Progress and Principle: The Legal Thought of Sir John Beverley Robinson

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In recent years, legal scholars have portrayed Sir John Beverly Robinson, Chief Justice of Upper Canada from 1829 to 1862, as a profoundly conservative thinker who believed in ordered and hierarchical society based on traditional Christian and Tory ideals and who therefore declined to shape law in the interest of economic growth. The author questions this interpretation and claims that a careful analysis of Robinson's decision in the areas of property, commercial and transportation law reveals that he was more reeeptive to commercial development than scholars have suggested. Moreover, far from adhering strictly to precedent, The Chief Justice was willing to interpret the law to fit colonial circumstances. After comparing the Chief Justice with certain American contemporaries, the author concludes that Robinson's legal thought is better understood in a continental context.

Sir John Beverly Robinson fut juge en chef du Haut-Canada de 1829 à 1862. Les historiens du droit l'ont décrit comme un penseur profondément conservateur. Selon eux, il adhérait à une vision hiérarchique et ordonnée de la société basée sur des idéaux chrétiens et tory ; il refusait d'adapter le droit dans l'intérêt de la croissance économique. L'auteur conteste cette interprétation et soutient qu'une analyse attentive des décisions de Robinson en matière de droit des biens, de droit commercial et de droit des transports révèle qu'il était plus ouvert au dévelopement commercial que ne le laissent croire les études récentes. De plus, n'adhérant pas strictement aux précédents, le juge en chef interprétait le droit d'une façon qui tenait compte des circonstances de la colonie. Une comparaison du juge en chef avec certains de ses contemporains américains permet de conclure que la pensée juridique de Robinson se comprend mieux dans un contexte continental.

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Synopsis

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Introdnction

Sir John Beverley Robinson was the greatest Canadian jurist of the nineteenth century. Chief Justice of Queen's Bench for the province of Upper Canada from 1829 to 1862, he left a judicial legacy extending through more than thirty volumes of Upper Canada Reports.[1] His decisions in virtually all major areas of jurisprudence did much to define Canadian common law in its formative period. When Robinson took office in 1829, Upper Canada's legal system was still in a primitive state. The first set of official reports (Taylor's) had only commenced six years previous; there was no court of equity and no regularly constituted court of appeal in the modern sense.[2] Upper Canada itself was still little more than a struggling English outpost on the edge of the Canadian wilderness — its capital, York, was a town of hardly three thousand souls.[3] By the time ill-health forced Robinson's retirement in 1862 significant changes had occurred. The legal and judicial structure of the province was well-established, and Upper Canadian judges

[1]The main sources for this paper were Draper's Reports (Draper), Upper Canada Queen's Bench Reports (U.C.Q.B. and U.C.Q.B. (O.S.)),Grant's Chancery Reports (Grant), Practice Reports, Chambers Reports, and Error and Appeal Reports (E & A).

[2]The highest Court of Appeal in the province during this period was the Executive Council, an appointed political body. It was composed of the Attorney-General, senior members of the colonial judiciary, and important political officials.

[3]C.W. Robinson, *Life of Sir John Beverley Robinson* (Toronto: Morang and Co., 1904) at 322.

were known and respected even in Westminister Hall.[4] The colony's population had grown to well over one million[5] and Toronto itself was approaching 50,000.[6] The construction of canals and railways had set the stage for industrialization and the colonies of Canada West (Upper Canada), Canada East (Lower Canada), Nova Scotia, and New Brunswick were just five years short of becoming provinces in a new nation.

Robinson's judicial career was the centerpiece of a remarkable life. Born of Loyalist stock in Lower Canada in 1791, he was educated at York by the high Anglican churchman John Strachan. In 1807, he followed his father Christopher Robinson into the practice of law by commencing his articles with D'Arcy Boulton, the colony's Solicitor General. In 1811 he came under the supervision of the Attorney General, John Macdonell. When the latter was killed resisting American invaders at the battle of Queenston Heights in 1812, the precocious Robinson, barely 21 and not yet a member of any Bar, became acting Attorney-General. At the end of the war he became Solicitor-General of the colony, and, in 1818, Attorney-General — this time officially. After two lengthy sabbaticals in England, he was finally called to the Bar at Lincoln's Inn in 1823.

During his years in the colonial government, Robinson exercised significant and even commanding political power. Elected to the Legislative Assembly for the first time in 1820, Robinson quickly became a dominant member of the so-called "Family Compact", the elite of officials, landowners and merchant-capitalists who in fact ran the colony. Even after becoming Chief Justice of Queen's (then King's) Bench in 1829, Robinson remained President of the Executive Council (roughly equivalent to today's provincial cabinet), and Speaker of the Legislative Council (the colonial upper house). He only resigned from the Executive Council in 1831 because of pressure from the politically unsympathetic provincial Assembly; he retained his position on the Legislative Council, but his political influence there gradually waned as that body became increasingly impotent under responsible government. Robinson nonetheless remained a force to be reckoned with by virtue of his connections at home and abroad. Given his personal prestige and judicial achievements, it was no exaggeration when the *Upper Canada Law Journal* suggested on his death in 1863 that he was "the greatest man that Canada has ever produced."[7]

In light of such a contemporary testimonial, it is unfortunate (not to say somewhat perplexing) that Canadian scholars have largely ignored Ro-

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[4]*Ibid.* at 375ff.

[5]*Ibid.* at 322.

[6]Toronto had passed the 50,000 mark by 1867. See R.C.B. Risk, "The Law and the Economy in Mid-Nineteenth-Century Ontario: A Perspective" (1977) 27 U.T.L.J. 403 at 404.

[7]"The Late Sir John B. Robinson, Baronet" (1863) 9 U.C.L.J. 57 at 66.

binson. Until very recently, the only monograph available on his life was that written by his son Christopher in 1904.[8] The Chief Justice was otherwise avoided by liberal historians more interested in the rise of Canadian democracy than in a man who had dedicated himself to the preservation of tradition and empire. Lawyers likewise paid little attention to their erstwhile hero. D.B. Read, who pleaded before Robinson, devoted a chapter to his old Chief in his 1888 work *Lives of the Judges of Upper Canada*, but apart from this the members of Robinson's own profession were content to be silent.[9] As the Canadian legal community of the late nineteenth and early twentieth centuries became increasingly deferential to imperial precedent and the dictates of classical legal science, Robinson and his colonial age seemed somehow irrelevant. The lack of interest was so complete that one might have thought a curtain had been drawn on a past that was better off forgotten.[10]

In the late 1960s and 1970s, however, nationalist academics began to rediscover Robinson. Their rediscovery was part of a general attempt to resurrect an allegedly distinctive Canadian historical identity within North America by focusing on the supposed "Tory touch" in Canadian culture. According to Canadian disciples of American historian Louis Hartz, this was the surviving ideological manifestation of the Loyalist-conservative social "fragment" cast off from the liberal United States in the years immediately following the American Revolution.[11] Robinson, it was argued, was

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[8]Robinson, *supra*, note 3.

[9]D.B. Read, *The Lives of the Judges of Upper Canada and Ontario* (Toronto: Roswell and Hutchison, 1888).

[10]"The central-Canadian common law community appears to remember relatively little about its own development or the attitudes and values its first century was committed to furthering. Its maturation, especially in the very late nineteenth and early-twentieth centuries, is largely a story of disruption and subsequent dissociation from the past .... The need and desire almost to repress systematically that which was distinctive about nineteenth-century British North American legal culture ... was merely one aspect of a larger shift in outlook which constituted a discontinuity in the organic development of Canadian legal culture." G.B. Baker, "The Reconstruction of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law & Hist. Rev. 219 at 285-287.

[11]The literature from the 1960s and 1970s on "Tory touch" and the Canadian conservative tradition is considerable. See, *e.g.*, K. McRae, "The Structure of Canadian History" in L. Hartz, ed. *The Founding of New Societies* (New York: Harcourt, Brace & World, 1964); G. Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto: McClelland and Stewart, 1965); G. Horowitz, "Conservatism, Liberalism and Socialism in Canada" (1966) 32 Can. J. Eco. & Pol. Sci. 141; S.F. Wise, "Upper Canada and the Conservative Tradition" in Ontario Historical Society, eds, *Profiles of a Province: Studies in the History of Ontario* (Toronto: Ontario Historical Society, 1967); S.F. Wise, "Conservatism and Political Development: The Canadian Case" (1970) 69 South Atlantic Quarterly 226; T. Cook, "The Canadian Conservative Tradition: An Historical Perspective" (1973) 8:4 J. Can. Stud. 31. Ironically, the Tory touch movement began as an attempt to demonstrate the similarities between Canada and the United States. In the early years of the movement, theorists maintained that Tory ideals had been imprinted

the quintessential Canadian Tory, less a believer in individualistic commercial enterprise and colonial economic development than in the creation and perpetuation of a structured and hierarchical Christian society based on duty, order, and deference to authority, all encompassed in the notion of overriding loyalty to the British crown.[12] He sought to make Upper Canada a virtual transcript of the mother country's ancient traditions and mixed constitution, thus sparing the colony from the chaos of American republicanism.

