cowan with stealing cotton, a case referred to above. Nevertheless, some prosecutors for theft were quite wealthy and some of them were even J.P.s.

Once a trial jury convicted a person, it was up to the magistrates to decide on punishment. Magistrates exercised their discretion over punishment in ways that we would expect, taking into account such factors as the nature of the offence, gender, relative culpability and character. Generally punishments for assault were small fines, although acts of violence which injured people could lead to more severe punishments. Larceny was more severely punished throughout the period, although the nature of punishment for larceny shifted from the “shaming punishments” to increasing reliance on imprisonment by the end of the period. These trends have been well described by penal historians and this study confirms that those trends extended into the Newcastle District.
Chapter 6

The Magistrates in Social Context

Thus far this study has examined the roles that magistrates performed in criminal justice administration. Elements of the discussion in the various chapters addressed some aspects of magistrates' roles within the broader context of their communities, a subject that this chapter discusses more explicitly. First, statements about the roles of magistrates in Upper Canada from the point of view of the elites are examined. Elite views are contrasted with popular views of the social order, which tend to emphasize relative equality rather than the acceptance of a natural hierarchy. Comparing the two viewpoints makes it clear that a considerable segment of the population would not have been likely to accept the authority of magistrates without question. More concrete evidence concerning the tension between the two views in practice, and of popular views and those of critics of the administration concerning the actions of particular magistrates, can be seen from the example of the situation in Port Hope in the 1830s. The chapter concludes with broader observations on the limits of the powers of magistrates and other figures of authority in the colony.

The Magistrates' Views of their Office

At the opening of the April 1835 Quarter Sessions, chairman John Steele delivered a charge to the grand jury in which he outlined the importance of the law and those who carried out its responsibilities to the maintenance of order and constitutional balance in Upper Canada. The address was intended to foster a sense of pride and a consciousness of the weight of their responsibilities in the jurors themselves, stressing that trial by jury was
the “bulwark of our glorious constitution.” But this speech has broader significance because it demonstrates the “tory” attitude towards the functions that magistrates served in law, politics, and society, and because it represents the views not of a Judge but of a magistrate speaking before other magistrates and people in court. Underlying Steele’s message is an unabashed confidence in British institutions and the tradition of the rule of law.

After referring to the duties of jurors and the place of the jury trial in the constitution, Steele went on to say that “no personal inconvenience or sacrifice should be considered too great, to deter any one, when duly called upon to discharge such an incumbent and honorable duty, a duty which we owe to our country, our friends, our posterity and ourselves.” He went on:

The law of the land extends its fostering care to our lives, liberties and possessions, and under this powerful shield every faithful subject places his confidence, and feels assured that while these laws are properly administered he can safely enjoy all the comforts and blessings, which his honest exertions and means can procure for him in society.... [It is important] to support and maintain these Laws which extend their protection to all classes -- obedience to the law is an unceasing obligation and is the bond of union which cements society together and keeps undisturbed the happiness of the whole community -- without Law, there would be no order, anarchy and wild confusion will spread universal ruin and misery.

We cannot too highly appreciate the happiness and prosperity of our present condition.... Being placed in such propitious circumstances as these, we must readily suppose that every man will feel the necessity of preserving and supporting such an order of things; and not allow his mind to be led astray by the sin and greedery and grievances and complaints of the disaffected, that boldly stand forth as the avowed enemies of all social order and good government.

You may as the grand inquest of the district not only present, whatever may disturb the public peace; but as individuals whose situation and condition in society give you an interest in it, you may by your influence and example check any inroads that may be made to undermine and destroy our glorious constitution -- let justice be administered impartially to all classes, and the oppression of the most powerful, will not prevail against the rights of the meanest subjects - unbounded confidence in the wise and just administration of the Laws, will constitute our greatest and best protection. Every one of us in our respective spheres of life are bound to assist each other in doing all we can to promote the public good, and we cannot do this more effectually than by upholding our excellent Laws, and keeping inviolate our free institutions.

There was no doubt in Steele’s mind that the superior political system of the day was that represented by the “glorious constitution,” central to which was the idea of constitutional balance.² Reflecting British society, British government consisted of three

²Steele was referring to the political settlements arrived at after the “Glorious Revolution” of 1689 in which the Roman Catholic “tyrant” James II had been forced to give up the British throne in favour of the Protestant William and Mary, events crucial to the development of British constitutional thinking. No longer were monarchs to be permitted to rule unfettered; they were held to be subject to the rule of law like everybody else. Monarchs could not enjoy their positions unconditionally; if they ceased to rule as they ought to and became tyrannical, it was the responsibility of others to remove them and thereby restore constitutional balance. A summary of the impact of the Glorious Revolution on British political thought can be found in H.T. Dickinson, Liberty and Property: Political Ideology in Eighteenth-Century Britain (London: Weidenfeld and Nicolson, 1977), chapter 1 of which is useful for understanding the impact on tory ideology. For the ways in which this ideology was transported in Upper Canada, see Robert L. Fraser, “‘All the Privileges which Englishmen Possess’: Order, Rights, and Constitutionalism in Upper Canada,” in Provincial Justice: Upper Canadian Legal Portraits (Toronto: The Osgoode Society, 1992): xxi-xcii; P. Romney, “Very Late Loyalist Fantasies: Nostalgic Tory History and the Rule of Law in Upper Canada,” in Canadian Perspectives on Law & Society: Issues in Legal History, ed. W.W. Pue and B. Wright (Ottawa: Carleton University Press, 1988):118-147; David Mills, The Idea of Loyalty in Upper Canada, 1784-1850 (Kingston and Montreal: McGill-Queen’s
elements — the monarch, the Lords and the Commons. Each of these was considered to be important, and the emphasis was the harmony or balance of the three; no one element should dominate the others. Each element had its own responsibilities and prerogatives, upon which the others could (at least in theory) not infringe. Britons and the transplanted Britons who became Upper Canadian leaders believed that social and political order would follow from this constitutional balance.

While the balanced constitution was held up as the ideal form of government, the reality in Upper Canada fell far short. Despite Simcoe’s intention to foster the development of a landed aristocracy to fulfil the social and political roles of their British counterparts, such efforts failed. Land was simply too plentiful for a small group to get a monopoly over it. Labour was expensive and difficult to hire, at least in the early years, so that even those who had been awarded huge land grants found it difficult to put that land to use. Speculation proved unprofitable because the price of land remained relatively low for decades because initially the supply appeared endless. Settlement was necessary for security reasons, which led the government to offer incentives to prospective settlers, who were given free land or sold land at low prices. The perilous security of the colony in some ways worked against the growth of an aristocracy. A combination of government policies and environmental factors worked against the development of such a class. So in Upper Canada, one element was missing from the constitutional organism.

University Press, 1988).

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Not only was there no aristocracy but the influence of the "Commons" was not strong. Much of the colony's political history involved the fight for responsible government, which would eventually make the executive accountable to the elected assembly. Although the assembly had some powers they were overshadowed by the powerful Lieutenant Governor and his appointed agents. The needs of the fledgling colony and the fear of republican influences engendered by the close proximity to the post-revolutionary United States provided the executive with excuses to flex its political muscles. Reformers accused the executive of interfering in the electoral system to give members of the executive undue influence over the Assembly. Reformers complained loudly, particularly in the 1830s, that the ruling elite practiced a "tyranny," using language which echoed that of the Glorious Revolution of 1689.

Simply put, reformers believed that the executive had too much control, particularly over the judicial system. The Lieutenant Governor appointed Judges, who retained their office "at pleasure;" in other words, they could be dismissed if their actions annoyed members of the executive. One of the reformers' constant demands was that the judiciary should be made independent. Moreover, opponents of the government believed that judges did not always exercise their authority legitimately. In reporting Chief Justice Boulton's charge to the Grand Jury at the Niagara Assizes in August 1824, the Colonial Advocate could not restrain from sarcasm: "it consisted chiefly of a eulogy on the Constitution and the land we live in, where, said the judge, the poor man is heard as well as the rich -- the juries ought to be the guardians of innocence, ought to defend the constitution against arbitrary
The executive also appointed magistrates, who could be dropped from the next commission if they acted in ways which displeased those more powerful than themselves. And the ways in which magistrates behaved in office were no better than the behaviour of judges: "a late writer on the duty of a justice of the peace, gives us as the primum bonum, that he is first to regard his own interest, and then that of the public." The executive could interfere in the jury selection process through its agent, the sheriff. Reformers consistently argued that all parts of the judicial system should become independent of the executive.

When John Steele expressed confidence in the glorious constitution, then, one wonders what he must have meant. Whatever the realities in Upper Canada, faith in British political institutions remained uppermost in the minds of Upper Canadian magistrates, whether they had come from Britain or from loyalist backgrounds. But we can see from John Steele's speech that Upper Canadian ideas about the glorious constitution were inextricably bound to two related ideas -- the rule of law and the belief that order could be preserved only by adherence to the law.

The rule of law was, at least in principle, an integral part of the glorious constitution as Upper Canadians interpreted it. While taking the oath of office, magistrates swore to administer the law impartially, "alike to the poor as well as to the rich," words which echo in Steele's address. Defending their conduct, three Newcastle District magistrates wrote: "As magistrates...we trust that we have always done our Duty[,] that we have administered strict

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4 Colonial Advocate, 5 Aug. 1824. Emphasis in original.
justice, tempered with mercy, alike to the Rich and to the Poor....” Impartiality of the law was an idea that would have appealed not only to magistrates, but to ordinary Upper Canadians as well. As David Neal reminds us in the context of a different colony, everyone, including rulers, were, at least in theory, bound by the rule of law. That some Upper Canadian legal officials of the highest stature appeared to consider themselves above the rule of law rather than bound by it constituted a serious grievance.

Similarly, for Steele the law was crucial to the preservation of order: “obedience to the law...is the bond which binds society together and keeps undisturbed the happiness of the whole community.” In the tory view the law was a strictly benevolent institution. Another Newcastle District magistrate, Charles Rubidge, believed the colony was sheltered “under the tranquil shade of well regulated and impartial justice.” So strong was their faith in the impartiality and importance for the maintenance of order of British justice that it was very nearly impossible for them to see the defects in the Upper Canadian judicial system and the potential for tyranny which some of the reformers pointed out. Those who spoke against

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6Henry LeVesconte, Thomas Allan and John Langton to S.B. Harrison, 17 Sept. 1840; AO, RG8, ser. I-1-P, Department of the Provincial Secretary, Pre-Confederation Correspondence, Box 1.

7Neal, The Rule of Law in a Penal Colony, 65-71. John Brewer observes that this principle extended to amateur office-holders, who were considered to be “of the law and the community, never above or beyond them.” “An Ungovernable People? Law and Disorder in Stuart and Hanoverian England,” History Today 30 (Jan. 1980): 18-27.


“the Law” were regarded as “avowed enemies of all social order and good government,”
again in Steele’s words. Given that the glorious constitution was on such shaky grounds in
Upper Canada, it is hardly surprising that criticisms of the regime and its laws were regarded
with such alarm. After all, the law was the cement binding society together, and “without
Law, there would be no order, anarchy and wild confusion will spread universal ruin and
misery.”

The roles of the magistrates in upholding the rule of law and in maintaining law and
order were thus of great significance politically and constitutionally, as well as legally. As
Hugh Taylor put it in his 1843 magistrate’s manual:

The Justice constitutes a material link in the chain that connects the people to
the Government; he is appointed by the one, but for the protection of the
other, and is in a situation to communicate with both, while called by his
office to check the faults and failings of those around him, he has occasion
also to know much of their character and disposition, to control [sic] the
violent and ill-disposed by his influence and authority, and to direct them in
the way of their duty. The Magistrate who thus supports the interests of the
community and the dignity of the office, discharges aright the trust reposed in
him by the constitution, and deserves well of the public....

However, Taylor also advises that a magistrate ought to avoid partiality:

The impression that he who is raised to the seat of Justice, leans in his
decisions to the side of friendship, or to that of a political party, is destructive
of all confidence, and alienates the minds of men from that obedience to the
laws, and that respect for justice, which are so essential for the support of
good order in society.