It was within this context of academic nationalism that modern Canadian legal scholars made their first attempts to assess Robinson's judicial contribution. Embracing certain Tory ideals themselves, they projected onto Robinson those "classical" conceptions of law and the judicial enterprise which they associated with the last decades of the nineteenth century. The lawyers thus came to regard the Chief Justice as an historical progenitor (even, perhaps, a legitimator) of a precedent-bound domestic judicial "tradition". Thus, R.C.B. Risk's 1977 characterization:

> Robinson's [political and economic] beliefs were strongly held, but ... they [do not] seem to have influenced his judgements ... . Robinson led the common law courts throughout a long and important period and he was one of the early makers of a tradition that has become dominant among Canadian judges: deference to authority, denial of any significant creative power, and denial of any general attitudes beyond fidelity to statutes and the accumulation of precedent.[13]

Risk's work was at once the starting and finishing-point for Patrick Brode's 1984 biography, *Sir John Beverley Robinson: Bone and Sinew of the Compact*.[14] In light of Risk's discouraging words, it is not surprising that Brode (although a lawyer himself) chose to focus on Robinson's political life as a Tory to the relative exclusion of his judicial career. Brode introduced some interesting evidence concerning Robinson's judicial attitudes (in the areas of commercial and transportation law in particular), but chose in the

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on Anglo-Canadian culture by the Loyalist migrations in the late 18th and early 19th centuries, but they nevertheless emphasized that Canada remained an essentially "liberal" society. As the 1960s progressed and Canadian nationalism grew stronger, however, the movement became preoccupied with stressing historical-ideological differences between the two countries. Thus, while Toryism was just a "touch" for Kenneth McRae in 1964, it became the distinctive characteristic of Canadian culture in George Grant's book in 1965 and Gad Horowitz's famous article in 1966.

[12]See, *e.g.*, T. Cook, "John Beverley Robinson and the Conservative Blueprint for the Upper Canadian Community" (1974) 64 Ont. Hist. 79.

[13]Risk, *supra*, note 6 at 431. In fairness to Risk, it should be said that his own views of Robinson's significance and his place in the Canadian legal tradition have changed since this article was written.

[14]P. Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto: University of Toronto Press, 1984).

end not to depart from the conventional wisdom fostered by Risk. Finally, in 1985, an article by David Howes in the *McGill Law Journal* took Risk's conservative analysis one step further by trying to demonstrate that Robinson's Tory respect for property and authority in fact made his Upper Canada "the converse of Wisconsin" (a reference to the research focus of pioneering American legal historian Willard Hurst).[15] While Robinson's judicial contemporaries in the United States were enthusiastically engaging in what Hurst's followers termed "instrumentalism" (*i.e.* molding established legal rules and precedents to favour economic growth and suit peculiarly American circumstances), Howes contended that the Canadian Chief Justice persisted in restrictive legal thinking and reasoning more consistent with the eighteenth century pre-Revolutionary formalism of the American colonies.[16]

An exhaustive review of Robinson's reported decisions reveals such an assessment of his legal character to be based less on historical fact than on a misconceived marriage between the Tory myth of Canadian history and the ideological precepts of classical legal thought. Instead of a convincing picture of an independently-minded jurist who was praised by his contemporaries for his concern for colonial conditions,[17] his support of commerce,[18] and his opposition to the "triumph ... of technicality over truth,"[19] what has emerged from the recent literature is a caricature of a man "mindlessly aping"[20] English practice and precedent in a colonial backwater cut off from the intellectual current of the nineteenth century legal world.

While not wishing to suggest that Toryism or formalism was absent in early nineteenth century Canada, or that these notions are irrelevant to an understanding of Robinson's thought, it is nevertheless evident that the Tory-formalist thesis has obscured as much about Robinson as it has revealed. In reaching for a distinctively Canadian explanation of Robinson's thought, it has overlooked much of what was most interesting about the Chief Justice, and in the process has artificially divorced him from his broader North American legal context. More importantly, it has hindered

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[15]D. Howes, "Property, God and Nature in the Thought of Sir John Beverley Robinson" (1985) 30 McGill L.J. 365 at 367.

[16]"It could be said that Robinson conceived of the common law in much the same way as an eighteenth-century American judge would, 'as a body of essentially fixed doctrine to be applied in order to achieve a fair result between private litigants in individual cases'. He did not regard common law rules as instruments of social policy, nor did he view himself as effecting social change (or stasis) by applying them." *Ibid.* at 377.

[17]Read, *supra*, note 9 at 136.

[18]*Ibid.*

[19]*Supra*, note 7 at 62.

[20]The phrase is that of D.G. Bell interpreting Risk. D.G. Bell, "The Birth of Canadian Legal History" (1984) 33 U.N.B.L.J. 312 at 318.

the study of an important phenomenon in Canadian legal history: the late nineteenth/early twentieth century transformation of Canadian legal culture from a relatively lively context-sensitive continentalism, to a plodding imperial formalism.[21] In a phrase, the Tory-formalist conceptualization of the Chief Justice has done much to turn Canadian legal history on its head.

The purpose of this article is to help right the enterprise. This can be done by demonstrating the inaccuracies in the current understanding of Robinson, and by offering an interpretation of his legal thought which places it in the context of contemporary North American legal culture. To accomplish this, the article has been divided into five sections. Section I examines Robinson's views on the sources of law, the functions of courts, and the role of legislatures in the making and changing of law. Section II explores Robinson's thinking in the substantive area of property law. Section III deals with Robinson and the law of commerce, that is, the law relating to contract, bills and notes, franchises, corporations, and debtor-creditor relations. Section IV reviews Robinson's decisions on the law of transportation — common carriers, canals, road companies and railways. Finally, Section V reconsiders the allegation that Upper Canada was the legal "converse of Wisconsin", and attempts to place Robinson's judicial thinking in a broader, continental context.

I. Law and the Judicial Enterprise

One hundred and twenty-six years after his death, Robinson's legal philosophy can only be reconstructed through a painstaking examination of his judicial decisions. Even these, however, provide but incidental evidence of his beliefs — Robinson was necessarily more concerned with resolving disputes and establishing rules than he was with documenting his personal principles for posterity. The cases nonetheless yield much in the form of reasoning, comments, complaints and results.

Consistent with suggestions in recent scholarship, Robinson's judgments demonstrate that he shared many of the rhetorical truths of 19th century English common law. Law in general was founded on reason, composed of principles, and evidenced through precedent.[22] Where necessary for purposes of public policy and convenience, it could be modified by statute. The province of the judge was to discover the law and administer

[21]See Baker, *supra*, note 10. See also J.F. Newman, "Reaction and Change: A Study of the Ontario Bar, 1880-1920" (1974) 32 U.T. Fac. L. Rev. 51; B.J. Hibbitts, "A Change of Mind: The Supreme Court of Canada and the Board of Railway Commissioners" [forthcoming (1990) 40 U.T.L.J.].

[22]On the view that law is founded on reason, see *Starr* v. *Gardner* (1843), 6 U.C.Q.B. (O.S.) 512 at 523.

it to resolve individual disputes between litigants. In Upper Canada, he was constitutionally bound by English authority: the colony's first statute, 32 Geo. 3, c. 1, had declared that "in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of England as the rule for decision of the same."[23] Judges were not to introduce new legal principles into the system, depart at pleasure from settled rules, or offer gratuitous opinions, lest they disturb existing rights;[24] neither were they to give any weight to public policy arguments unless "they...[were] so clear and so decisive as to form in themselves a clear ground of deciding the question upon legal priciples".[25] Above all, they were not to act upon "considerations of policy, or even of compassion", where a legal duty was prescribed.[26] To do these things would be to "[depart] from our proper sphere", *i.e.* to adopt a prohibited legislative function and arbitrarily substitute a sense of what the law ought to be for what it, in fact, was.[27]

The existing literature fails to recognize the extent to which these conceptions turned out to be rather more pliable in Robinson's hands than some of the rhetoric implied. This pliability was partly a function of indeterminacy inherent in the common law and partly a response to pressures of the colonial condition. In the first place, Upper Canada's Chief Justice recognized that the law was not a constant; rather, it evolved with society,

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[23]Section 3. Robinson's substantive approval of English law as the basis for the Upper Canadian legal system was most apparent in *Gardiner* v. *Gardiner* (1832), 2 U.C.Q.B. (O.S.) 554 where he commented at 586 that "we have had the good sense happily to adopt the common law of England", and, later at 595 that "we have in this colony. . .very wisely taken to ourselves the law of England as our rule of decision."

[24]See, *e.g.*, *Commissioners of Public Works* v. *Daly* (1849), 6 U.C.Q.B. 33 at 43. See also *Phillips* v. *Redpath* (1830), Draper 68 at 74 (U.C.K.B.): "Law is administered upon general principles, and if without some satisfactory reason we should forbear to apply a well-known rule. . .which is applied in other cases we should be acting arbitrarily and against authority." *Rowland* v. *Tyler* (1834), 3 U.C.Q.B. (O.S.) 630 at 637: "[W]e should do more evil than good by casting off an adherence to principles, and disregarding all settled distinctions, in the attempt to afford a remedy. . . ." On the unsettling effect of gratuitous opinions, see *McDonell* v. *Bank of Upper Canada* (1850), 7 U.C.Q.B. 252 at 289: "[F]or all that we know, an extra judicial opinion. . .might tend to unsettle a good deal of property without necessity."

[25]*Bank of Montreal* v. *Bethune* (1835), 4 U.C.Q.B. (O.S.) 341 at 349.

[26]*Re John Anderson* (1860), 20 U.C.Q.B. 124 at 174. See also *A.G.* v. *Grasset* (1857), 6 Grant 200 at 218 (U.C. Ch. Ct.): "A court of justice. . .can dispose of no question as a merely abstract or speculative question, with a view to its bearing upon political considerations, and without regard to the legal interest that may be involved."