Despite the weight of responsibility, both literally and ideologically, that fell to the
lot of the magistrate, a large number of men were willing to take up the challenge. And

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11Ibid, 27.
some of them did not take office merely for the prestige it afforded them -- or so they said. Again and again they referred to their "duty," as the three magistrates whose letter stating they had always upheld their duty to administer justice alike to the rich and poor, quoted earlier, attests. After complaining about the dreadful disorder along the Rideau Canal site in 1827, Andrew Wilson, already a J.P., offered to extend his jurisdiction: "although there is neither pleasure nor profit to be gained in the Execution of the duty...."12 In a letter published in the Colonial Advocate, Newcastle District magistrate John Hutchison, defending himself against a charge that an action he had taken as a magistrate had caused someone hardship, wrote:

...is a magistrate to shrink from his duty, and compromise the public interest from the pusillanimous fear of hardship, to an individual? No -- I rejoice to see the people jealous of their rights, because that jealousy forms a strong bulwark of our liberties: but Sir, while I have the honour to be included in His Majesty's Commission of the Peace, I hope I shall never be driven from a conscientious discharge of my duty by the menaces of the party supposing himself aggrieved, or his mischievous advisers, nor allured from it by favour, affection, or hope of reward.13

These statements might be dismissed as self-serving rhetoric, but to do so would cause us to lose possibly the most significant element of the magistrate's self-image. Because the law was necessary to the preservation not only of social order but the entire constitutional ideology, magistrates as agents of that law saw themselves as playing a very important part with the broadest possible significance.

Because the duties of a magistrate were so varied and imbued with broader meaning, "the man of education and refinement" saw himself as particularly appropriate for the job,

12 Andrew Wilson to George Hillier, 18 May 1827; Sundries, 45755-8.

13 Colonial Advocate, 20 Apr. 1826.
regardless of his financial situation. Perpetually in penury, Samuel Strickland consoled himself thus:

A man of education will always possess an influence, even in bush society: he may be poor, but his value will not be tested by the low standard of money, and notwithstanding his want of the current coin of the realm, he will be appealed to for his judgment in many matters, and will be inducted into several offices, infinitely more honourable than lucrative.... [He] will hold offices in the Colony and responsible situations which his richer but less learned neighbour can never fill with ease or propriety.14

English or loyalist men of “the better sort” believed themselves the natural leaders of their communities. As was discussed in chapter 2, the kinds of men who became J.P.s were tireless organizers of and lobbyists for public improvement projects. Several Newcastle District magistrates were particularly active in seeking improvements in navigation on the Rice Lake and Trent waterways, efforts which eventually created the Trent-Severn canal system. They sought improved roads, essential for transportation of persons but more importantly perhaps of goods for market. They established societies dedicated to the relief of pauper immigrants and other needy groups.

In addition to advocating much-needed improvements, they saw themselves as responsible for “civilizing” the wilderness of Upper Canada and the society that emerged there. Halfway between York and Newmarket, Isaac Fidler called upon a gentleman who was a justice of the peace:

My surprise, on entering his house, was great, to find in the wilds of Canada the comforts and even luxuries of civilized life. I was not prepared for expecting the elegance and refinement which appeared around me. A large family, handsomely attired, in apartments well carpeted and furnished, a good library, a blazing fire, and numerous servants.... Here I remained all night,

14Samuel Strickland, Twenty-Seven Years in Canada West..., Vol. 1, reprint (Edmonton: M.G.Hurtig, 1970), 81; xvii-xviii.
and found more of European information and of true hospitality than I had done in any part of America.... It appeared to me as if I were once more in England.\textsuperscript{15}

They hacked and hewed at the forests (or had people to do it for them), trying to impose order and "civilization" even there. By 1830, Frances Stewart wrote that their residence near Peterborough had a shrubbery walk enclosing a flower garden. By 1838, the "Fenelon Hunt regatta and ball" was underway.\textsuperscript{16}

The confidence of such people in British laws, constitution, and "civilization" extended as well to religion. Virtually all magistrates in Upper Canada were Protestant, predominantly Anglican or Presbyterian, but other denominations were represented. There were few Catholics, although there was at least one in Newcastle District. Newcastle District magistrate George Arundel Hill probably shared a general Protestant suspicion of the excesses of Catholicism, particularly of that variety found in Lower Canada:

Popery is the dominant creed, and Spain herself does not, I believe, contain a more numerous or bigoted priesthood -- a more formidable machinery of monks and friars, or a more ignorant and priest-ridden population. Possessions of the host are frequent, and the person who, from a just contempt for such juggleries, will refuse to make obeisances as they pass, stands a good chance of becoming entitled to a page in "the Book of Martyrs."\textsuperscript{17}

\textsuperscript{15}Isaac Fidler, Observations on Professions..., (London: Whittaker, Treacher, 1833), 132.

\textsuperscript{16}Frances Stewart, Our Forest Home..., ed. E.S. Dunlop. (Toronto: , 1899), 71, 99. Unfortunately, in her memoirs she neglected to mention the dead infant found in their privy; see AO, RG22, unprocessed; Northumberland and Durham (Newcastle District) Coroners Records, Box 1, env. 4. Her husband, Thomas Alexander Stewart, was a J.P., Legislative Councillor and Member of the House of Assembly.

\textsuperscript{17}George Arundel Hill, A Guide for Emigrants... (Dublin: R. Moore, 1834), 10.
Upper Canadian magistrates were among those who gave much support and encouragement to local religious institutions, and several endowed the establishment of their church.

Upper Canadian magistrates, then, probably acknowledged their roles as crucial actors in upholding social order and proper political principles. They felt it their sacred duty to administer the laws, with the help of the jury in some cases, impartially to the rich and poor. Their unofficial but perhaps equally important duty was to bring the benefits of British civilization to their neighbourhoods. They were to set the example to which their socially inferior neighbours could aspire. Their responsibilities were many, often tiresome and sometimes thankless, but they understood that if they performed their duty they would be helping to preserve peace and order, and the glorious constitution. Colonial officials saw them in the same way and that is why the matter of who got an appointment was so important. But how did ordinary Upper Canadians view them and their functions?

The Problem of Legitimating Authority in the Social Context of Upper Canada

If everyone in the colony had agreed that men of “superior” achievements and status were the natural leaders of society, it would have been easy for magistrates to exercise authority in Upper Canada. But Upper Canadian social ideology embraced a strange mixture of hierarchy and egalitarianism. Although historians tend to emphasize inequality as a fundamental social characteristic of Upper Canada,¹⁸ and no one could deny that there was

¹⁸According to S.J.R. Noel, for example, early Ontario society was characterized by “pronounced inequalities of wealth and status.” Patrons, Clients, Brokers: Ontario Society and Politics, 1791-1898 (Toronto: University of Toronto Press, 1990), 17. Peter A. Russell prefers to use the phrase “a series of ranks”; Attitudes to Social Structure and Mobility, introduction (no pagination).
inequality, there was also a parallel "democratic spirit" upon which the authors of contemporary printed sources often remarked. The coexistence of these two opposing social forces must have provided awkward moments for magistrates, whose authority did not merely emanate from their social position or "respectability." British settlers and visitors to the colony reported that many people deeply resented any hint of social pretension on the part of "their betters." As E.C. Guillet observes, "aristocratic notions were increasingly unpopular among the settlers along the Trent..."19

Contemporary authors, both visitors to and settlers in the colony, reported on the "egalitarian spirit" frequently and with some dismay. They blamed Upper Canada's proximity to the United States as a primary cause of insufficient deference, the virus having spread contagion even beyond the republic. As one visitor to the Niagara area remarked in the mid-1810s, "this free and easy behaviour of the lower classes, which English travellers so frequently complain of in the United States, and attribute to their Republican principles, is common enough under our own Government...."20

This egalitarian sentiment appears to have become even more pronounced during the 1820s and 1830s, if contemporary commentary is any indication, and this was the period of massive British immigration. The experience of migrating from Britain to the Canadian colonies was a liberating one for many ordinary people. The Americans were not the only ones to possess an egalitarian spirit. Even if the image of the new world as a freer place than the old was largely in reference to the United States, many immigrants do not seem to have

19 Valley of the Trent, iv.

20 Francis Hall, Travels in Canada and the United States in 1816 and 1817 (London: Longman, 1819), 217.
made the distinction between “the land of the free” and the Canadian colonies. A transformation took place as they approached the shores of their new homeland. Of her nautical companions, Susanna Moodie wrote upon their arrival in North America:

I was not a little amused at the extravagant expectations entertained by some of our steerage passengers. The sight of the Canadian shores had changed them into persons of great consequence. The poorest and the worse-dressed, the least-deserving and the most repulsive in minds and morals exhibited most disgusting traits of self-importance. Vanity and presumption seemed to possess them altogether.... Girls, who were scarcely able to wash a floor decently, talked of service with contempt.... To endeavour to undeceive them was a useless and ungracious task. After having tried it with several without success, I left it to time and bitter experience to restore them to their sober senses.21

Similarly, John Howison reported: “Many of the emigrants I saw had been on shore a few hours only, ... yet they had already acquired those absurd notions of independence and equality, which are so deeply engraven in the minds of the lowest individuals of the American nation....”22

That excitement, optimism and an egalitarian spirit swelled in the heart of the newly arrived immigrant is hardly surprising, given the immigration propaganda of the day. Books and pamphlets on the advantages of immigration, intended to encourage poor British families to uproot and transfer themselves across the Atlantic, stressed the opportunities that were there for the taking to the hard-working poor in the new world. This was the “myth of


22 In G.M. Craig, Early Travellers in the Canadas, 1791-1867 (Toronto: McClelland and Stewart, 1963), 46.
the poor man's country."

So long as the immigrant family worked hard and behaved well (which meant primarily that they all stayed sober and out of trouble), they could acquire land and be prosperous. The possibilities for social mobility were endless. However unrealistic, this must have been the expectation of many migrants.

When they arrived, what kind of place did they find? For all of the class barriers that still existed, particularly for those who arrived without money in the 1830s, Upper Canada was different from Britain, and newcomers must have noticed that immediately. The hierarchical system of England was obviously not present. Relatively speaking, society seemed more homogeneous and less rigidly stratified. The newly arrived did not see the extremes of rich and poor that they had come to see as normal in Britain. As one letter-writer reported: "There is no beggars in this country, nor any carriages." Another wrote: "This is a good country for one thing, the people are all of one sort, pretty much: their servants lives with their masters, and they gets good wages...." Devastating poverty was noticeably absent:


24Thomas Sockett, Letters from Sussex Immigrants (Petworth, Eng.: J. Phillips, 1833), 11. I realize that these letters were used as immigration propaganda and that their veracity might thus be suspect. However, precisely because such letters were used as propaganda, both to encourage immigrants to undertake the voyage and to encourage sponsors to fund such schemes, these kinds of statements must have reflected or encouraged these ideas in those who supported the efforts and those who succumbed to such appeals. For a critical analysis of these letters see Wendy Cameron, "‘Till they get Tidings from those who are Gone...’: Thomas Sockett and Letters from Petworth Emigrants, 1832-1837," Ontario History 85, 1 (Mar. 1993):1-16.

25Sockett, Letters from Sussex Immigrants, 7.
All the farmers that I see, is independent, and has plenty; and I wish that the poor people in England had the leavings of their tables, that goes to their dogs, and hogs; they live better than most of the farmers in England; that is, our dogs.\textsuperscript{26}

Immigrants also found it noteworthy that the classes mingled in Upper Canada, quite unlike the situation in Britain: "Farmers and labourers all sit at one table here." At a logging bee, "we had dinner in the barn, masters and servants together, without distinction. Two young Englishmen were present, but did not assist, and were therefore laughed at...."\textsuperscript{27} If the Englishmen were neighbours of the rest, popular pressure would undoubtedly have discouraged them from proclaiming themselves socially elevated above the others, at least in a matter of time.

One of the most popularly despised legal barriers between the classes in Britain -- the game laws -- had not transferred to Upper Canada. Writers of travel diaries and immigration manuals invariably remarked upon this difference. One of the Sussex immigrants reported: "here is wild deer, and turkeys, and pheasants, partridges, and rabbits; and any body may kill them." Another wrote: "This is a fine country, and a free country; you can go where you like here, and no one to hinder you; shoot any thing as you see, of wild fowl: and there is plenty deer." Other immigrants wrote similarly: "I am at liberty to shoot turkeys, quail, pigeon, and all kinds of game which I have in my back wood." And "Here you can go and shoot wild deer, turkeys, pheasants, quails, pigeons, and other sorts of game, and catch plenty of fish without molestation whatever." Even "respectable" people sounded a bit incredulous; James Strachan noted that game laws were unknown, adding

\textsuperscript{26}\textit{Ibid}, 45-6.

\textsuperscript{27}\textit{Ibid}, 10-11, 46.
“Deer are numerous in the woods, and you may shoot every one you meet.” William Cattermole too advised: “Deer abound in the woods, all persons capable and willing to hunt them do so, there being no game laws.” The absence of game laws apparently made a profound psychological impact on immigrants from Britain, who found themselves possessed of a privilege denied them before their migration.

Another “levelling” factor was that many immigrants from Britain could do something in the colony they would never have dreamed possible in their homelands – own land. The appeal of this prospect cannot be under-estimated. Again, immigration propaganda appealed to this hitherto unrequited aspiration: “Just fancy yourselves possessed of real property on such terms – no yearly tenancy – no terminable leases to breed interminable jealousies at the change of occupants, but pure fee simple – no rent to pay – landed proprietors – estated gentlemen!!” That this possibility appealed to the poor, even the “respectable” poor, is hardly surprising. One labourer, who had a 50 acre farm in Ontario, wrote: “if I had staid at Corsley, I never should have had nothing.” Owning land brought freedom from previously experienced forms of repression at the hands of landlords: “Men must labour very hard here; but they are well fed and well paid; and what a man has is his own; there is no landlord or tyrant to reign over them.” Another wrote: “No game-

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keepers, or Lords over you."\(^\text{29}\) John Mactaggart wrote of the profound psychological impact that landownership had on poorer Scottish immigrants:

> There have often strange reflections come over me when observing people prowling about in quest of land, to be lairds themselves. This is a wonderful matter; and although land in Canada is of very little value, comparatively speaking, to what it is in England, yet when a poor creature receives a grant, he is little less in his own conceit than the King himself, or the first Governor in the land.... He will allow no one to cut a stick off of it, if he know; and if any tell him, the guilty are sure to have a summons in their hand in a very short time.\(^\text{30}\)

The promise of landownership appealed to the "respectable" propertyless who dreamed of independence, as well as to the poor. Even men who became magistrates savoured the experience. Thomas Mossington, appointed a magistrate in the Home District in the 1830s, had been a lumber agent and quartermaster of shipwrights for the Royal Navy in Britain before settling south of Lake Simcoe in Upper Canada. He turned down the offer of a job buying and selling timber for the government because: "I seem to have my heart set upon digging my own potatoes[,} eating my own mutton and catching my own fish, that seems to be the kind of independence I am longing for and the Elder boys also seem most anxious to enter into an agricultural life in preference to anything else." Although working his land required exhausting manual labour, this work would be rewarded by a potential for independence likely beyond Mossington's reach in England. Mossington's wife and daughters may have envisioned a less romantic and more realistic evaluation of their

\(^{29}\)Martin Doyle, *Hints on Emigration to Upper Canada...* (London: W. Curry Jr., 1831), 17, 72; Picken, *The Canadas*, xxxiv-v. Peter A. Russell cites a similar letter in *Attitudes to Social Structure and Mobility*, introduction (no pagination), which is the source of his book's subtitle.

prospects; they were less than eager to emigrate to Upper Canada. Mossington's friends encouraged him to take the journey, assuring him that the women in his family would come to realize that this was the right choice: "the independence they begin to feel, attached to their own soil, on the borders of Lake Simcoe, may make it appear a paradise in their estimation." Another wrote with some envy: "I must now congratulate you on the prospects before you."31

Another sign that class barriers in Upper Canada were not so deeply entrenched as they were in Britain was that there was no leisure class in the colony; even men who were members of local elites were seen to work. Radcliffe wrote:

> When we first came here, our hands were soft and delicate, as those of a lady, from being unused to laborious occupation, but seeing every one around us employed at manual works -- magistrates, senators, counsellors and colonels, without any feeling of degradation, we fairly set to, in the spirit of emulative industry, and have already exhibited pretty fair specimens of our efforts in clearing the land, and afterwards ploughing it.32

These immigrants realized that they would have to perform what they would have previously considered to be the most menial kinds of manual labour. As Pickering noted: "Farmers, captains, and esquires, rich and poor, none think it a disgrace to work, even for each other."33

As was discussed earlier, the Newcastle District magistrates generally worked for a living-- they ran farms and often businesses. In many places in England there were still

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31PAO, Thomas Mossington Papers, MU 5895; Mossington to William Edwards, 14 Feb. 1830; Robert Elwes to Mossington, 20 July 1830; Edwards to Mossington, 30 Apr. 1831.


33Joseph Pickering, Inquiries of an Emigrant... (London: E. Wilson, 1831), 66.
social barriers to the kinds of employment a member of the respectable gentry might take. As Susanna Moodie explained the difference between the mother country and the colony:

“The conventional prejudices that shackle the movements of members of the higher classes in Britain are scarcely recognized in Canada; and a man is at liberty to choose the most profitable manner of acquiring wealth, without the fear of ridicule and the loss of caste.”

Newcastle District magistrate Thomas Need wrote: “In this country, a gentleman may, if he chooses, keep an open store or shop without derogation, and it is no uncommon thing to see a man of education and acquirement standing behind a counter.” Thomas Traill, married to Susanna Moodie’s sister Catharine Parr and appointed a magistrate in the 1840s, added:

The storekeeper in Canada holds a very different rank from the shopkeeper in the English village. Storekeepers are the merchants and bankers of the places in which they reside. Almost all money matters are transacted by them, and they are often men of landed property and consequence, not infrequently filling the situations of magistrates, commissioners, and even members of the provincial parliament. They maintain a rank in society which entitles them to equality with the aristocracy of the country.

Many immigrants were profoundly affected by the apparent differences in colonial society from what they were used to in Britain. Despite the persistent inequality, rigid social stratifications were not as evident, there was greater possibility for social mobility (at least in theory), and anyone could hunt game and dream of owning land. These factors engendered

34Although the situation was changing in urban England, and manufacturers, for example, were being named to the bench in industrial centres. See, for example, David Philips, Crime and Authority in Victorian England: The Black Country, 1835-1860 (London: Croom Helm, 1977).


an attitude in ordinary settlers about which many "respectable" observers found annoying; persons of lower orders refused to defer to those of superior manners and social position. An "Ex-Settler" published a travel report in the 1830s; after outlining the benefits settlers might encounter, he continued:

But there is a very serious drawback against Canada, of which we have all heard, viz. -- the great incivility and rudeness of the lower classes; believe me, this has not been exaggerated; their superiority is very galling, and I consider it far the most trying and disagreeable thing, as a gentleman, you have to encounter in America.37

John Howison wrote similarly about settlers in the Niagara region, whose farms had become prosperous after decades of settlement:

but this amelioration in their condition, unfortunately, has not produced a corresponding effect upon their manners, character, or mode of life. They are still the same untutored incorrigible beings that they probably were, when, the ruffian remnant of a disbanded regiment, or the outlawed refuse of some European nation, they sought refuge in the wilds of Upper Canada, aware that they would neither find means of subsistence, nor be countenanced in any civilized country. Their original depravity has been confirmed and increased by the circumstances in which they are now placed.... The excessive obstinacy of these people forms one great barrier to their improvement, but a greater still is created by their absurd and boundless vanity.38

William Rowan singled out "border rowdies" -- people infected by a republican virus seeping across the border with the United States -- as particularly troublesome:

These vile pests flourish in the neighbourhoods of rum shops, and in border towns congregate about the corners of streets as affording a good position for outraging passers-by. They hold the theory that one man is as good as another, and take a peculiar way of illustrating their theory, viz. by being on all occasions as brutal and disgusting as possible. They never give a civil

37Ex-Settler, Canada in the Years 1832, 1833, and 1834... (Dublin: L.P.D. Hardy, 1835), 24.

answer to anyone, for fear that such politeness might be construed into a mark of inferiority.  

Newcastle District magistrate Thomas Carr wrote about his neighbours in the backwoods of the district:

A vast majority of the British settlers, who have established themselves in this Colony, were originally of the lower orders in their native countries. Since their arrival here, they have, by industry and economy, acquired independence; which has not only exalted them very much in the scale of society, but still more in their own estimation, and inclines them, from a recollection of their former state of poverty and perhaps of oppression, to wish to become the oppressors in their turn, and to look, with a jealous eye, upon their superiors in civilization and knowledge.... In these circumstances, I may add, that their independent condition places them beyond the influence or control of the intelligent; who, generally speaking are, in point of property, upon a level with themselves.  

Some of these commentators believed that the superior attitudes of the lower orders could be partially attributed to their ethnic origins. John Howison found the Scots particularly objectionable:

The Scotch ... do not fail to acquire some of those ideas and principles that are indigenous to this side of the Atlantic. They soon begin to attain some conception of the advantages of equality, to consider themselves as gentlemen, and become independent; which, in North America, means to sit at meals with one's hat on; never to submit to be treated as an inferior; and to use the same kind of manners toward all men.  

George Arundel Hill, on the other hand, found the Irish problematic, particularly when under the influence of alcohol: "When Paddy has got a bee in his brain from a few glasses of

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39 John J. Rowan, The Emigrant and Sportsman in Canada... (London: E. Stanford, 1876), 44.


whiskey, he looks down on every one who has a claim to be called a gentleman with the utmost contempt." Of course, the Americans were always regarded as a suspect influence.

The touchiness of the "lower orders" in Upper Canada was matched by the attitude of those more socially prominent, many of whom were eager to assert their superior status on any occasion. As historians of other British colonies have noted, those "who only had slim claims to high social status in English terms" were acutely anxious about respectability and status. Katherine McKenna has written of the importance of women in establishing status in Upper Canada: "the wives of the official leaders guarded their position in the hierarchy jealously, doing their utmost both to reinforce its values and to promote their own standing within it." Many of the commentators already quoted complaining about the attitudes of the lower orders exude confidence in their own superiority. That both ordinary people and elites considered no-one superior to them posed interesting problems for those attempting to exercise authority in the colony. As Lieutenant-Governor Colborne wrote in 1834:

In this Province, where the great body of the people are independent landed proprietors, and have acquired farms by their own labour, a democratic influence must essentially prevail. This greatly increases the difficulties experienced by the Executive Government in the distribution of minor offices, and selection of Magistrates; and in excluding unfit persons from the Commission of the Peace."

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42Hill, Guide for Emigrants from the British Shores, 52.


45Quoted in Aitchison, "Development of Local Government," 66.
As S.D. Clark and others have pointed out, opposing conceptions of the nature of society lay
behind much of the conflict in the colony:

A philosophy of social and economic egalitarianism was rooted deeply in the
thinking of the frontier farmer, and a fear of the power of wealth lent support
to the belief that there should be no class distinctions in society. On the other
hand, the governing group in the British North American colonies accepted as
implicitly the belief that the welfare of society depended upon maintaining
the influence of the aristocratic class, and that therefore the end of
government should be that of encouraging the concentration of wealth.46

In Upper Canada, then, there existed a popular spirit of egalitarianism involving a
refusal or reluctance to defer to social superiors and a strong desire to be recognized for
being as good as anyone else. This is the social context within which we must consider the
role of the colony’s magistrates; they received the appointment for their respectability and
connections, factors unlikely to weigh in the justice’s favour in the minds of many of his
neighbours. Colonel Talbot pointed out the difficulties: “the acquisition of money is, the
only advantage derived by the magistrates from their office. Influence they cannot have, in a
country where such a degree of equality prevails, and where every man, however humble his
fortune, considers himself quite as good as his neighbour.”47

So if magistrates saw themselves as the natural leaders of their communities, others
did not necessarily see them in that light. The ways in which magistrates acted might have
gone a long way towards legitimating their authority – acting as agents of their communities,
for example, or responding to requests for help from their neighbours rather than initiating

46Movements of Political Protest in Canada (Toronto: University of Toronto Press,
1959), 227.

47E.A. Talbot, Five Years’ Residence in the Canadas... (London: Longman, Hurst,
Rees, Orme, Brown and Green, 1824), 414.
criminal complaints themselves, and acting with a light rather than a heavy hand in the
administration of justice locally. Newcastle District magistrates appear to have done all of
these things. And the district inhabitants certainly were willing to get help from the justices,
and they did so often. However, to be seen to use their authority to manipulate the system in
their own interests or those of a particular political interest did not enhance the local
authority of a magistrate, as the following case study demonstrates.