[27]From a Grand Jury charge, quoted in Brode, *supra*, note 14 at 178. See also *Robinett* v. *Lewis*, (1830), Draper 260 at 264 (U.C.K.B.): "I think it would be in some measure assuming the power to legislate . . . if the court were to attempt to fix what they cannot shew to have been clearly settled by former adjudications." See also *Genesee Mutual Insurance Co.* v. *Westman* (1852), 8 U.C.Q.B. 487 at 498: "If the Legislature should think that either justice or policy points to a different course, they can apply a remedy. We have no discretion to say that the law is different from what we consider it to be."

reflecting its changing conditions and responding to them in the interests of the common weal. In *Belcher* v. *Cook* (1847), for instance, he openly acknowledged "changes in the system of society which have gradually moulded and altered some parts of our common law, so as to make them more suitable to a new state of things".[28] By the same token, he was critical of "more subtle reasoning than was suited to the actual affairs of life".[29] Robinson was sensitive to the context and consequences of his decisions; precedent and principle permitting, he tended to interpret the law in the manner which made the most functional sense to him. Pro-offered rules were often rationalized or rejected in terms of their practical impact. In *Boulton* v. *Jeffrey* (1845), for instance, Robinson (sitting on the Executive Council) ruled that the Court of Chancery had no power to declare a grantee of land under Crown patent a trustee for another party on the basis of prior equities once the actual legal grant had been made; such a power would be nothing less than a prescription for social and administrative chaos.[30] The judicial process itself was frequently regarded in the same practical sense. Thus, in *Ballard* v. *Ransom* (1831), a case arising out of problems in the colonial timber trade, Robinson seemed to conceive his responsibility not merely in terms of setting a rule, but of actually facilitating commerce by forestalling the emergence of disputes.[31]

The potential for such instrumentalism was greatest where precedents were absent or less than dispositive, or where colliding principles forced judges to consider problems of interpretation for themselves in light of analogy, reason, and public policy. Both situations occurred. Robinson found himself confronting the former sort more frequently than he would have liked. He often complained of "unsettled" law, or of no authoritative guidance for problems newly thrown up by technological innovation or economic development.[32] Recourse to existing principles sometimes offered little com-

[28](1847), 4 U.C.Q.B. 401 at 414. See also *Bank of Upper Canada* v. *Widmer* (1832), 2 U.C.Q.B. (O.S.) 256 at 284: "[R]eason and experience . . . have led to great changes in many departments of the law."

[29]*Belcher* v. *Cook*, *ibid.* at 422.

[30](1845), 1 E & A 111 at 113-14.

[31](1831), 2 U.C.Q.B. (O.S.) 70 at 72.

[32]Thus, in *Ramsay Cloth Co.* v. *Mutual Fire Insurance* (1854), 11 U.C.Q.B. 516 at 523, he expressed surprise at "how meagre English text books are on the subject of fire insurance, and how few cases are to be met with in the reports upon questions arising out of such policies." That Robinson should have made such a complaint in the context of a fire insurance case is hardly surprising. Even in the United States, which appears to have been in advance of England in this area, the law was such that the Massachusetts Supreme Judicial Court complained in 1852 that "[f]ire insurance . . . is in its rudiments". As quoted in M. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977) at 230. On the dearth of English authority, see also *Mamora Foundry Co.* v. *Jackson* (1852), 9 U.C.Q.B. 509 at 515: "I am surprised that we find so little on the point in our books, and regret it, for it would have been satisfactory to have found a decision or precedent expressly in point."

fort. For instance, in *Bell* v. *Levy* (1844), Robinson found himself confronted with a conundrum. The case involved the interpretation of a recent Upper Canadian statute abolishing imprisonment for debt. The question was whether the statute applied to those individuals against whom process had been commenced prior to its enactment, but who were not actually charged in execution until after the act had been passed. Robinson explained his position in a remarkable passage which, to modern eyes, seems more characteristic of a legal realist than of a nineteenth century colonial jurist:

> Considering the nature of the enactment, there are two principles in the construction of statutes which bear upon it in opposite directions. On the one hand, we ought not to give a statute an *ex post facto* operation, injurious to the rights of parties, by any latitude of construction. On the other hand, a statute passed in favour of liberty, and with the avowed purpose of mitigating the pre-existing law, ought to receive a favorable, that is, a benign construction. The fair effect of these opposing maxims perhaps is, that they neutralize each other, and make it our duty simply to go as far as we conscientiously believe the act goes ... .[33]

The absence of clear English authority encouraged Robinson to look in other directions for guidance, a tendency which opened Upper Canada's common law to refreshing foreign influences. The most significant "external" source of law was the United States. Indisputably similar geographical, economic and even social circumstances encouraged this broadening of judicial horizons, especially in areas where North American conditions differed substantially from those in England. Robinson had no love for American democracy, but he acknowledged the circumstantial similarities between Upper Canada and the southern republic. As he declared in *Bank of British North America* v. *Ross* (1844):

> In any doubtful question before us, it will be always an advantage to know the light in which it has been viewed by a tribunal in another country, which follows, in the main, the same system, and where the judges are known to be men of great ability and research; and it is especially desirable when the point happens to be a novel one, arising out of transactions or circumstances unusual in England, and with which people in America are more familiar.[34]

Recourse to American thinking was particularly common in the context of commercial law, where Robinson relied heavily on prolific writers such as

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[33](1844), 1 U.C.Q.B. 9 at 9.

[34](1844), 1 U.C.Q.B. 199 at 210. See also *Hill* v. *Gander* (1844), 1 U.C.Q.B. 3 at 5: "I do not cite these dicta as decisions binding upon us, but it is satisfactory to find these expositions of the principle in question by eminent judges, though of a foreign country, founded as we know they are in their judgement, upon the common law of England, and bearing upon questions, which from the nature of things are much less frequently called upon in England than in America, and upon which therefore it is not always easy to find adjudications in our book."

Joseph Story.[35] As the Chief Justice noted in *Bank of Montreal* v. *DeLatre* (1849):

> [T]he American Courts have generally gone before those in England, in introducing such relaxations as have seemed necessary for the convenience and safety of those engaged in commerce; and they have in some instances gone further without the aid of legislative enactments, in moulding the principles of common law to suit supposed exigences, than English Courts of Justice have yet ventured to go.[36]

Robinson nonetheless appreciated that, as a colonial judge, he could only go so far in relying on American jurisprudence, regardless of how helpful it might seem to be. Put simply,

> [t]he tribunals of the United States, both legal and equitable, have in the decisions of the English courts a pattern which they *may* work by. We have in them a pattern which we *must* work by, unless where the legislature has sanctioned a deviation. Besides constitutional principles binding upon us as an English colony, our adoption of the English law ... make [s this] mandatory... [emphasis in the original].[37]

A second significant "foreign" influence was the civil law. While hardly as important in Robinson's intellectual scheme as American jurisprudence, civil law occasionally offered the Chief Justice guidance on principle where the English law was unclear and American authority was of little or no assistance. In *Ballard* v. *Ransom*, for example, Robinson relied directly on Justinian's *Institutes* and the *Digest* to settle a point in the law of sales.[38] In other instances, he relied on the modern French treatise writer Pothier.[39] To be sure, the move to civilian authority was not original on Robinson's part — in the late eighteenth century, eminent English judges such as Lord

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[35]Story's works were relied or cited in: *Davidson* v. *Bartlett* (1844), 1 U.C.Q.B. 50; *Beckett* v. *Cornish* (1847), 4 U.C.Q.B. 138; *Bank of Upper Canada* v. *Smith* (1847), 4 U.C.Q.B. 483; *Bank of Montreal* v. *DeLatre* (1849), 5 U.C.Q.B. 362; *McCuniffe* v. *Allen* (1849), 6 U.C.Q.B. 377; *Wilcocks* v. *Tinning* (1850), 7 U.C.Q.B. 372; *Ingersoll and Thamesford Gravel Road Company* v. *McCarthy* (1858), 16 U.C.Q.B. 162; *Sinclair* v. *Robson* (1858), 16 U.C.Q.B. 211; *Hard* v. *Palmer* (1860), 20 U.C.Q.B. 208.

[36](1849), 5 U.C.Q.B. 362 at 368.

[37]*Street* v. *Commercial Bank* (1844), 1 Grant 169 at 189-90 (U.C. Ch. Ct.). See also *Hamilton* v. *Niagara Harbor & Dock Co.* (1842), 6 U.C.Q.B. (O.S.) 381 at 399: "[W]e must still consider that our adherence to the principles of the English common law is a duty imposed on us by written law, and is therefore more strongly obligatory than it may be acknowledged to be in the courts of the United States. Our statute says that we are to be governed by it 'in all controversies relating to property and civil rights,' and the English 'rules of evidence' are expressly made binding upon us. Whatever liberties therefore may have been assumed in foreign countries in departing from principles which are binding upon English courts, we are not allowed to exercise such discretion . . . ."

[38]*Supra*, note 31 at 79.

[39]See, *e.g.*, *McKinnon* v. *Burrows* (1834), 3 U.C.Q.B. (O.S.) 590 at 593; *Rochleau* v. *Bidwell* (1831), Draper 345 at 358 (U.C.K.B.); *Jones* v. *Capreol* (1835), 4 U.C.Q.B. (O.S.) 227 at 240.

Mansfield had drawn heavily on continental and Roman authority to accommodate traditional English law to the requirements of a commercial age.[40] Robinson's willingness to follow their lead suggests that he was open-minded and concerned with the same general problem of fitting law to suit society.