**A Community Case Study in Law and Legitimacy**

In order to delve more into themes of community relations and the roles that some
magistrates played in either fostering or damaging community harmony, this chapter
presents a detailed case study of Port Hope in the 1830s. In that town two factions of
magistrates battled it out for influence. Two interesting themes emerge from the story. The
ring-leader of the tory faction, John Brown, was not immune from public criticism; indeed,
reform magistrates and others complained that his lawlessness was undermining the
legitimacy of the entire regime. Secondly, there were active magistrates belonging to both
factions, which suggests that many people exercised a choice when seeking the services of a
magistrate, and that reformers may not have been as shut out of the judicial and political
systems as is often thought. Aspects of the Port Hope case study are then applied elsewhere
in the district to delve further into issues relating to the legitimation of authority in rural
Upper Canadian communities.

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48 An earlier version of the section of this chapter relating to Port Hope was presented
to the Legal History Group at the University of Toronto in March 1996. I thank the
members of that group for their comments and suggestions.
When John Brown died at age 52, he was buried at Port Hope with full Orange honours. The funeral procession was reportedly "the largest ever seen on such an occasion." That a prominent townsman should receive such posthumous recognition is not surprising. However, John Brown had as many enemies as he had supporters. Indeed, he was known in Port Hope in the 1830s as "The Disturber" because of his "lawless aggression." According to some of his contemporaries, peaceable citizens had taken to carrying arms in the town after dark because they feared for their safety. They attributed their insecurity to the dangerous presence of John Brown. The author of a township history wrote of Brown: "His presence was felt from the day of his arrival [in 1818] to the day of his death...." This assessment was no exaggeration.

The incidents which led to such accusations implicate John Brown in a series of violent acts in Port Hope during the 1830s. Events in the town reveal a deep fracturing of the local elite. Some magistrates, supposedly agents of law and order, contributed a great deal to local unrest. They did not always act alone, though. Groups of men, often employees of the principals, formed two factions around prominent members of the

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49Brown died in 1842. The obituary from the Toronto Examiner was reprinted in Harold Reeve, The History of the Township of Hope (Cobourg: Cobourg Sentinel-Star, 1967), 143.

50Inhabitants of Port Hope, Memorial to Lieutenant Governor John Colborne, 16 Apr. 1832; AO, RG22, 46, Cobourg Quarter Sessions Miscellaneous Records, Box 1, env. 3: "Charges of Misconduct against John Brown, JP, 1832-33"; another copy appears in Upper Canada Sundries, 65083-4.

51Reeve, Township of Hope, 139. Indeed, Brown's presence was felt even after his death: in his will, he left all of his property to his wife except for five shillings bequeathed to the husband of his eldest daughter. This provision must have been a calculated insult. AO, RG22, MS638, Probate Records, reel 41, 11/4/42.
magistracy. While membership in these factions was not necessarily constant, and men may have had different reasons for aligning with a particular group, there was some continuity of membership in acts of violence.

This discussion begins with brief biographies of the principals, followed by a condensed outline of the disputes which erupted in Port Hope during this turbulent decade. Although it is important to develop a sense of the scope and nature of these violent acts, of greater interest are the responses which violence invoked, both within the community and in official circles. Local magistrates and other Port Hope inhabitants who opposed Brown reacted strongly to his alleged acts of violence: they complained vociferously and frequently about his activities and warned that Brown's continuing presence on the district bench constituted a serious grievance in the area. Colonial officials did not ignore these complaints, but were reluctant to take action against Brown not so much because he was a political supporter of the government, but because they did not wish to appear to interfere in local affairs. They referred matters to the courts rather than taking direct action against him.

John Brown was a ringleader of the tory faction in the town. He had been appointed to the district bench in 1823, five years after his immigration from Ireland. Brown was a

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merchant and businessman involved in several enterprises, including mills, a linseed oil factory, a nail factory, a blacksmith’s shop, and a distillery, at various times in Port Hope. He was a Member of the House of Assembly from 1830 to 1836, and was active as a magistrate throughout the 1820s and 1830s. He was President of the Port Hope Harbour Company, and as such was deeply involved in wharf construction projects in the early 1830s.

Brown’s main ally was former military officer Richard Bullock, who became prominent in the militia and in the Orange Order. He was a colonel in the militia and in the post-Rebellion era was appointed Adjutant General. He was Deputy Grand Master of the Upper Canadian Orange Lodge. From the mid-1830s, Bullock was Sheriff in turn of the Prince Edward and the Midland Districts. He also was an active magistrate throughout the 1830s.53

Opposed to Brown and Bullock were a group of men who had as their leaders a coalition of reform magistrates: David Smart, John David Smith and John Tucker Williams, who elected him” by the freeholders of Whitby, who held a meeting at which they passed resolutions objecting to Mackenzie’s expulsion. One of the resolutions condemned John Brown’s conduct for sneaking into the room before the group had assembled and carrying off the requisitions and notice for convening the meeting, without which it had no legal basis. This incident was reported in the Brockville Recorder, 19 Jan. 1832. I thank Carol Wilton for bringing this report to my attention.

53 Despite Lieutenant Governor Sir George Arthur’s opinion that Bullock was “gallant but incompetent,” he retained the post of Adjutant General until 1846; see Colin Read and Ronald J. Stagg, The Rebellions of 1837 in Upper Canada (Ottawa; Carleton University Press, 1980), 262, fn. 17. Bullock’s signature followed that of Ogle Gowan when the Orange Lodge executive signed an address to Lieutenant Governor Colborne, 18 Aug. 1833; Sundries 73205-7. Dates of Bullock’s appointments as Sheriff appear in Frederick H. Armstrong, Handbook of Upper Canadian Chronology, rev. ed. (Toronto: Dundurn Press, 1985), 182, 190.
the latter two of whom opposed Tories in election campaigns for the legislature. First appointed to the district bench in 1823, Smart was Postmaster at Port Hope from 1817. He also ran a distillery and possibly other businesses. Smith was a descendant of Loyalists: his father was one of the area’s earliest settlers and one of the first magistrates appointed there. Smith was a merchant, surveyor and distiller; his family was characterized as “renowned Indian traders.” John David Smith was a militia captain during the War of 1812 and a Member of the House of Assembly from 1828 to 1830. He too was an active magistrate, having been first appointed one in 1813. Like David Smith, John Tucker Williams was active in the War of 1812: he commanded a vessel on the Great Lakes and settled in Port Hope at the conflict’s end. Williams too was prominent in the militia and in politics: he was the first Mayor of Port Hope, and was a Member of the House of Assembly after the post-Union elections. First appointed a magistrate in 1821, Williams remained one of the most active magistrates throughout the following two decades.

References to Williams appear in Squair, Darlington and Clarke; Craick, Port Hope Historical Sketches; Reeve, Township of Hope; Helen Schmid and Sid Rutherford, Out of the Mists: A History of Clarke Township (Orono, 1975), and Q. Brown, “Swinging with the Governors.” Being a Reformer did not prevent Williams from accumulating substantial wealth: at the time of his death in 1854 he hold over £ 40,000 worth of bonds and mortgages alone. AO, MS638, Probate Court Records, reel 70, 13/2/55.

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54 Reeve, Township of Hope, 129; W.A. Craick, Port Hope Historical Sketches (Port Hope: Williamson Press, 1901), 115.

55 Read and Stagg characterize Smith as “evidently a government supporter,” Rebellion of 1837, 290, fn 95; J.K Johnson correctly identifies him as a Reformer in Becoming Prominent, 227. Other sources include John Squair, The Townships of Darlington and Clarke... (n.p., 1927), Craick, Port Hope Historical Sketches; E.C. Guillet, The Valley of the Trent (Toronto: University of Toronto Press, 1957) and Clare F. Galvin, The Holy Land: A History of Ennismore Township... (Ennismore, 1978), in which appears the “Indian trader” quotation (p. 31).
Although complaints against John Brown had been raised previously, the first incident involving Brown and an opposing magistrate occurred in October 1829 when David Smart accused him of assault. Smart had been riding along the road about ten o'clock at night with another magistrate, William Owsten, when Brown confronted him, asking to have a private word. According to Smart, as soon as the two were alone, Brown threatened to give Smart "a good whaling," and manoeuvred his horse across the road to prevent Smart from passing. Smart tried to get away but Brown chased him at full speed, shouting threats of revenge. Smart claimed to be afraid that Brown would "shoot wound maim or do him some grievous bodily harm or set fire to or destroy his premises." As a result of this altercation, Brown was bound over in recognizance to attend Quarter Sessions, although Smart wanted him to stand trial at the Assizes, and to keep the peace.

A few months later, in March 1830, James Deyell went to magistrates Smith and Williams to complain that three of John Brown's employees had beat him with a club in the streets of Port Hope. Although Brown appears not to have participated directly in the attack, the identification of the three accused as "employees of John Brown" implies that he may have been involved.

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57 Brown had been accused of assault at least three times before. At the April 1826 Quarter Sessions he was fined 20s for assaulting James MacDavid, and in May 1827 labourer Philip Fyke complained that Brown had assaulted him, but this case appears not to have proceeded to trial. In 1829 Brown was tried for assault with intent to murder after attempting to stab his clerk, Edmund Law, with a knife. The jury found him guilty of assault only and fined him 10 shillings. This incident rankled in the bosoms of Brown's opponents who raised it several years later when complaining about Brown's behaviour. Information about these cases appears in AO, RG22, ser. 29, Cobourg Quarter Sessions Minute Books, April. 1826; ser. 31, Case Files, Box 6; ser. 32, Filings, Box 3, envs. 1, 2 and 5; ser. 134, Assizes Minute Books, 1829; and Sundries, Memorial of Port Hope Inhabitants to Colborne, 16 Apr. 1832.

58 Deposition of David Smart, 19 Oct. 1829, Sundries 65321-2; Quarter Sessions Filings, Box 3, env. 8. There is no indication that a trial actually took place.
have been indirectly involved or at least held responsible in some way. One of the men pleaded guilty and was fined £1; the other two were acquitted.  

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Relations between the two groups took a decided turn for the worse in 1832. In April Alexander Davidson, who worked for David Smart, lodged a complaint against Brown. He said that one of Brown’s employees had attacked his brother in the street a few days previously and “Whatever kind of weapon was used, it went through his hat, and wounded him in the back part of his head” so forcefully “that the blow was sufficient to have fractured his skull.” Davidson was convinced that Brown had instigated the attack. A few minutes before, Brown had been talking to Samuel Davidson “respecting the Methodists, in which there was a difference of opinion, and when their interview ended, he took my brother by the hand and told him to take care of himself, anticipating what was almost immediately attempted.” The Davidsons were never able to prove that Brown had instigated the attack, and he was not charged with any offence as a result.  

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The relationship between John Tucker Williams and Richard Bullock became severely strained in early May following a court of petty sessions at which the two, along with Brown and Smart, had tried a man charged with refusing to perform statute labour. “I was not only insulted in the Court by Mr. Bullock for giving my conscientious judgment in that case,” wrote Williams, “but on returning peaceably home today was followed by Mr. Bullock and most grossly insulted and abused, and he insisted on fighting me.” Bullock must have challenged Williams to a duel. A few days later Williams reported: “Mr. Bullock

59 Case Files, Box 9.

60 Alexander Davidson to Edward McMahon, 2 Apr. 1832, Sundries, 65308-10; another copy appears in Quarter Sessions Miscellaneous Records, env. 3.
finding the most insulting language and opprobrious epithets could not induce me to violate the Laws, has now exhibited Placards in every direction subscribed with his name denouncing me as a Poltroon.” Williams was outraged, but managed to restrain himself: “time, with me has shed a dim lustre over these acts of violence — reflection has taught me to fear God rather than Man, that the Laws of Honor (so called) are in direct opposition to the Human and Divine Law, and that I might not appeal to them.” At the July Quarter Sessions Richard Bullock was bound over to keep the peace in the considerable sum of £200. John Brown and sheriff Henry Ruttan were his sureties.61 During the same week as the Bullock/Williams affair, David Smart reported that John Brown had assaulted him as he was returning from the court house. The two incidents were likely related.62

A few months later, John Brown complained that David Smart and a local merchant named John Crawford, along with some other men, had threatened the workmen on the wharf several times, and had also threatened to damage the Harbour Company’s property. In one incident described by Brown, the construction site had been secured for the night when David Smart, John Crawford and a group of other men approached by water and loosened the boom protecting the site to get inside, against Brown’s orders. Once they had achieved their goal and got their boat inside the boom, somebody on board fired a pistol “as if in triumph.” According to Brown, some of the workmen were afraid to work on the wharf for

61 Williams to Colborne, 4 May 1832; Sundries, 65122-3; same to same, 8 May 1832, 66092-3; Quarter Sessions Filings, 13 July 1832. On the significance of “posting,” see Cecilia Morgan, “‘In Search of the Phantom Misnamed Honour’: Duelling in Upper Canada,” Canadian Historical Review (Dec. 1995): 550-1.

62 Smart to Colborne, 8 May 1832; Sundries, 65324-5.
fear that the men would come after them with guns. Smart and Crawford were bound over for trial at the Assizes, but there is no further reference to this case in the court records.63

The following month, the wharf crew were given a half holiday on a Saturday, having worked three months straight on the construction. In celebration of their half-day off, they marched through the village in procession, “here and there passing salute to their friends, and occasionally eliciting some marks of disapprobation towards those who were attached to an opposite party.” Opposite Mr. Brown’s store, somebody tried to take away their flag, which led to “quarrel and tumult.” In the melee, John Crawford suffered broken ribs and a broken collarbone. He claimed that “riotous persons” had assembled, armed with guns and axes, in front of his store and had thrown stones at him. Crawford named fourteen men, including John Brown who, he said, shouted and clapped encouragement from his verandah on the opposite side of the street. Again the alleged perpetrator, in this case Brown, was bound over for trial at the Assizes, and again, there is no record that a trial took place.64

Undoubtedly the two groups in Port Hope continued to disagree and engage in the occasional affray, but they disappear from the court records until their sudden re-emergence early in 1836 when the town’s annual meeting deteriorated into a riot, during which the Exchange Coffee House was badly damaged. Earlier, John Brown had been removed as Chairman of the meeting due to fraudulent balloting. John Brown convicted John Tucker

63 Deposition of John Brown, 8 July 1832, Quarter Sessions Filings; Assizes Minute Books, 1832, 1833.

64 Cobourg Star, 29 Aug. 1832, 5 Sept. 1832; L. Soper to William Rowan, 8 Oct. 1832; Sundries, 67581-2.
Williams and William Kingsmill (another magistrate) summarily of aiding and abetting a riot, and fined them each £1/5 to be paid to Norman Strong, the proprietor of the damaged establishment. They immediately appealed to Quarter Sessions, as did the riot’s ringleader, whom Brown had fined £5.\(^{65}\)

In November 1836 a young clerk of Crawford’s was hit on the head from behind as he examined a whiskey shipment at the wharf. He died of his injuries during the night. Rumours were rife that John Brown himself was either directly or indirectly involved in this attack. An employee of Brown’s and perhaps even a relation, Robert Brown, stood trial for murder at the 1837 Assizes. After hearing the testimony of fifteen crown and five defence witnesses, the jury sat in deliberation for a week, after which its members returned to court and indicated that they had been unable to reach agreement on a verdict. The court discharged that jury and sent Robert Brown back to gaol to await trial at the subsequent Assizes. The second trial resulted in acquittal, allegedly because members of a “secret society,” presumably Masons, had pressured the jury.\(^{66}\) John Brown’s role in this incident remains unclear but he was never prosecuted. Whoever was responsible for O’Neill’s death was never convicted of the offence.

\(^{65}\)Quarter Sessions Minutes are incomplete after 1833 and details of these events appear in the Case Files. Brown’s removal as Chair is referred to in AO, RG22, ser. 387, Cobourg Quarter Sessions Township Officers, Box 1, File 1836(1); I am grateful to Howard Baker for bringing this reference to my attention. Brown was able to try Williams and Kingsmill summarily because of the legislation passed in 1834 that enabled magistrates to try some petty offences without a jury (the Petty Trespass Act discussed in chapter 3 above; 3 Wm. 4, c. 4).

\(^{66}\)Cobourg Star, 30 Nov. 1836; Reeve, History of Hope Township, 142; Assizes Minute Books; Craick, Port Hope Historical Sketches, 56-7.
The events described above reveal deep fractures in the local elite in Port Hope, where two identifiable groups vied for position or influence, sometimes resorting to violence in order to accomplish their goals. Although magistrate-businessmen led the two factions, a number of other men were involved, both employees of the leaders and others who dwelt in the village. Several areas of tension overlapped to engender uneasiness and fear of unrest in the town, which people blamed on the characters of individuals and on political, business and religious tensions.

Brown’s opponents attributed the problems in Port Hope to one cause -- Brown’s character and behaviour. They accused Brown of being drunk on the bench, using obscene language, insulting peaceable persons in the streets, threatening the lives of loyal subjects, and “laughing at the principles of truth, justice and honour.” They reminded officials that Brown had been charged with several crimes, “not excepting some of the greatest terpitude.”

Alexander Davidson, whose brother Samuel had been attacked viciously in the street, wrote to complain that “the general tenor of Mr. Brown’s conduct is diametrically opposite to his duty as a Commissioner of the Peace, and would be most disgraceful even in a private individual.” Because no one had been able to check Brown’s aggression, he “is now more boldly and openly profane, than in times past....” According to Williams, since Brown’s appointment to the bench, “this village has been in a constant state of tumult alarm and excitement....” However, problems had escalated with the appointment of Bullock, “a

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67 Memorial to Colborne from the inhabitants of Port Hope, 16 Apr. 1832; Sundries, 65083-4.

68 Davidson to McMahon, 2 Apr. 1832; Sundries, 65309-10.

69 Smith to Colborne, 5 May 1832; Sundries, 65316-7.
Man of most ungovernable temper, urging others in to a violation of the Laws of God and Man. Brown's opponents also accused him of electoral fraud, not only at the township meeting of 1836 that resulted in the damage to the Exchange Coffee House, but also after the town's first municipal election, in the course of which Brown was elected to the Police Board. It was noted that more votes had been cast than there were eligible voters in the ward in which he ran, and that election was contested. His opponents also stated that Brown had won election to the House of Assembly "more by art and cunning than by... voluntary support on the part of his Electors."71

When asked to account for the complaints against him, Brown naturally blamed the characters of his opponents who, in an unmanly fashion, held grudges against him for past differences. Brown said that David Smart:

is one of my most implacable enemies, originating in a quarrel between him & me about four or five years ago, wherein I was induced to threaten to horsewhip him for having spoken most insultingly of me...and instead of noticing it in any gentlemanly manner, he seems to have suffered it to rankle in his bosom ever since.72

Alexander Davidson had once worked for Brown, who had fired him, after which he went to work for David Smart. Brown believed that Davidson also held a grudge against him, and that two of his most implacable enemies had thereby united to conspire against him.73

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70Williams to Colborne, 5 May 1832; Sundries, 65122-3.

71Petition of L. Soper and others to Viscount Goderich, Colonial Secretary, 28 Jan. 1833, Quarter Sessions Miscellaneous Records, env. 3.

72Brown to McMahon, 21 May 1832; Sundries, 65305-7.

73Brown to McMahon, 15 Apr. 1832; Sundries, 65305-7. According to Brown, Alexander Davidson used David Smart's horse to travel around and obtain signatures on a petition against him. He said that Davidson also wrote letters to the newspapers denouncing
Brown referred to political tensions between him and the others, although he did not explain in detail. He insisted that Davidson's action against him for his alleged involvement in the attack on Samuel Davidson "was at the instigation of some of the other Magistrates as a party business." He believed the group that opposed him was motivated by "political as well as other causes." Brown wrote of Smart that "he and a few others in this village inimical to my interests, have coalesced [sic] with my political adversaries and are now seeking my degradation." He attributed the hostility towards him to rivalry in trade and political excitement, and blamed his occasional lapses in judgment on extreme provocation: "if I have not at all times been able to control my feelings as good policy would dictate, it is not to be wondered at."

In Brown's mind, political and business factors were intertwined. Brown and Crawford ran rival enterprises right across the street from each other, and some men who worked for them participated fully in this ongoing competition. Contradicting Brown's enemies, "other respectable persons asserted that he had been persecuted by an interested party and that his enterprize as a merchant and the improvements at Port Hope to which he has effected had occasion[ed] the disputes." Brown's leadership in the wharf improvement

Brown, signing them "Nemo"; same to same, 21 May 1832; Sundries, 65305-7.

Davidson to McMahon, 17 Apr. 1832; Sundries, 64895-6.

Brown to McMahon, 21 May 1832; Sundries, 65305-7.

Brown to Rowan, 16 Apr. 1833; Sundries, 70603-6.

Rowan to Soper, 26 Feb. 1833, Quarter Sessions Miscellaneous Records, env. 3.
project was a subject of great local controversy, the reason for which is not entirely clear, but competing claims to a piece of property were apparently responsible.\footnote{In a civil case tried at the 1832 Assizes, the Port Hope Harbour Company sued David Smart for trespass. The company claimed control over a section of beach which Smart claimed to own and on which he had built a storehouse. After examining the Company’s charter, the Judge “ruled clearly in favor of the defendant, on the ground that the property, until required and legally purchased by the company, neither of which appeared in evidence, must be considered in the hands of the Defendant.” Cobourg Star, 10 Oct. 1832. A map of the harbour with improvements planned in 1846 shows the company’s property boundaries at that date, and that J.D. Smith and J.T. Williams owned adjoining properties. By that time Smart must have sold his lot. See R. Louis Gentilcore and C. Grant Head, \textit{Ontario’s History in Maps} (Toronto: University of Toronto Press, 1984), Map 7.10.}

Religious conflict apparently contributed to the tensions in Port Hope as well. Alexander Davidson believed that a discussion about Methodists had precipitated the attack on his brother. More than a tinge of Orange can be detected in the form of the harbour workers’ procession preceding their injury to Crawford. Brown and Bullock were active members of the Orange Order, well known to have exacerbated sectarian violence in the colony. Anti-Irish sentiment appears in the allegation that Brown had manipulated the Irish voters who were his principal electoral supporters.\footnote{Soper to Goderich, 28 Jan. 1833, Quarter Sessions Miscellaneous Records, env. 3.}

Of even greater interest than the causes of unrest in Port Hope is the public reaction to it. The town’s inhabitants took a variety of actions to try to curb what they considered excesses of violence. Individuals, both magistrates and non-magistrates, wrote letters of complaint to the Lieutenant Governor’s office, seeking an official inquiry into Brown’s behaviour. In April and in September 1832, townsfolk held public meetings for the purpose of passing resolutions condemning the violence and suggesting ways to stop it. They circulated at least two petitions and sent them to the Lieutenant Governor. When the
townsmen thought that officials were ignoring their complaints, they appealed directly to the Colonial Secretary in London. Some victims of violence put their complaints before the courts.

Not only the forms by which people registered their complaints, but the statements that they made, are noteworthy. A recurring theme was the incompatibility of violent behaviour with the exercise of legitimate authority. A petition signed by 32 men stated that they “have ever been accustomed to consider the office of Magistrate as being one of the utmost importance, requiring in those that fill it not only principles of uprightness but dignity and morality of conduct and that they should be a terror to evil doers and not those that do well.” His detractors made it clear that they thought that Brown’s behaviour led to the opposite result; he was more a terror to the law-abiding segment of the population, while encouraging troublemakers to ever greater atrocities. His conduct, they wrote, was “directly the reverse of what he ought to evince in his official character.”

Some Port Hope inhabitants felt so threatened by the lawlessness of some of the town’s legal officials that they began to carry weapons when outside after dark. According to John Tucker Williams, many in the town “conceive our properties and lives in such danger, that we are obliged to carry arms to resist aggression.” David Smart warned of “the alarming state of Society in this vicinity occasioned, I apprehend, by violent men intrusted with Authority.” According to Smart, “riots and tumults” had occasionally taken place in Port Hope for years, “but of late these disgraceful scenes, have assumed a more formidable

80 Memorial of the inhabitants of Port Hope to Colborne, 16 Apr. 1832; Sundries, 65083-4.
shape and I fear are approaching an awful crisis.” An implicit threat of revolt pervades these accounts.81

To add to the sense of impending disaster, the magistrates who claimed to have been victimized by Brown threatened to refuse to act as magistrates unless he was removed from the district bench, in effect leaving their neighbours at the mercy of Brown and Bullock. John David Smith asked the Lieutenant Governor to “consider the impropriety of continuing Mr. Brown in the Commission of the Peace as I find it impossible any longer to officiate with him in the capacity of a Magistrate.” Williams claimed he could no longer “exercise the functions entrusted to me,” and asked the Lieutenant Governor to “permit me to resign all...employment until happier times may arise.” Smart requested that he be allowed to “relinquish all office under Government until a more sane state of things exist,” it being “impossible for a person of sedate demeanour and respectable behaviour to be associated in the Commission of the Peace with men of such turbulent passions.”82

Brown’s opponents presented his behaviour as having broader repercussions beyond the conflicts of Port Hope. In fact, they intimated that Brown’s conduct, and his continuance on the district bench, undermined the authority of the entire regime. According to Alexander Davidson, “he is a disgrace to any country, to any cause, office, or employment.” He went on to emphasize that “I am not personally acquainted with any greater grievance in this

81Williams to Colborne, 5 May 1832; Sundries, 65122-3; Smart to Colborne, 8 May 1832; Sundries; 65324-5.