Surprisingly, the least cited external source of authority was the jurisprudence of the rest of British North America. The constitutional systems of the other colonies (with the exception of Lower Canada) made them obvious standards of legal comparison, as did their similar physical and economic circumstances, yet only rarely did Robinson consider their case law or their legislation. His hesitation did not seem to be grounded in principle, for, as he said in *Gardiner* v. *Gardiner* (1832),[41] interpretations from other colonies were not inappropriate, especially where the colonies were operating under similar statutes. Perhaps his failure to refer more often to colonial sources was simply the result of the dearth of colonial reports and records relative to English and American materials.[42]

Even where English authority was clear and undisputed, however, Robinson did not always apply it — 32 Geo. 3, c.1 notwithstanding. Robinson declined to wear the straight-jacket of precedent. In the first place, he recognized that to some extent law had to change with society. The Chief Justice was no hide-bound slave of the past. As he put it in one case on the law of corporations,

> it would be as reasonable to insist that the dress of an infant should be made to fit a grown-up man, as that a set of maxims and principles could have been framed two or three hundred years ago, which without any modification would suit the present circumstances of mankind.[43]

Second, Robinson refused to put blind faith in the rulings of English tribunals. Recognizing that mistakes could even be made by the best known metropolitan jurists, he preferred to take personal responsibility for the integrity of the common law in Upper Canada.

In attempting to avoid what he considered to be inappropriate or incorrect English decisions, Robinson took advantage of the comparative flexibility which prevailed in the early nineteenth century doctrine of

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[40]On Mansfield, see C.H.S. Fifoot, *Lord Mansfield* (Oxford: Clarendon Press, 1936).

[41]*Supra*, note 23.

[42]A darker explanation might lie in the "hostility of the Law Society [of Upper Canada] towards Nova Scotian, Newfoundland, [and] New Brunswick . . . lawyers" during most of the nineteenth century. See Baker, *supra*, note 10 at 241.

[43]*Bank of Upper Canada* v. *Widmer*, *supra*, note 28 at 284.

precedent.[44] Precedents at this time were regarded less as actual law than as mere evidence of more abstract and independent legal principles. Insofar as a precedent appeared to depart from principle, it was (as Blackstone put it in his famous *Commentaries*) not so much bad law as no law, with no binding force and effect.[45] In this context the last word on a particular question of law was not necessarily the best word. Nor was this approach always a prescription for conservatism. Occasionally it worked to preserve progressive elements of English common law and permitted Robinson to avoid some of the reactionary constructions of the post-Mansfieldian period.[46]

In particular, Robinson hesitated to apply English precedents which were unsuited to colonial conditions. The experience of the early American colonies had demonstrated that English common and statute law was not universally transferable to North America. Blackstone had written in his *Commentaries* that in the case of an uninhabited country discovered and populated by English subjects, colonists took with them "only so much of the English law as ... [was] applicable to their own situation and the condition of an infant colony". Upper Canada was not an "uninhabited country" by Blackstone's definition, it having in fact been taken from the French, but Robinson insisted that Blackstone's general approach was nonetheless appropriate. Deploring what he called "a servile adherence to English decisions", he commented in *Jordan* v. *Marr* (1847):

> However ready we are to follow the decisions of the English courts, founded as they are upon the reasoning of judges of great learning and experience, yet we are not to adhere to them in disregard of all circumstances; for it is not in that spirit, nor to that extent, that the courts which made those decisions hold themselves to be bound by their own judgements or those of their predecessors.[47]

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[44]On precedent in the late eighteenth and early nineteenth centuries, see C. Allen, *Law in the Making*, 6th ed. (Oxford: Clarendon Press, 1958) especially at 206-230; W. Holdsworth, *A History of English Law*, vol. 12 (London: Methuen, 1938) especially at 146-153.

[45]"It is an established rule to abide by former precedents, where the same points come again in litigation .... Yet this rule admits of exception, where the former determination is most evidently contrary to reason .... But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law* ... ." Sir W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765) at 69-70. In light of such statements, Duncan Kennedy has characterized "reason" in the pre-classical version of legal thought as a "disruptive" factor in the system. D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L. Rev. 205 at 250-51.

[46]See, *e.g.*, *Clark* v. *Hamilton and Gore Mechanics' Institute* (1854), 12 U.C.Q.B. 178.

[47](1847), 4 U.C.Q.B. 53 at 72.

Similar considerations repeatedly led Robinson to deny the relevance of certain English statutes. In *Anderson* v. *Todd* (1845), he limited the overall range of acts applicable to the colony by reading down the general words of 32 Geo. 3, c. 1. That Act, he suggested, was in effect a re-enactment for Upper Canada of a 1763 proclamation designed for the province of Quebec, directing that all causes civil and criminal should be determined according to law and equity "as near as may be agreeable to the laws of England."[48] Such an interpretation permitted the Upper Canadian courts to ignore English enactments beyond those relating to the English poor law and the law of bankruptcy which the statute had explicitly excepted. Robinson believed that this reading, however radical on its face, was consistent with parliamentary intention:

> It would have been hardly possible for the legislature to have excepted in special terms all those British statutes which, being inapplicable to the condition of the colony, they might not wish to include as parts of the law of England. And it is impossible to allow that they could have intended, by the words they used, to embrace every provision in the British statute book which they did not specifically except ... The game laws, for instance, are not excepted in the statute; nor the statutes which disable persons from using a trade who have not served seven years apprenticeship; nor any of the multitude of acts relating to certain trades and manufactures ... which, having been passed upon grounds and for purposes peculiar to England and either wholly or in a great degree foreign to this colony, have never been attempted to be enforced here, and have never been taken to apply to us.[49]

Robinson appreciated the implications of such an approach for judicial power, but could see no alternative consistent with policy and common sense:

> That misera servitus which is said to exist where "Jus est vagum", is so justly dreaded in these times, that no one can consent to admit that there exists in any tribunal an arbitrary discretion to say what British statutes shall be in force here, and what not; and yet, on the other hand, in the present state of our jurisprudence there cannot be said to be any other method of settling all these doubts as they arise, than for courts of justice to determine them, not by any arbitrary exercise of their will, for they can claim no such rights, but upon the best views which they can take of arguments which cannot in their nature lead to any clear and incontestable conclusion.[50]

By 1844, decisions exempting Upper Canada from general English statutes had already become so common in Queen's Bench that a writer of an article on law reform in the *Upper Canada Jurist* complained that the colony's law

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[48](1845), 2 U.C.Q.B. 82 at 85.
[49]*Ibid.* at 86-87.
[50]*Ibid.* at 87.

was "on very much the same footing as it would have stood, if the English law had never been formally introduced".[51]

While adopting a critical attitude towards English statute law, Robinson nevertheless displayed considerable deference to the enactments of Upper Canada's own legislature, the "supreme power acting in this province".[52] *Anderson* v. *Todd* was a case in point; in that decision Robinson went beyond the mere words of the statute to look for the substantial intention of the legislature even where it appeared to be inconsistent with those words. Robinson's pre-eminent concern was with public policy, and he seemed in practice to regard the judiciary as a partner of the legislature. He refused to read legislation in a way that rendered it absurd or unworkable. In *Bell* v. *Levy*, he said that it was "undoubtedly a principle in the construction of statutes, that they ... [should] receive a reasonable interpretation, that is, so as to make their operation reasonable, if that ... [is] possible."[53] This did not mean that private rights — in particular, the rights of property — were to be ignored in the policy process. As the Chief Justice said in *Myers* v. *Howard* (1835):

> [A]cts which give powers infringing upon private rights are to be construed with a strict regard to the property of the subject, allowing no undue extension of the terms in which the authority is conferred.[54]

Robinson's profound commitment to policy led him to interpret legislative mandates broadly. Public officers exercising delegated legislative power were allowed to exercise very wide discretion, even if it brought the threat of abuse of power.[55] Similarly, particular institutional creatures of the legislature, such as municipalities, were given leeway in order to exercise powers in the public interest.[56]

Robinson demonstrated a similar capacity for flexibility in interpreting rules of legal procedure and practice. The complicated pleadings system of

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[51]"Law Reform" (1844) 1 U.C. Jurist 16 at 18.

[52]*McNab* v. *Bidwell and Baldwin* (1830), Draper 144 at 152 (U.C.K.B.). In that case, Robinson stated: "[I]ts legislative authority extends to the most important objects, and the instances in which it is restrained are, perhaps, not those of the greatest and most immediate consequence to the welfare of society." The Chief Justice recognized the obvious implication of all this in *Smith* v. *McGowan* (1855), 12 U.C.Q.B. 270 at 280: "It is not the proper business of courts of justice to find fault with what the Legislature has done, though we often find them expressing themselves strongly upon the incautiousness of particular enactments."

[53]See *supra*, note 33 at 11.

[54](1835), 4 U.C.Q.B. (O.S.) 113 at 116.

[55]See, *e.g.*, *Ireland* v. *Guess* (1847), 3 U.C.Q.B. 220 at 229-230. See also *Cumming* v. *Guess* (1845), 2 U.C.Q.B. 125.

[56]"[I]t may be safely assumed that wherever there is fair ground of doubt ... the inclination will always be to let the by-law operate, and leave it to the legislature to interpose if they see a necessity." *Re Barclay and Municipality of Darlington* (1854), 12 U.C.Q.B. 86 at 92.

the early nineteenth century English common law — based at that time on the forms of action — frequently encouraged squabbles over technicalities. The Chief Justice felt frustrated by this tendency, especially where technical considerations stood in the way of considering the true merit of cases. At the end of his career, he regretted that so many of his decisions had been, as he put it, "*vexatio de lana capricia*" (disputes about nothing) and confessed that "we ... used to feel ... shame, while we were unwillingly engaged in them".[57] Given this belief, it is hardly surprising that, while always advising parties to adhere to formal legal requirements, Robinson demonstrated a willingness to tolerate departures from such requirements as long as pleading remained intelligible. In *McLeod* v. *Torrance* (1846), for instance, he suggested on a point of evidence given by affidavit that

> [i]t is better and safer to comply closely with all that the statute directs; but I do not, for my own part, hold that a literal compliance with the direction is indispensable, and that any deviation must be fatal. It would expose parties sometimes to most inconvenient consequences, if it were so ... .[58]

On other occasions, Robinson relaxed English procedural rules as far as possible to suit particular colonial circumstances. One example of this was in dower, where traditional English law required proof of marriage by a bishop's certificate before a valid claim could be made. In two cases in the 1840s, Robinson held that, given the situation of many parties in Upper Canada, dower could be claimed there merely on proof of reputation and co-habitation.[59] Robinson stood by these judgments when he reviewed them in 1856:

> It may be thought that the court took rather questionable ground in admitting proof of reputation and cohabitation in such cases. We had no express authority for it, nor I think any against it, and we ventured to rule as we did from a consideration of the impossibility in many cases of obtaining any other proof here of the marriage of parties, especially in humble stations of life, who have been emigrating to this country by thousands annually for forty years; and by the further consideration, that where proof could be obtained, in Ireland for

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[57](1862), 8 U.C.L.J. 173.

[58](1846), 3 U.C.Q.B. 146 at 147. See also *Fraser Qui Tam* v. *Thompson* (1845), 1 U.C.Q.B. 522 at 525: "Now it might go far towards defeating the good intentions of the legislature, if courts were to be so rigid as to refuse peremptorily to allow to parties ... to correct, in any stage of the cause, any trifling inaccuracy in their practice or pleadings, so that the slightest inadvertance might be fatal."

[59]*Stoner* v. *Walton* (1841), 6 U.C.Q.B. (O.S.) 190; *Phipps* v. *Moore* (1848), 5 U.C.Q.B. 16.

> instance, upon commission, the expense of obtaining it would in some cases, perhaps in many, exceed the value of the dower which the widow is claiming.[60]

In a similar vein, in *Henderson* v. *Stephens* (1845), Robinson refused to allow a plaintiff to enter an essoign in a dower proceeding even though such a course was available as a matter of strict law. Robinson asserted that the attempt

> to revive the old English practice of casting an essoign, is embarrassing very unnecessarily the administration of justice, and in this country, in the present state of society, there is great absurdity in it.[61]

In the same practical spirit, Robinson prohibited parties from taking advantage of the system's formalities to promote fraudulent schemes. In *Tannahill* v. *Mosier* (1832), he permitted the highly unusual introduction of a counter-affadavit to contradict an affadavit of debt, the *bona fides* of which was at best dubious. Challenging the alleged rigidity of accepted practice on this point, he ventured:

> If no authority could have been found for granting relief in a case like the present, I should still have been of the opinion that the general principle, that the cause of action cannot be tried on affadavit, must admit of some control, because circumstances may be imagined of so outrageous a character, that common sense must compel us to admit the possibility of extending relief; and the law is not so stern, that people must of necessity lose their liberty, and perhaps in consequence their lives, while a court of justice must helplessly look on, seeing and not doubting that a most oppressive and abusive use is made of the process, but imagining themselves disabled from interfering, because they must hold a maxim to be inflexible that is just and sound as a general rule, but which like most other maxims must in its application be controlled by reason.[62]

Such an approach was hardly the mark of a Tory-formalist; rather, it was indicative of a jurist who, in the words of the *Upper Canada Law Journal*,

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[60]*Street* v. *Dolsen* (1856), 14 U.C.Q.B. 537 at 539. See also *Breakey* v. *Breakey* (1845), 2 U.C.Q.B. 349 at 354: "[Adhering to the strict law] would be cruel, and the hardship in this country would be grievous, where so many thousands of people have emigrated from distant countries, and are of that station in life that they cannot be supposed always to have preserved or to be able to procure such evidence as could satisfy any doubts and cavils in regard to the regularity of their marriages . . . ."

[61](1845), 2 U.C.Q.B. 64 at 64.

[62](1832), 2 U.C.Q.B. (O.S.) 483 at 489. For other instances of Robinson's procedural flexibility, see *Commercial Bank* v. *Cameron* (1846), 3 U.C.Q.B. 363; *Hutchinson* v. *Munroe* (1851), 8 U.C.Q.B. 103; *Powell* v. *Currier* (1851), 9 U.C.Q.B. 352; *Springer* v. *Miller* (1852), 10 U.C.Q.B. 57; *Nicolls* v. *Duncan* (1854), 11 U.C.Q.B. 332; *Ellwood* v. *Middlesex (Corporation of the County of)* (1859), 19 U.C.Q.B. 25; *Folger* v. *McCallum* (1852), 1 Practice Reports 352 (Chambers); *R. ex rel. Ritson* v. *Perry* (1854), 1 Practice Reports 237 (Chambers); *Hopkins* v. *Haskayne* (1854), 1 Practice Reports 184 (Chambers); *Morrell* v. *Capron* (no date) 1 Chambers Reports 144.

"objected to the triumph of form over substance, of technicality over truth".[63]

Robinson's views on law and the judicial enterprise did not reflect a mindless deference to authority. On the contrary, he displayed a consistent if somewhat cautious willingness within the constitutional confines of the colony to think about the purposes and ends of law. While invoking contemporary English legal ideals and authorities, he insisted on considering Upper Canadian circumstances to such an extent that he seemed occasionally to indulge in the very judicial legislation he claimed to abhor.

This apparent contradiction begs explanation. Perhaps Robinson was simply inconsistent, that is, "driven, ... unconsciously, to contradict his 'formalistic' instincts."[64] On the other hand, it is possible that his protestations of loyalty and deference in some cases were merely designed to draw attention away from his "legislative" activity in others. Neither of these hypotheses is satisfactory, however. The first detracts from Robinson's recognized intelligence and perception, and comes preciously close to suggesting that he did not know what he was doing. Robinson may not have been a profoundly original thinker, but he did understand the problems posed by legal rigidity in a colonial environment that differed from England. The second hypothesis ascribes to Robinson an uncharacteristic insincerity and a cynical contempt for law and the judicial enterprise which can in no way be reconciled with the considerable moral and legal reputation that Robinson enjoyed among his contemporaries.[65] Upper Canada's Chief Justice held English common law in the highest regard; he was quite genuine in lamenting at one point that the "prevailing disposition for change" might make the lifespan of English principles in the colony "not ... so long as we might some time ago have imagined."[66]

A better explanation is that, from Robinson's perspective, there was actually no contradiction between the ideals he proclaimed and his efforts to shape the law to suit colonial conditions. In part this was because existing legal principles and precedents did not cover all the contingencies of the modern age. More fundamentally, however, the absence of contradiction

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[63]*Supra*, note 7 at 62.

[64]P. Romney, "The Ten Thousand Pound Job: Political Corruption, Equitable Jurisdiction, and the Public Interest in Upper Canada 1852-6" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: University of Toronto Press, 1983) 143 at 181.

[65]Note, *e.g.*, the following editorial comment from the liberal Toronto *Globe* newspaper on Robinson's retirement from the Bench: "Doubtless he was often in the wrong — who has not been proved by time to be in the wrong? — but no one will deny to him the credit of being perfectly sincere and honest in his convictions, and having laboured for them with conscientious zeal and assiduity." As quoted in Read, *supra*, note 9 at 146.

[66]*Greenshields* v. *Barnhart* (1851), 3 Grant 1 at 45 (U.C. Ch. Ct).

was reflective of an early nineteenth century "pre-classical" conception of law and the judicial enterprise which, despite certain rhetorical similarities, was in fact very different from the "classical" conception which came to replace it after 1870 and which survives in some respects even today.[67] Pre-classical legal thought did not insist on the harsh distinctions (*e.g.* law vs. politics; public vs. private) that came to typify its successor. It interpreted legislation more on the basis of its spirit than its text, and was as much concerned with implementation as construction. It regarded the common law itself as a manifestation of a robust natural reason rather than simply a positivist aggregation of specific decisions. Not infrequently, judgments in this early period proceeded by consideration of general points with minimal references to existing authority. When it was used, precedent was much less binding and determinative than it later became. The system as a whole was more deductive than inductive.

In this context, shaping the law to fit colonial conditions and promote colonial interests was a legitimate judicial enterprise insofar as reason and principle provided the means by which change could be accommodated in the larger legal universe. Only in later classical times, when the creative role of reason was radically de-emphasized in the interests of political reaction, were judges discouraged from looking beyond the case law. Even while it represented a fundamental departure from earlier thinking, classical legal thought nevertheless appropriated to itself the existing language of legal discourse. Unfortunately, the resulting combination of old discourse and new substance was so powerful that even in the post-classical period it is still tempting to see apparent contradictions in the thought of early nineteenth century judges where they conceived of none, and also (recalling the Introduction to this paper) claim that a continuity exists between their perceptions and those of much more recent jurists.[68] It is, however, necessary

[67]On the emergence of classical legal thought in the latter half of the nineteenth century, see M. Horwitz, "The Rise of Legal Formalism" (1975) 19 Am. J. Leg. Hist. 251; D. Kennedy, "Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940" (1980) 3 Res. in Law and Sociology 3; T. Grey, "Langdell's Orthodoxy" (1983) 45 U. Pitt. L. Rev. 1; D. Sugarman, "Legal Theory, The Common Law and the Making of the Textbook Tradition" in W. Twining, ed., *Legal Theory and the Common Law* (Oxford: B. Blackwell, 1986). Legal classicism seems to have enjoyed a greater following in the United States than in England perhaps because of the success in America of the case method of legal education. Significantly, the reaction to classical legal thought, first in the form of sociological jurisprudence and later in the form of legal realism, also developed most extensively in the United States. See R. Cosgrove, *Our Lady the Common Law: An Anglo-American Legal Community, 1870-1930* (New York: New York University Press, 1987).