82Smith to Colborne, 23 Apr. 1832; Sundries, 65316-7; Williams to Colborne, 5 May 1832; Sundries, 65122-3; Smart to Colborne, 8 May 1832; Sundries, 65324-5. These threats were apparently empty; all three continued to act as magistrates after writing to the Lieutenant Governor asking to resign.
Province than that of John Brown being in the Commission of the Peace.” The April petition warned that Brown’s conduct was “calculated to bring the administration of justice into utmost contempt.”

Those present at a “numerously and respectably attended” public meeting in September 1832 passed a series of resolutions which threatened further action if complaints remained unresolved. The first resolution, that upon which the rest hinged, read:

That it is the privilege of every person who obeys the laws of the Country in which he has fixed his residence and who maintains his allegiance to the Sovereign of that Country, to be in return protected both in his life and property and that so far as the Sovereign or his representative suffers the rights of any subject to be wantonly infringed or violated [he] renders nugatory his claims to the allegiance of that subject.  

This is a scarcely veiled threat. If the Sovereign or his representatives (in this case the Lieutenant Governor and the Justices of the Peace) infringe upon or violate the rights of any subject, that subject has no obligation to continued allegiance. What follows makes it clear that many Port Hope inhabitants thought that the line had been crossed.

The second resolution stated that the inhabitants of the area, being “good, true, loyal and law-abiding,” “consequently have a right to an immunity from fear of aggression of any kind and from molestation or interruption in the pursuit of their respective avocations.” The third referred to the “outrage” at Port Hope, the disturbance in which Crawford had been injured, in which “the lives of peaceable and unoffending subjects...were exposed to

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83Davidson to McMahon, 10 May 1832; Sundries, 65327-8.

84Report of a meeting at Port Hope, 29 Sept. 1833, L. Soper Chairman; Sundries, 57584-6. The following quotations are also from this document.
imminent danger,” and “loudly calls for executive interference.” It goes on to implicate John Brown as the instigator of that and other outrages.

Resolution four directly concerned Brown:

That this individual is improperly vested with authority since his general conduct has a most particular tendency to bring the Magisterial Office into disrepute[,] to disturb the peace and harmony of society[,] to prevent the improvement of Port Hope[,] to alienate the minds of good and loyal persons from attachment, to this their native or adopted Country and to inspire contempt or its administration.

In other words, Brown’s conduct was undermining the legitimacy not only of the district magistracy, but of the entire regime.

When they got no official response to their resolutions, Brown’s opponents, weary of the Lieutenant-Governor’s foot-dragging, decided to go over his head and appealed directly to the Colonial Secretary in London. They complained not only of Brown, but of colonial officials as well, whom they accused of acting in ways which did not further the interests of law and order in the colony. The authors of this letter accused Brown of electoral irregularities, charging that he had secured votes by contriving to make the freeholders in the back townships indebted to his business. They went on that Brown had bragged about his influence, both locally and amongst higher officials, saying that if voting by ballot was accepted “he could return a negro for the county of Durham,” and “that no law could be obtained against him from the present Attorney General,” Henry John Boulton.85

Brown’s detractors then complained that the Lieutenant Governor had ignored their concerns, seeming “averse” to investigating matters. They suspected that the Attorney

85 According to Paul Romney, “No one did more than John Beverley Robinson and Henry John Boulton to destroy public confidence in the integrity of the government and the impartiality of the administration of justice.” See Mr. Attorney, 10.
General, "who is very unpopular in the province and always a partizan of Mr. Brown," was behind official inaction. They concluded: "Not only Mr. Brown's conduct but the manner in which the Provincial authorities...have treated those who felt themselves aggrieved, has certainly had a very particular tendency to create dissatisfaction in the minds of his Majesty's loyal subjects in this District." 86

Indeed, the colonial administration appears to have been reluctant to take action against Brown, although the complaints were not entirely ignored. Upon first receiving John David Smith's complaint about Brown, the Lieutenant Governor's reaction was to seek advice from Chief Justice John Beverley Robinson, who advised that no steps should be taken against Brown "without first giving him an opportunity to vindicate himself.”

Because the charges were indefinite and related primarily to Brown's character, Robinson recommended that Smith's permission should be obtained to use his letter for official purposes, implying that a copy should be sent to Brown with a request for an explanation. 87

In other words, the administration should first try to get the other side of the story, a course which seems to have been followed consistently in the Brown case, but hardly likely to smooth over local tensions.

The Lieutenant Governor chose not to interfere in the charge that Brown had been responsible for the attack on Alexander Davidson, but asked the Chairman of Quarter Sessions to investigate. Chairman William Falkner reported: "I have consulted the principal

86 Soper to Goderich, 28 Jan. 1833, Quarter Sessions Miscellaneous Records, env. 3.
87 John Beverley Robinson, note to Colborne, 26 Apr. 1832; Sundries, 65015-6.
acting Magistrates of my neighbourhood and am requested to say that there is nothing yet known to them directly implicating Mr. Brown in the Assault.” He continued: “Affidavits have been sworn to me by Mr. Brown and others in full contradiction to the assertions and inferences contained in Mr. Davidson’s Letter.” Falkner said the magistrates could raise the matter at Quarter Sessions if the Lieutenant Governor favoured a full investigation.

“Otherwise the usual remedy is open to the Complainant by a regular application to a Court of Justice.”

The Lieutenant Governor referred the entire matter of Brown’s conduct to the district magistrates for investigation in February 1833. Although Brown had been accused of “the most flagrant crimes,” the letter continued that other respectable persons had contradicted the assertions. The Lieutenant Governor expressed confidence that the complainants would “see the difficulty of his appointing commissioners to investigate every local dispute in which the conduct of a Magistrate is impugned and that you will perceive also the embarrassment which might be created by removing a magistrate unless a strong case had been proved against him.”

However, the Lieutenant Governor and his officials apparently decided that events in Port Hope might improve if Brown and Bullock were separated. They seem to have assigned Bullock a position which required his removal to Cobourg, although what position

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88 Cobourg, the district’s judicial centre, at which Tories were dominant.

89 Falkner to McMahon, 8 May 1832, Sundries 65137-8.

90 Rowan to Soper, 26 Feb. 1833, Quarter Sessions Miscellaneous Records, env. 3.
that was is not entirely clear.\textsuperscript{91} Less than a year later, Bullock was appointed Sheriff of the newly-formed Prince Edward District, which moved him even farther away from Brown.

In May 1836, John Brown was the subject of discussion at a meeting of the Executive Council. Complaints about his behaviour were considered, and the members recommended that unless Brown could account for his behaviour in a convincing manner, his name should be omitted from the next Commission of the Peace for the district.\textsuperscript{92} However, when the new Commission appeared in 1837, Brown's name was on it. The inhabitants of Port Hope were stuck with him until he died in 1842.

The Lieutenant Governor was placed in a more difficult position than events described here may imply. John Brown did have considerable local support throughout these years. Indeed, he sat as a Member of the House of Assembly for the County of Durham from 1830 to 1836. He was elected to the first Port Hope Board of Police after the town's incorporation in 1834, although his opponents contested his election, alleging electoral fraud. After the riot at the town meeting in 1836, Brown organized a public meeting at which resolutions similar to those which had been passed against him a few years earlier were passed against Williams and Kingsmill.\textsuperscript{93} The workers on the wharf and those who worked for him in his businesses seem to have supported Brown and engaged directly in acts of violence arising from Brown's rivalry with Smart and Crawford.

\textsuperscript{91}In a letter to Rowan dated 3 Apr. 1833, Brown expresses regret that the Lieutenant Governor has decided to move Bullock to Cobourg, and asks him to reconsider; Sundries, 70396-7.

\textsuperscript{92}NAC, RG1, Executive Council Records, 2 May 1836.

\textsuperscript{93}Brown to John Joseph, 3 Feb. 1836; Sundries, 88213.
It seems rather paradoxical that the Port Hope reformers expended so much energy urging officials to interfere in local affairs. However, they seem to have been taking advantage of potential unrest in the town to serve their own ends, using discourse about the law and about their expectations of legal officials to legitimize their growing opposition to the regime, and to solidify their position vis-à-vis that of Brown. While they argued that Brown’s behaviour undermined the legitimacy of the law and its administration, which may indeed have been the case among segments of the town’s population, Brown retained the support of many inhabitants.

Although events in Port Hope undermined the legitimacy of the judicial and political system in the eyes of some of the town’s inhabitants, it is possible that the existence of two factions of active magistrates may have worked not so much to undermined legitimacy, but to strengthen it. Brown, Bullock, Smith, Williams and Smart were all active magistrates during the early to mid-1830s. Individuals who sought the services of a magistrate at Port Hope were not faced with a monolithic bench, on which sat men of precisely the same mind set. They had a choice between men of different views, attitudes and demeanours. Although this situation contributed to a complex fabric of discord in some ways, the presence of an active group of anti-Tory magistrates may have prevented many townspeople from utter alienation from a regime they essentially opposed.

**Popular Resistance to Legal Authorities**

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94A somewhat different version of this discussion appears in “Violence, Law, and Community in Rural Upper Canada,” 367-72.
Historians of Upper Canadian society and politics have tended to emphasize the essentially undemocratic nature of both society and government in the colony, and these criticisms extend to the magistracy. J.K. Johnson has written that magistrates were “totally unrepresentative, owing not the slightest responsibility to the people whose affairs they administered.” To Read and Stagg “the voice of the common man was muted indeed.”

Two local historians echo this concern when they point to an evident weakness in the system being that “the Magistrate received a life appointment to office and this removed from the local inhabitants any direct control of his performance.”

But historians of Upper Canada and of other British colonies have also emphasized that the cultural baggage which settlers brought with them to their new homes was a belief in the rule of law. Moreover, attachment to the rule of law “was not confined to the middle and upper classes;” concepts of British justice and liberty were “deeply enshrined in popular culture.”

Historians have tended to use evidence critical of magistrates to suggest that justices used their powers arbitrarily. For example, Johnson says: “That the powers of magistrates were real is attested to by the number of times they were accused of exceeding

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95Johnson, Becoming Prominent, 64-6; Read and Stagg, Rebellions, xxii. These historians, however, should be applauded for recognizing the importance of magistrates, who are barely mentioned in most histories of the colony.

96Schmid and Rutherford, Out of the Mists, 249-50.

97For example, in The Rule of Law in a Penal Colony, David Neal argues that settlers in New South Wales used the rule of law to effect the remarkable shift from a penal colony to a free society.

98Marquis, “Doing Justice to ‘British Justice,’” 45, 60. See also the work of Paul Romney, particularly Mr. Attorney, and “From the Types Riot to the Rebellion.”
or abusing them. But the fact that people complained about them shifts the emphasis somewhat away from the activities of magistrates themselves and more toward the people who did the complaining. Johnson puts his finger on an important point -- that magistrates could not simply do what they liked. They were bound by law and by popular expectation. When magistrates behaved in ways that ordinary people considered illegitimate, those people often fought back and they used a variety of mechanisms to do so, as the Port Hope example demonstrates. The ways in which people could register a complaint about the activities of a magistrate, or about the law more generally, included lawsuits, appeals, circumventing or undermining the authority of those with whom they disagreed, complaining and petitioning higher officials, and malicious rumour, physical intimidation or outright violence.