[68]"To recollect the unities and, equally important, the separations constitutive of the 19th century legal mind involves thinking across a watershed ... [I]n order to be conversant with the culture of argument in Old Ontario, the historian needs to develop skills analagous to those of a translator." D. Howes, Book Review (1986) 35 U.N.B.L.J. 231 at 233-234. The creation

to penetrate these philosophic mirages in order to appreciate the reality which Robinson himself experienced.

If Robinson *was* aware of contradiction in the law, it was not between what modern scholars have termed "formalism" and "instrumentalism" (corresponding broadly to "law" and "politics") but rather between "law as it is" and "law as it ought to be".[69] This was not a pre-classical expression of the basic classical dichotomy, but rather something substantively different. While "law as it is" was made up of reason and principle expressed in precedent, "law as it ought to be" was an arbitrary conception dependent on the subjective preferences of the judge ruling "at pleasure". By definition it was not reasoned or principled. It was, in fact, legislation with all the irrational connotations the word had had for English common lawyers since the time of Coke. Shaping the law in the perceived interests of the colony was not, however, necessarily a matter of indulging in "law as it ought to be". This exercise could still be principled and reasoned.[70] In this context, shaping the law to suit colonial circumstances was a legitimate judicial enterprise. Reason and principle provided the means to accommodate change in the larger legal universe. There was thus no contradiction in deferring to law and principle on the one hand while adapting law to suit colonial circumstances on the other. Adherence to law, in the pre-classical sense, permitted and sometimes even required such adaptation. The three sections that follow — the substantive law of property, the law of commerce, and the law of transportation — are intended to illustrate how Robinson responded to pressures for change which were sometimes imposed on him as much by his own conception of law as by his understanding of the needs of his society.

II. The Law of Property

No less than contemporary Britain or America, Upper Canada was a society established on the principle of private property. Property could of course take a variety of forms, both corporeal and incorporeal. In the early nineteenth century, however, the most important form of property was land. Land was the primary source of social wealth and power. In Upper Canada, private property in land provided the organizational framework for settlement, for investment, and for exploitation of the colony's rich natural re-

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of false continuities as part of a general attempt to gain intellectual legitimacy for revolutionary paradigms is a general phenomenon discussed in T.S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

[69]Robinson made this distinction explicitly in *Hamilton* v. *Niagara Harbor & Dock Co.*, *supra*, note 37 at 398.

[70]See, *e.g.*, Robinson's judgment in *Dean* v. *McCarty* (1846), 2 U.C.Q.B. 448, discussed *infra*, Section II.

sources. At the same time it constituted the basis of social status and the criterion for the franchise. As a result, protection of private property rights was generally regarded as central to continued colonial prosperity and political stability.

Few in Upper Canada appreciated the social significance of property more than Sir John Beverley Robinson. To permit interference with private property by others would, he once suggested, "not be consistent with the interest of individuals, and the peace of society".[71] On the bench, Robinson translated this view into a conception of judicial responsibility which placed great emphasis on the protection of property rights. Substantively, this protection was to be achieved through the raising of what Robinson termed "an invisible wall" around land, within which the landowner's interests were secured by law.[72] This accorded well with Blackstone, who had defined the right of property in general as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe".[73] Procedurally, property rights were to be protected by adhering to English precedent in a way that made property owners secure in their estates. Robinson expressed this last approach most forcefully in *Simpson* v. *Smyth* (1846):

> In questions... relating to the rights of property, and especially real property, it is always to be held incumbent on the courts to adhere to adjudged cases. If these seem to lead to inconvenient or even to absurd results, as they have been sometimes admitted to do, still it is considered right, for the sake of certainty, to abide by the generally known and understood rule, leaving it to the legislature, if they shall think fit, to alter it, rather than to shake confidence in the state of the law, and produce uncertainty in dealing with and advising upon titles, by departing at pleasure from established decisions... .[74]

It is in such property cases that the Tory-formalist interpretation of Robinson's legal thought rings most true.

Robinson's respect for traditional rights of property was manifested graphically by his reception of the English laws of waste and dower. The ancient doctrine of waste precluded a tenant from doing permanent damage to freehold or inherited land by materially altering its nature or by otherwise diminishing its value. Dower ensured that the widow of a landowner took one-third of his lands by operation of law on the occasion of his death.

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[71] *Ballard* v. *Ransom*, *supra*, note 31 at 77.

[72] "The law surrounds every man's property with an invisible wall." *R.* v. *Spence* (1853), 11 U.C.Q.B. 31 at 38; see also *Belford* v. *Haynes* (1850), 7 U.C.Q.B. 464 at 469: "A man is under no legal necessity to enclose all his land: the law encloses all of it with an invisible boundary . . . ."

[73] Blackstone, *supra*, note 45, vol. 2 at 2.

[74] (1846) 2 U.C. Jurist 162 at 196.

Unfortunately, both doctrines tended to inhibit the colony's agricultural advancement, the former by placing a legal obstacle in the way of clearing land for the purposes of cultivation, and the latter by replacing productive tenant farmers with widows unprepared to till the soil but forced to take possession to gain the benefit of the dower grant. Robinson incorporated the English doctrine of waste into Upper Canadian law almost by default. In three decisions touching on the subject between 1837 and 1853,[75] he simply seemed to assume that the doctrine was properly applicable to the colony. This was a somewhat curious conclusion because waste (at least in its strict English sense) had, by 1853, been repudiated by most American states,[76] as well as by New Brunswick.[77] In *Weller* v. *Burnham* (1853), his most complete consideration of the waste issue, Robinson went so far as to reject the defendant's explicit plea that he had cut down trees "*for the purpose of clearing the said lands*, and improving and cultivating the same ... according to the custom of good husbandry, and the custom of the country in Upper Canada".[78] This was not good enough:

> [S]upposing that it were clearly lawful in this country for a tenant for life to change the character of the estate wholly or in part, at his discretion, from woodland to arable land, stripping it of all its timber, yet it is not averred here that the defendant did actually clear the land and make it fit for cultivation. It is consistent with all that is stated here that the defendant may have cut down the trees and left them lying there. He only says that he cut down the trees *for the purpose of* clearing the land.[79]

Robinson's treatment of dower was somewhat more tentative. While he did not question the applicability of the doctrine, he nevertheless voiced reservations about the process. In *Robinett* v. *Lewis* (1830), for instance, he acknowledged that in the absence of a Court of Equity, the common law procedure for enforcing a dower right might not be "well suited in some of its principles to the circumstances of this country",[80] although he left it to the legislature "to make any alteration that may be thought expedient".[81] A year later, in *Phelan* v. *Phelan* (1831), he elaborated:

> The proceeding in England for the purpose of obtaining dower, is almost obsolete, and the forms seem so little adapted to the present condition of things

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[75]*Taylor* v. *Taylor* (1837), 5 U.C.Q.B. (O.S.) 501; *Chestnut* v. *Day* (1843), 6 U.C.Q.B. (O.S.) 637; *Weller* v. *Burnham* (1853), 11 U.C.Q.B. 90.

[76]M. Horwitz, *supra*, note 35 at 54-58. See, however, *Conner* v. *Shephard* 15 Mass. 164 (1818).

[77]*Rector of Hampton* v. *Titus* (1849), 6 N.B.R. 278 (S.C.). Robinson, however, was not alone in Upper Canada in his application of the doctrine. See, *e.g.*, *Lawrence* v. *Judge* (1851), 2 Grant 301 (U.C. Ch. Ct.) per Chancellor Blake.

[78]*Supra*, note 75 at 90-91.

[79]*Ibid.* at 91.

[80](1830), Draper 260 (U.C.K.B.) at 263.

[81]*Ibid.*

> in this country, that the court would willingly endeavour to devise a system more simple, by which the same end might be obtained; but upon mature consideration, we apprehend that such an improvement must be left to the care of the legislature ... [W]e will not attempt to interfere with the freehold of the subject by any process not expressly sanctioned by the common law or statute.[82]

These cases are not cited to suggest that in enforcing such traditional doctrines as waste and dower Robinson necessarily disregarded the interests of the colonial community. Rather, he appears to have conceived of these interests in a manner which put a premium on the rights of landowners. The importance of those rights could not be absolutely denied, even by the sternest of critics. Without recourse to the law of waste, for instance, a tenant could arbitrarily change the very nature of an estate, stripping it of valuable timber and in the process even diminishing its worth as an investment. This was a particularly important consideration while speculators — in some cases colonial officials and judges — held most of the colony's undeveloped lands.[83] Without dower rights, the widow of a landowner could easily be rendered destitute. Guaranteeing such rights might harm tenant farmers and restrict the alienability of land, but Robinson regarded certainty and security in estates as more important to a civilized community. His failure to comment on the merit of waste and dower suggests that he thought their intrinsic worth was obvious.