English historians have pointed to a weapon available to people battling the forces of state order: lawsuits undertaken against officials in retaliation for their actions. As E.P. Thompson states: "the ruled -- if they could find a purse and a lawyer -- would actually fight for their rights by means of law." This willingness to use the law in this way was not unique to Britain. David Neal writes about New South Wales settlers of a similar period: "While prepared to mimic, mock and break the law, they also used it extensively against

99 Becoming Prominent, 81.


101 Whigs and Hunters, 261.
their masters in civil litigation.”102 Upper Canadian officials were subject to this type of hazard as well.103 In 1828 magistrate and sheriff Henry Ruttan was charged with trespass on the case, and the following year John Brown was charged with trespass and assault, both actions arising from their actions as magistrates. Two Newcastle District magistrates, Joseph A. Keeler and Joel Merriman, were charged with extortion in a case that was sent to the Assizes.104 A magistrate from Brock township complained about a conspiracy against him and his fellow magistrates: “subscriptions have been entered into for the Purpose of carrying on grievous Prosecutions against us.”105 One Newcastle District magistrate resigned after being charged with wrongful imprisonment. Francis B. Spilsbury wrote to Lieutenant Governor Maitland: “Your Excellency must be well aware that few of us are Lawyers and have seen it in others, that we lay under the lash of every pettifogging Lawyer in the Country without any protection...”106

102 The Rule of Law in a Penal Colony, 24, 75. He notes also that commentators were surprised at the amount of litigation in the colony.

103 One such case from the Western District provided the focus for my article “Violence, Law, and Community in Rural Upper Canada.”

104 Quarter Sessions Filings, 1828 and 1829. These cases did not appear in the minute books so they may have been dropped or tried elsewhere. Still, their initiation must have been bothersome to those charged and they still represent someone’s attempt to challenge their authority.

105 Matthew Cowan to Francis Bond Head, 21 June 1836; Sundries, 91465-7. Cowan wrote, he said, to acquaint the Lieutenant Governor with the difficulties that Magistrates were labouring under in administering the laws in that part of the country. Cowan was from Brock township, located just west of the Newcastle District.

106 Spilsbury to Maitland, 5 June 1827; Sundries, 45859-61. Spilsbury concluded: “I cannot in justice to my young and numerous family hold a situation that at best is a continual expense and loss of time, I must therefore beg of your Excellency to be pleased to dispense with my services as a Magistrate.”
That the prosecution of magistrates was perceived to be a problem is evident in the passing of legislation in 1832 “to afford such Justices reasonable protection in the discharge of their duty.”\(^{107}\) Apparently it had become common practice to sue magistrates who had convicted summarily when the conviction was overturned on appeal. The Act explained that in cases of summary conviction magistrates may, “by some irregularity or defect in the form of their proceedings, render themselves liable to actions of trespass, when there was no disposition on their part to oppress the party, and where the guilt of the defendant may have been manifest.” The Act said that it was “reasonable to protect Justices wherever it shall appear that their proceedings have been grounded upon good causes, and where they have acted without malice.” The amount of damages a plaintiff could collect in a case where a conviction had been subsequently overturned could not exceed one shilling, nor could costs be recovered. Unless it could be shown that the magistrate acted maliciously or without “reasonable or probable cause,” there was little point in pursuing a case against a magistrate.\(^{108}\)

Constables also could find themselves in difficulty arising from their behaviour in the course of carrying out their duties. While it is not possible to quantify the number of cases against constables, it is nevertheless clear that they did end up in court charged with criminal offences. A presentment was found against a constable at the January 1818 Quarter Sessions for “taking leather the property of John Randall without legal authority.” Constable Samuel Potter was fined 25 shillings upon his conviction for extortion at Quarter

\(^{107}\) Wm. IV, c. 2. The statute also provided for the facilitation of summary proceedings before justices of the peace.

\(^{108}\) This statute was summarized in Keele, *Provincial Justice*. 
Sessions; he had "got 11s6d from the prosecutor by pretending to be a constable executing a process issuing out of the Courts of Request." A number of constables were charged, and on several occasions convicted, of assault. Constable Dennis Riordan regularly showed up in Quarter Sessions records, sometimes as prosecutor but often as a defendant in assault trials.

It was also possible to circumvent or undermine the authority of magistrates or other judicial officials by exercising group action. If members of a community felt strongly that a person had been convicted and fined unjustly, they sometimes banded together to help pay the fine. Anne Langton noted in Mar. 1840: "We had a begging petition to-day...this was on the levy of a fine with costs for selling whiskey without a licence. Every one seemed disposed to open their purse-strings for, though the man, of course, was wrong, his cases seemed hard, because the fining magistrate is a tavern-keeper." In Port Hope in the 1830s hundreds of local men subscribed small sums to help pay a large damage assessment arising from a case at the civil Assizes. Such assistance usually must have taken on a less formal character; probably family members or friends often loaned or gave money to impecunious loved ones to help pay fines.

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109 Quarter Sessions Minutes; Potter case in Case Files, Box 4.

110 Anne Langton, A Gentlewoman in Upper Canada: The Journals of Anne Langton, ed. H.H. Langton (Toronto: Clarke Irwin, 1950), 122. She concluded: "Law is rather curiously carried on in this irregular country."

111 Sundries, n.d. [1833], 70614-26. The subscribers expressed regret at the result of a recent King's Bench trial at which two prominent citizens (one of them John Brown) were found guilty of libel. About 440 men signed these forms, some of which were printed up, and contributed towards the damages of £212.
Another way of protesting a legal decision and to mitigate its effects on a convicted person was to harbour fugitives. For some months the Moodies had a house guest who was hiding from the sheriff’s officers: “a warrant was out for his apprehension, which he contrived to elude during his sojourn with us.”\textsuperscript{112} Similarly, people hid their property when expecting a visit from a bailiff or constable intending to collect goods for non-payment of fines or costs. John T. Wright hid his horse at Amos Wright’s, fearing that the horse might be seized for non-payment of rent. Lest there be a misunderstanding, Wright’s wife told the constable that she had “taken good care to do away with the goods.”\textsuperscript{113}

The Port Hope case study demonstrated another means of protest — complaint. In the colony, hundreds of people affixed their signatures or marks to petitions complaining about the actions of certain magistrates, or wrote letters of their own complaining about them. J.K. Johnson has noted that personal petitions were extraordinarily prevalent, and that a great many of those who signed them were ordinary people.\textsuperscript{114} According to Greg Marquis, the petition was an important mode of political expression and often stressed the right to agitate.\textsuperscript{115} As was made evident in the Port Hope case study, the language of these petitions and letters reveals the expectations that people had of judicial officials. Moreover, there

\begin{itemize}
  \item \textsuperscript{112}Moodie, \textit{Roughing it in the Bush}, 177-80. Her husband was appointed a sheriff shortly after this incident.
  \item \textsuperscript{113}Returns of Convictions, box 1, env. 6.
  \item \textsuperscript{115}“Doing Justice to ‘British Justice’, 53. In New South Wales too people used petitions to invoke the rule of law against magistrates; Neal, \textit{Rule of Law}, 138.
\end{itemize}
were scarcely veiled threats about the consequences of allowing miscreants to continue unhindered. For example, 114 people, including two magistrates, signed a petition complaining about the actions of two magistrates in the Court of Requests: “in various cases they have refused to hear evidence on the one side where it could have been satisfactorily proved, on account of them being prejudiced against the parties.”116 Petitions from Seymour township complained about the “dissentions” that existed among the magistrates of that township which “injured the interests of the Petitioners, and brought the authority of the Magistrates into contempt...”117

More direct means of registering disapproval, including rumours, threats, and outright violence, also appear in the records. One way to undermine the authority of men who were magistrates was to cast aspersions on their characters and thereby undermine their local influence. The partisan press was only too happy to print scurrilous stories about prominent people.118 Derogatory announcements were sometimes posted in public; John Tucker Williams was outraged to find handbills posted in Port Hope denouncing him as a “mean paltoon.” The Cobourg Star denounced a vicious rumour circulating late in 1831:

>A very wanton, scandalous and malicious publication has been circulated in this place, and we are told other parts of the District, during the past week. It is headed, “Murder will be out,” and proceeds to charge with that fearful crime, under circumstances of unusual atrocity, two respectable settlers in the township of Cavan; whom it mentions by name, and one of whom is a Magistrate in the District.— The murder is stated to have been committed about eight years ago, in that township. We know nothing of the parties

116Quarter Sessions Petitions, box 1, env. 6, n.d.

117Petitions dated 1 July 1841 and 6 July 1841, Upper Canada Sundries, find full refs.

118Romney has pointed out that Mackenzie’s publishing such articles in the Colonial Advocate was a catalyst for the types riot; “From the Types Riot to the Rebellion.”
accused, and are certainly not prepared to say that such an event may not have happened; but the fierce -- the almost demoniacal spirit of vengeance and malignancy, which glows in every line of the paper before us -- together with the fact of its being anonymous, carries conviction to our minds...that it never did....

Legal officials were not immune from more literal forms of attack either. There were at least fifty incidents in which constables or bailiffs were assaulted or threatened in the Newcastle District court records from 1813 to 1840, a considerable number in a predominantly rural district. However, people tended to behave somewhat more civilly towards magistrates, although some did insult them or threaten them when their actions failed to please.

As historians of England and other colonies have pointed out, the exercise of authority was a far from easy task. Upper Canadian historians have tended to assume that it was in fact easy. As David Neal writes about New South Wales, “Effective operation of the rule of law at the local level depended on respect for the magistracy at the local level.” Similarly, in colonial New York “The consent of the community was vital, for without it they were impotent to do their jobs properly.” Greenberg writes that in practice officials were governing with the full consent of the governed before the full development of the democratic idea, and that “if the legitimacy of their power was questioned by the people, there could be no effective law enforcement.” Yet respect for the magistracy depended greatly upon the ways in which magistrates carried out their responsibilities. People by no

**119** Cobourg Star, 22 Nov. 1831.

**120** See Lewthwaite, “Violence, Law, and Community in Rural Upper Canada.”

means accepted the authority of individuals who did not fulfil the popular expectations of magistrates.
Chapter 7

Conclusion

Close analysis of the records of the lower courts reveals a great deal about the ways in which magistrates administered criminal justice in Upper Canada. Moreover, such examination permits inquiry into the subject of the legitimacy of the criminal law. English historian E.P. Thompson has argued that although law was an ideology which served and legitimized class power, "the essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity..." and "rulers could not break those rules or the whole game would be thrown away." Elites therefore had an interest in ensuring that justice was done in order to encourage the widest possible belief in the legitimacy of the system.¹

Relying on records relating to political cases and on reform criticisms of the Upper Canadian regime, historians of the criminal justice system in the colony have tended to emphasize that elites did grossly manipulate the system and that widespread abuses did undermine popular legitimacy of the criminal law and the political system.² Peter Oliver

¹E.P. Thompson, Whigs and Hunters: The Origin of the Black Act (New York: Pantheon Books, 1975), 262-3. In an article which remains influential Douglas Hay pointed to three elements which reinforced legitimacy of the law: majesty, justice, and mercy; "Property, Authority, and the Criminal Law." For Hay, elites manipulated these elements to encourage popular legitimacy of the law, and thus enable them to consolidate their hold on power.

²Romney, “From the Types Riot to the Rebellion;” Mr. Attorney; Fraser, “All the Privileges which Englishmen Possess.” See also Romney and Wright, “State Trials and Security Proceedings in Upper Canada during the War of 1812.” Carol Wilton discusses the use of violence by political elites in “Lawless Law.”
cautions against drawing broad conclusions from these cases of "notorious outrage" and suggests that historians should rather systematically examine Assizes court records, where they would probably find that "ordinary criminal cases were indeed adjudicated honestly and impartially," and that the ways in which Assizes court judges administered the criminal law, with essential integrity and fairness, "could not have been without effect in shaping public and popular attitudes to the machinery of justice."³

Historians of lower courts have tended to focus on a later period and have emphasized the ways in which middle class reformers used those courts to inculcate middle-class values in the labouring poor.⁴ Greg Marquis, however, has suggested that:

Instead of class resistance the lower class engendered, if not mass support, at least a degree of popular legitimacy. The paternalism of justices of the peace, aldermen and police magistrates and the settlement of disputes out of court went a long way in limiting the legal order's coercive impact. Moreover, there is little evidence that the bulk of urban workers and rural dwellers had much sympathy for the brawlers, drunks, vagrants and wife beaters who filled the lower courts.⁵

By examining court business from a broader perspective than that of the social control model, he

is able to draw conclusions about the larger significance of the criminal justice system.

This study examines a group of local leaders and criminal justice administrators who were very much of rather than above their communities. They carried out their duties in the localities in which they owned mills, shops, or businesses; and they were advocates and

³"The Place of the Judiciary in the Historiography of Upper Canada," 449.

⁴Craven, "Law and Ideology: The Toronto Police Court," Weaver, Crimes, Constables and Courts.