Other judgments by the Chief Justice support the proposition that his rulings in the area of property law were founded as much on a particular conception of the community interest as on dedication to entrenched doctrine. In *McKinnon* v. *Burrows* (1834), for instance, Robinson was asked to award damages for breach of covenant of title representing the value of improvements made to land by the vendee. By analogy to the law on the sale of goods, Robinson reasoned that the defendant vendor was not liable to this extent. Nevertheless, he continued:

> [E]very argument *ab inconvenienti* is against giving a greater effect to the covenant here, from the peculiar state of things in a country which like this is in the progress of rapid settlement. A lot of land which ten years ago was sold as the ordinary farm of a settler, for one or two hundred pounds, has become perhaps in the meantime the site of a village, and if damages in case of default of title could be claimed upon a computation of its present worth, founded

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[82](1831), Draper 386 (U.C.K.B.) at 393-94.

[83]As Parker C.J. wrote in *Connor* v. *Shephard*, *supra*, note 76 at 167: "Lands actually in a state of nature may, in a country fast increasing in population, be more valuable than the same land would be with cultivation." On policy considerations behind the law of waste, see Horwitz, *supra*, note 32 at 54-58, 286 n. 128. See also M. Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina, 1986) at 175-83. There exists evidence that Robinson himself may have been involved in land speculation. By 1820, Robinson had acquired considerable property around York. See Brode, *supra*, note 14 at 69.

> upon the rise in value and the buildings erected on it, without regard to the consideration received by the person who entered into the covenant, the consequences to the vendor must be utterly ruinous ... [It] would be monstrous indeed if the responsibility for the title must fall under such circumstances without limit on the first vendor. And more especially in this country, where provision is made for the registry of all titles, thereby generally affording to all persons equal means of information in respect to their validity.[84]

In practice, this decision was consistent with those on waste and dower. *McKinnon* favoured original landowners, in particular the speculators who together with the government held most of the province's undeveloped property.[85] The judgment in effect protected them from their own mistakes in a rising market.

Another instance where Robinson emphasized colonial circumstances in applying traditional doctrine to protect landowner interests was *Matthews* v. *Holmes* (1853).[86] In that case Robinson ruled that parol evidence contradicting a deed was inadmissible. A grantor's assignee in bankruptcy had claimed that what appeared to be an absolute conveyance of land by the grantor to a third party was in fact only a mortgage, leaving in the assignee an equity of redemption. In rejecting evidence of conversations and the circumstances surrounding the deed (which allegedly supported the plaintiff assignee's contention), Robinson declared that he was bound by English authority, in particular the *Statute of Frauds*. Again, however, that was not all. Robinson continued, explaining the particular relevance of the English rule to existing conditions in Upper Canada:

> We know that for many years past it has been common as between English and Lower Canadian merchants and their debtors in Upper Canada, and as between the merchants in our large towns and their customers in the country, to accept lands at a valuation in payment of debts when there was no hope in payment in money. In many cases the grantors in such deeds have been well pleased to make such arrangements, and free themselves from liabilities .... Now within the last year or two, in many cases, lands in this country which have been made over by debtors to their creditors in satisfaction or part discharge of their debts, and not in security merely, have risen immensely in value, from the operation of causes unlooked for, and tending to enhance their price to a degree greatly beyond what could have been anticipated. I allude to the many great railway projects which are at present being actively proceeded in, and in the way of being certainly accomplished by the aid of English capital, which has been freely embarked in them to the amount of some millions sterling. This has had the effect of suddenly raising the value of lands so as in many cases to double or treble it, and in some cases to raise it ten or twenty

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[84]*Supra*, note 39 at 594.

[85]For a similar approach in the American context, see Horwitz, *supra*, note 32 at 58-62.

[86](1853), 5 Grant 1 (U.C. Ch. Ct.).

> fold. What a temptation such a state of things affords to just such fraud and perjury as the Statute of Frauds was meant to protect people against![87]

At one level, *Matthews* v. *Holmes* had to do with the rights of merchant-creditors and even appeared to be contrary to the interest of landowners because it deprived them of potential defences to claims. More generally, however, the decision protected the certainty of transactions — an issue of concern to all landowners and speculators. To have admitted parol evidence in contradiction to written terms would, as Robinson intimated, have created nothing less than chaos in the land market. The Chief Justice believed that this was by no means good for the community.

Robinson's sensitivity to local conditions and his awareness of the consequences of his decisions occasionally led him to depart from English common law in the same spirit which encouraged him to enforce it in other situations. Again, this interest seemed to address the concerns of landowners rather than tenants or occupiers, who coincidentally were not favoured by any of the changes. This was apparent in cases ranging from matters of property acquisition to property use.

Matthews v. *Holmes* was an instance of strict enforcement of the *Statute of Frauds* for what Robinson regarded as the good of the colony. Nevertheless, Robinson recognized that a consistently strict enforcement of the statute would have grave consequences for the purchase and sale of land in Upper Canada. In *Kilborn* v. *Forester* (1831), the Chief Justice observed:

> [I]n this province, [because of] the low price of real estate [and] the frequent transfers that are in consequence made ... the bargains to which that kind of traffic gives rise, are not accompanied with the same cautious circumspection that attends such transactions in older countries.[88]

In this context, Robinson was willing to treat certain acts (*e.g.* acceptance of a bond) as equivalent to a signed contract. He did this to prevent fraud, paradoxically suggesting that Upper Canada might otherwise "be much better without a Statute of Frauds".[89]

Once acquired, land could be held for speculation, or it could be developed. As has already been suggested, speculation was more the rule than the exception in early Upper Canada. The potential profit to be made was great, but, at the same time, speculators ran risks that were not simply economic. Absentee landowners, for example, had to beware of "squatters" — persons settling on land without the permission of the owner and who often claimed title by adverse possession. By 1841, most of the land in what

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[87]*Ibid.* at 27-28.
[88](1831), Draper 332 (U.C.K.B.) at 133.
[89]*Ibid.* at 341.

is now southern Ontario had been allocated.[90] Little, however, had been settled — two sevenths had basically been excluded from settlement because of its nature as Crown and clergy reserve. This situation tempted landless labourers and new settlers unable to acquire patent rights; by the hundreds, if not thousands, they moved into the unoccupied areas of the province.

Robinson took a dim view of this process, especially since it stood in the way of persons who had been granted lands originally reserved.[91] As he said in *Henderson* v. *Seymour* (1852), "[i]t has the appearance I confess of being a perversion of sound principle, and detrimental to morality, to afford to wilful trespassers the privilege of a pre-emption right by reason of their illegal occupation".[92] His resolution to deal with such trespassers as strictly as the law permitted was, however, as much a function of colonial circumstances and conditions as of abstract principle or morality. This was made particularly clear in the 1844 case of *Fitzgerald* v. *Finn.*[93] Here, a Crown grantee had brought an action of ejectment against a squatter who claimed actual occupation of the land granted since 1816, well over the twenty-year requirement of adverse possession set down in the *Statute of Limitations.* Robinson held that adverse possession could not run against the Crown, since it was deemed in law to always be in possession of its lands. The contrary rule might work in England, where settlement was dense and squatting was easily prevented, but in a great and unpopulated colony like Upper Canada such a policy would soon prove disastrous for the public interest. Besides, Robinson noted, changing the colonial law at this point — even to bring it in line with what appeared to be the tendency in English decisions — would undermine thousands of titles granted on the basis of the previous understanding.[94]

Land that was not bought for speculation was bought for development. Traditional English property law imposed significant limits on how rural or urban landowners could use their land. These limits were essentially good-neighbour obligations designed to protect the quiet enjoyment of estates. They were, however, the product of an earlier time and a different social context. Recognizing this, Robinson attempted to reconceive the law in light of colonial needs. *Dean* v. *McCarty* (1846)[95] was perhaps the most famous

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[90]R.C.B. Risk, "The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century" (1977) 27 U.T.L.J. 199 at 201.

[91]In 1852, in a letter to John Macauley, Upper Canada's Chief Justice of Common Pleas, Robinson admitted that "I have no sympathy for the genus squatter... If I were Louis Napolean legislating for a country I would allow no prescriptive right to be given those who have gone upon land to which they well knew they had no claim." See Brode, *supra,* note 14 at 260.

[92](1852), 9 U.C.Q.B. 47 at 53.

[93](1844), 1 U.C.Q.B. 70.

[94]*Ibid.* at 80.

[95]*Supra,* note 70.

example of this in the area of negligence law. The plaintiff Dean sued the defandant McCarty for damages caused when a fire, intentionally lit by McCarty to clear his land, got out of control and spread to Dean's property. Robinson instantly appreciated the significance of the case, stating that "in a country like this, it is of very great importance that the rights and liabilities of the parties in this particular, should be known ..."[96] Existing English law suggested that McCarty was liable under the *sic utere* principle. The Chief Justice, however, refused to adopt that approach:

> It is not very long since this country was altogether a wilderness, as by far the greater part is still. Till the land is cleared, it can produce nothing, and the burning of wood upon the ground is a necessary part of the operation of clearing. To hold that what is so indispensable, not merely to individual interest, but to the public good, must be done wholly at the risk of the party doing it, without allowance for any casualties which the act of God may occasion, and which no human care could certainly prevent, would be to depart from a principle which, in other necessary business of mankind, is plainly settled, and always upheld.[97]

A similar consideration of the realities of modern life probably animated Robinson's refusal to apply the classic law of nuisance in a series of cases involving mill-dams and the problem of overflow. Under traditional English law, the right of a mill-owner to pen-back water and overflow the land of an upstream proprietor was an easement which could only be created by deed. In three decisions handed down in 1852 and 1853, however, Robinson argued that although a deed was required before a licencee-overflower could bring an action himself to enforce his right, he could resist a claim *against* him *without* an actual sealed instrument.[98] This was especially true where, on the strength of a licence without seal, a licencee had incurred expense, such as in the construction of a mill and dam. Robinson discussed the point at length in *Beaver* v. *Reed* (1852).[99] Here, the plaintiff had granted a right to overflow to one Graham under a parole licence. On the strength of the licence Graham erected a mill and dam on his own land. Graham subsequently sold his land, with the mill and dam, to the defendant Reed. The plaintiff sought damages from Reed for continuing to allow the dam to overflow onto his land. The Court of Queen's Bench held that, in relying on the licence of the previous owner, Reed was in fact claiming an easement which could only have been created by deed. Since there had been no deed, the defendant had no right.