⁵"Doing Justice to 'British Justice,'", 50.
often financial supporters of local improvement projects that would benefit everyone in their
neighbourhoods. Their status was not sufficiently elevated that they could expect deference
merely as a matter of course; indeed, deference was a commodity difficult to come by in the
backwoods of Upper Canada. The magistrates performed functions relating to the
administration of criminal justice at the request of the people who came to them for help.
They did not go around looking for business.

The justices of the Newcastle District were a remarkably active group and performed
important roles in criminal justice administration. There is little evidence to suggest that
they were illiterate or ignorant about their responsibilities, despite their not being trained in
law. They conducted pre-trial hearings and summary trials in ways which suggest that they
took pains to get at the root of disputes and took into account the defendant's position and
evidence. They asked questions aimed at getting to the heart of disputes in order to
determine relative culpability, provocation, and other relevant factors. Individual
magistrates, even in rural backwoods townships, were called upon to conduct a wide variety
of tasks and kinds of business, and generally they appear to have conducted their
responsibilities within the limits of their authority and to the satisfaction of their neighbours.

The system of criminal justice administration in which magistrates played such
crucial roles was sufficiently flexible to allow for local variations. In a township far
removed from the district centre, for example, inhabitants might come to rely on summary
justice, a cheaper and more convenient alternative to pursuing trials at Quarter Sessions.
While some magistrates maintained active participation in the district centre, others avoided
it almost entirely, even some who lived within walking distance of the court at Cobourg.
Despite the considerable authority that magistrates possessed, the system they administered did not so much resemble an enforcement of authority from the top down, but enforcement of codes of behaviour from the bottom up; the role of magistrates was to provide services that people in their neighbourhoods requested. The settlers in the Newcastle District eagerly sought help from the magistrates when they found themselves the victim of an offence. In their roles at the pre-trial and summary stages, magistrates in effect were passive agents who responded to the complaints of others. Criminal justice prosecutions relied upon victims to come forward and make complaints. Moreover, the responsibility of detection rested with the victim and did not formally involve the magistrate in any meaningful way. At Quarter Sessions it was trial juries, as peers of the accused and agents of the community, not the magistrates, who decided whether individual defendants were to be convicted or acquitted.

Evidence also suggests that magistrates tried to carry out their criminal justice responsibilities in ways which fostered reconciliation rather than exacerbation of tensions between people involved in disputes. Magistrates encouraged prosecutors and defendants to come to an agreement and settle their disputes before they proceeded to trial, which would minimize hostility between them. They tried summarily offences which could have been sent to higher tribunals, to spare the participants further expence and trouble. They down-charged offences for the same reasons. These factors create the impression that magistrates acted in concert with people in their communities to minimize the local effects of disputes.

This is not to say that the system was entirely without bias. The lower courts were primarily concerned with disputes between men, and yet women did appear occasionally as
both defendants and prosecutors. Although people of all social ranks used the lower courts to settle disputes that arose from acts of violence, there was a growing number of larceny cases at Quarter Sessions in which people with property prosecuted the labouring poor. Non-whites rarely used the criminal justice system as prosecutors, but there were a few examples of native prosecutors in summary cases.

Overall, though, the magistrates of the Newcastle District appear to have negotiated successfully between the “two concepts of order” represented by institutions of the state such as the criminal law and community conceptions of justice. It appears from the workings of the lower courts that the actions of magistrates in criminal justice administration, far from alienating most people from the regime, fostered popular legitimacy for it. Whenever magistrates acted in ways that were considered self-interested or if they manipulated the system for political interests, these activities were not seen as legitimate, and people took a variety of kinds of action to register their disapproval. The fact that they used the language of rights and of law indicates that they viewed the law itself as legitimate.

These findings have broader political implications. It is probable that the relationship between many magistrates and their neighbours went a long way towards legitimizing the authority of a regime against which many Upper Canadians felt deep grievances. Many people, particularly in the countryside, deeply resented aspects of judicial

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administration which appeared to benefit office-holders at the expense of farmers. Some historians have attributed the failure of the rebellion to capture much support as evidence that: "The issues that underlay the rebellion were not in themselves sufficient to cause the turnout or else many more reformers would have joined." A more likely explanation is that magistrates often protected local interests from the incursion of central authorities, and their activities in administering the criminal law helped to legitimize their authority and, by extension, that of a regime from which many had reason to be disaffected. The local magistrates were symbols of political and judicial authority in the townships. But they were not inevitably monolithic reproductions of the Family Compact. As Donald Fyson has written about the Lower Canadian system in which magistrates were appointed by a regime which was not necessarily popular: "[it] should have produced exactly the sort of magistracy that many writers have assumed and then condemned: of low status and little competence, grossly unrepresentative of the predominant culture, dominated by administrative yes-men, and of very little consequence. But [it] did not." Neither did it in the Newcastle District.

Romney eloquently describes some of the injustices perpetrated by colonial justice officials in *Mr. Attorney* and "From the Types Riot to the Rebellion," and points out, quite rightly, that officials violated their own allegedly deeply held views of the rule of law, a point not lost on reformers. S.D. Clark characterizes the Upper Canadian rebellion as a "frontier" uprising in which rural agrarian interests fought against the commercial interests of the towns in *Movements of Political Protest in Canada*.

Read and Stagg, *The Rebellions of 1837*, lvii. They conclude that "the role of Mackenzie and the susceptibility of those of his audience who joined him must be credited with the major role in creating rebels out of average citizens desirous of reform."

### Appendix 1

**Newcastle District Justices of the Peace, 1803-1840**

<table>
<thead>
<tr>
<th>Name</th>
<th>Location, where known</th>
<th>Dates on C.P.</th>
<th>Dates Active</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allan, Thomas</td>
<td>Seymour township</td>
<td>1837-1840</td>
<td>1840</td>
</tr>
<tr>
<td>Baldwin, Robert Sr.</td>
<td>Clarke township</td>
<td>1803-1821</td>
<td>1803-1808</td>
</tr>
<tr>
<td>Balfour, John M.</td>
<td></td>
<td>1823-1829</td>
<td>1826</td>
</tr>
<tr>
<td>Bannister, John William</td>
<td>Rice Lake area</td>
<td>1821-1829</td>
<td>--</td>
</tr>
<tr>
<td>Barnum, Eliakim</td>
<td>Haldimand township</td>
<td>1829-1840</td>
<td>1830-1840</td>
</tr>
<tr>
<td>Benson, Thomas</td>
<td>Port Hope</td>
<td>1837-1840</td>
<td>--</td>
</tr>
<tr>
<td>Bethune, James Gray</td>
<td>Cobourg</td>
<td>1821-1840</td>
<td>1826-1839</td>
</tr>
<tr>
<td>Bird, George</td>
<td>Peterborough</td>
<td>1835-1840</td>
<td>1838-1840</td>
</tr>
<tr>
<td>Birdsall, Richard</td>
<td>Asphodel township</td>
<td>1829-1840</td>
<td>1829-1838</td>
</tr>
<tr>
<td>Black, James</td>
<td>Bowmanville</td>
<td>1823-1829</td>
<td>1826</td>
</tr>
<tr>
<td>Bleeker, John</td>
<td>Murray township</td>
<td>1803-1813</td>
<td>1803-1806</td>
</tr>
<tr>
<td>Boswell, John Crease</td>
<td>Cobourg</td>
<td>1835-1840</td>
<td>1835-1839</td>
</tr>
<tr>
<td>Boswell, Walter*</td>
<td>Cobourg</td>
<td>1821-1835</td>
<td>1821-1839</td>
</tr>
<tr>
<td>Boucher, Robert P.</td>
<td>Seymour township</td>
<td>1835-1840</td>
<td>1835-1839</td>
</tr>
<tr>
<td>Bowen, William</td>
<td>Murray township</td>
<td>1837-1840</td>
<td>1839</td>
</tr>
<tr>
<td>Brown, John</td>
<td>Port Hope</td>
<td>1823-1840</td>
<td>1823-1840</td>
</tr>
<tr>
<td>Browne, Robert</td>
<td>Cobourg</td>
<td>1835-1840</td>
<td>1835-1840</td>
</tr>
<tr>
<td>Buller, Charles G.</td>
<td>Cobourg</td>
<td>1835-1840</td>
<td>1836-1840</td>
</tr>
<tr>
<td>Bullock, Richard</td>
<td>Port Hope and Murray township</td>
<td>1818-1835</td>
<td>1818-1834</td>
</tr>
<tr>
<td>Burk, John</td>
<td>Darlington township</td>
<td>1829-1835</td>
<td>1830</td>
</tr>
<tr>
<td>Burn, John</td>
<td>Port Hope</td>
<td>1813-1823</td>
<td>1814-1823</td>
</tr>
<tr>
<td>Burnham, Asa</td>
<td>Hamilton &amp; Monaghan twps.</td>
<td>1803-1813</td>
<td>1803-1813</td>
</tr>
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*These three were Legislative Councillors and were listed at the beginning of the 1835 and 1837 Commissions of the Peace as honorary magistrates. Nevertheless, they obviously continued to act as magistrates in their localities.*
Appendix 2

Collective Profile of Newcastle District Magistrates

This appendix supplements the collective profile presented in chapter 2, providing more detailed information than appears in the body of the text. The lists of magistrates who fit into particular categories of analysis have generally been left out of chapter 2, and only the overall patterns were discussed therein. For purposes of streamlining the discussion, the particulars have been relegated to this appendix.

Bibliographic Note

The sources from which biographical data have been drawn were not always cited individually in the text. Biographical data on the Newcastle District magistrates was accumulated from a number of secondary sources, including local histories. Should any reader wish to know the source of particular pieces of information, she or he can contact the author, who would be pleased to supply details upon request.


Most useful among secondary sources were: T.W. Poole, A Sketch of the Early Settlement...of Peterborough (Peterborough, Ont.: The Peterborough Review, 1867; reprint 1941); J. Squair, The Township of Darlington and Clarke... (Toronto: University of Toronto Press, 1927); C.P. Mulvany et al., History of the County of Peterborough... (Toronto: C. Blackett Robinson, 1884); E.C. Guillet, Cobourg, 1798-1948 (Oshawa, Ont.: Goodfellow Print, 1948); R. Borg, ed., Peterborough: Land of Shining Waters... (Peterborough, Ont.: City and County of Peterborough, 1967); H.W. Reeve, The History of the Township of Hope (Cobourg, Ont.: The Cobourg Sentinel-Star, 1967); F.N. Pickford, “Two Centuries of Change”: The United Counties of Northumberland and Durham, 1767-1967 (Cobourg, Ont., 1967); R. Fleming, Eldon Connections (1975); H.T. Pammett, Lilies and Shamrocks: A
History of Emily Township... (Emily, Ont.: Emily Township Historical Committee, 1976); Q. Brown, ed., This Green and Pleasant Land: Chronicles of Cavan Township (Millbrook, Ont.: Millbrook and Cavan Historical Society, 1990).


Biographical Details

Occupation/Business Interests

The information contained in these lists should not be regarded as complete, but as representative of general patterns. Details were compiled from the sources listed above.

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Members of Orange Order: Brown, Bullock, Covert, Huston.

Note: S.S. Wilmot is classified as both Anglican and Methodist, because conflicting information exists in the records.
## Appendix 3

### Work Profiles of Newcastle District Justices of the Peace

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1. This figure represents all evidence of activities relating to criminal justice administration in all of the surviving Newcastle District court records.
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  ser. 30. Cobourg Quarter Sessions Minutes (Rough), 1808-1841.
  ser. 31. Cobourg Quarter Sessions Case Files, 1802-1841.
  ser. 32. Cobourg Quarter Sessions Filings, 1803-1841.
  ser. 33. Cobourg Quarter Sessions Orders, 1806-1841.
  ser. 34. Cobourg Quarter Sessions Accounts, 1801-1848.
  ser. 36. Cobourg Quarter Sessions Tavern and Shop Licencing Records, 1803-1841.
  ser. 37. Cobourg Quarter Sessions Petitions, 1808-1841.
  ser. 38. Cobourg Quarter Sessions Convictions by Justices of the Peace, 1834-1841.
  ser. 40. Cobourg Quarter Sessions Praecepts, 1834-1846.
  ser. 41. Cobourg Quarter Sessions Estreats, 1837-1841.
  ser. 42. Cobourg Quarter Sessions Constables Lists, 1809-1841.
  ser. 43. Cobourg Quarter Sessions Gaol Records, 1820-1846.
  ser. 44. Cobourg Quarter Sessions Gaol and Courthouse Building Committee Records, 1807-1836.
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