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[96]*Ibid.*

[97]*Ibid.* at 450.

[98]*Robinson* v. *Fetterly* (1852), 8 U.C.Q.B. 340; *Beaver* v. *Reed* (1852), 9 U.C.Q.B. 152; *Canada Company* v. *Pettis* (1852), 9 U.C.Q.B. 669.

[99](1852), 9 U.C.Q.B. 152.

Robinson dissented. He held, first, that the parol licence was sufficient to set up a defence in the abstract because it had led the original licencee to incur expense; this made the licence irrevocable. Second, and even more remarkably, he held that the original licence was sufficient to serve as a defence on the part of the defendant as assignee of the original licencee. In coming to this conclusion he relied not only on English precedent, but also on Kent's *Commentaries* and an American note on the famous English licence case of *Wood* v. *Leadbitter*.[100] In his view, the defendant gained a virtual easement over the plaintiff's land without any deed or any privity between him and the plaintiff. The investment represented by the mill was preserved.

In another nuisance case, *Lawrason* v. *Paul* (1854), Robinson refused to award damages for nuisance to a party owning a dwelling-house next to a stable. He seemed to recognize the impracticability of such an approach in a developing society:

> I confess I think it not very clear that what was proved in this case amounted to a nuisance, though unquestionably no one would like to have his neighbour's stable so near to him. If we consider for a moment what we have always observed to be the case in regard to livery stables even, not to speak of other stables which are to be found in all parts of towns and cities, I do not see the ground clear for holding the defendant's stable to be a nuisance .... We all know to how much greater annoyance people are frequently exposed from the smell of manure being spread upon gardens and used in hotbeds, and yet I have never known this complained of as a nuisance. No doubt what is complained of in this case would make a residence in the plaintiff's house much less eligible than if a quiet respectable family lived in a good house upon the spot where the stable now stands. But we might say the same if a low tavern, or a tinsmith's shop, or a smithy had been kept there by the defendant.[101]

Even with such liberalizing rules, not all landowners were able to make profitable use of their property, with the result that many of them went into debt. *Matthews* v. *Holmes* was one reflection of this problem; in other cases it arose more directly. In *Gardiner* v. *Gardiner* (1832),[102] Robinson was called on to decide whether, under the statute 5 Geo. 2, c. 7, lands of a deceased debtor could be seized in execution for debt pursuant to an action against the executors/administrators of the estate apart from the heir. The statute itself provided for the seizure of lands in execution, but left the position of the heir unclear. The principles of the common law suggested that the heir had a protected interest in the land which vested immediately upon the debtor's death, and that he therefore had a right to be involved

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[100](1845), 13 M & W 838 (Ex. Ct.).
U.C.Q.B. 285.
[101](1854), 11 U.C.Q.B. 534 at 537.
[102]*Supra*, note 23.

in any proceedings against the land insofar as the statute exposed it to execution.

This approach was consistent with Blackstone's conception of private property rights, but Robinson rejected it. Instead, he focused on the fact that the statute had been passed to "secure creditors in the colonies and to advance trade"[103] and therefore necessarily assimilated real and personal estates by eliminating the heir and his interest. He acknowledged that since the statute had this effect it was a "block thrown ... at random"[104] into the usual workings of the common law. Furthermore, the effective disinheritance of the heir was problematic "in a colony whose laws respect, as ours do in general, the right of the heir to the full extent of the common law of England".[105] He insisted all the same that his interpretation was consistent with both common sense and colonial practice. In the first place, he seemed to agree with the argument made successfully before the Privy Council in an earlier case, that

> [t]he opposite rule of the English law derived from the feudal system, which had never had place in America, is upheld by political considerations wholly inapplicable to the colonies, and would, if admitted there, be destructive of that commercial credit by means of which their lands are in general purchascd, as well as cleared and brought into cultivation; it would not be less injurious therefore to the landlord than to the merchant.[106]

By 1833, fewer British merchants were direct creditors of colonial debtors than when the statute was passed, but Robinson nevertheless believed that to include the heir in a proceeding against land in the colonial courts would still "be in many cases impossible, and in others ... [would] tend to ruinous delays"[107] for remaining creditors. Heirs were often infants, or persons absent from the jurisdiction. Thus, Robinson commented:

> When this statute was passed, it was very notorious that in many of the colonies ... the planters were in the habit of retiring to England with the fortunes they had acquired, their children were sent there to be educated, and of those who from family connection were most likely to be devisees of a resident planter, a greater number, I imagine, would generally be found resident in England or Scotland than in the [colony] which contained the estate.[108]

Robinson took great pains to point out that in recognition of these considerations almost all of the British colonies in American and the West Indies, as well as all the former American colonies, had adopted the same rule prior

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[103] *Ibid.* at 569.
[104] *Ibid.* at 602.
[105] *Ibid.* at 585.
[106] *Ibid.* at 571-572.
[107] *Ibid.* at 579.
[108] *Ibid.* at 587-88.

to the passing of the Imperial statute. He appreciated "that in a province which must be chiefly agricultural, the proprietors of estates should be encouraged to set a just value and feel a secure confidence in their possessions".[109] Nevertheless, he could not ultimately persuade himself that "all the colonies to which this statute applied acted erroneously at the time and persevered in that error ever afterwards, and that such error, affecting the titles of numerous heirs and valuable estates, could have gone on without question or remedy for a century."[110] In the end, private property rights had to yield to a legislative act passed primarily for commercial purposes.

In many ways *Gardiner* v. *Gardiner* represented the wave of the future in property law — a future in which the prevailing conception of land would not be so much static as dynamic, where rights of quiet enjoyment would take second place to rights of use, and where the land itself would be considered simply as one commodity among many. In Upper Canada, as in the United States and England, legislation and commercial pressures would combine during the nineteenth century to complete this transformation. In yielding to these pressures in the *Gardiner* case, Robinson demonstrated that, despite some reservations, he was capable of progressive thinking. Certainty and security in estates were still important, but so were trade and commercial enterprise. The ultimate interests of the colony, and even of the landowners themselves, demanded change.

That change was fundamental. In assimilating realty to personalty under the statute, Robinson had taken a revolutionary step. Traditional common law had regarded land as constitutive of wealth and status, and as the patrimony of future generations. Treating it in the same fashion as personalty was, in Robinson's own words, "subversive".[111] Indeed, the very idea of equating the two kinds of property was not just the old law; it was also a renunciation of the old and established order underlying it. Under the new approach, property was still important and worthy of some measure of judicial protection, but its nature, utility and comparative social value were

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[109]*Ibid.* at 598.

[110]*Ibid.* The fallout from *Gardiner* v. *Gardiner*, *supra*, note 23, was felt for many years. As late as 1859, a series of articles appeared in the Upper Canada Law Journal debating the decision. One editorial declared: "Making all proper allowance for the necessities of a new country, and admitting the propriety of facilitating the transfer of real estate by all the methods known to the law, we yet think that real and personal property should not be placed on the same footing, and, looking to the future of Canada, confess to a feeling — perhaps our readers may call it a prejudice — against the complete abandonment of *all* the protections which surround land at home (*i.e.* England); and we are of the opinion that 'this Canada of ours' would not add to her material interests by an authoritative recognition of any principle that would allow a homestead and a hoggerel to be dealt with in the same way, or by any extension of the doctrine in *Gardiner* v. *Gardiner*." (1859) 5 U.C.L.J. 169 at 170.

[111]*Gardiner* v. *Gardiner*, *supra*, note 23 at 562.

different. In *Gardiner* itself Robinson may have felt his hand forced by statute, but his decision was nonetheless significant, especially since other judges on the Queen's Bench could easily offer a competing interpretation. In the same spirit, the Chief Justice eventually modified other property rights for the purpose of accommodating canal and railway construction (see Section IV *infra*).

Even where he affirmed the traditional law and seemed to eschew innovation, it was clear that Robinson's respect for rights of private property did not rest on blind adherence to established doctrine. Like *Dean* v. *McCarty*, cases such as *Matthews* v. *Holmes* and *Fitzgerald* v. *Finn* demonstrated that context and consequence mattered — that rules and doctrines had to conform with what Robinson perceived to be the community good. Even waste and dower had a purpose, albeit more from the perspective of the landowner and speculator than from that of the tenant or occupier. Ultimately, Upper Canada's Chief Justice realized that quite apart from their effect on individual litigants, his decisions were shaping society.

III. The Law of Commerce

Robinson served as Chief Justice of Upper Canada during a period of unparalleled commercial expansion in the colony. He was well aware of the economic transformation in progress; equally, he recognized the challenge that commerce posed for the common law. Writing in 1854, Robinson observed that "[b]anks, insurance companies, railway companies and corporations of all kinds have sprung up, giving rise to new interests, and to a great variety of new legal questions ... ".[112] The Chief Justice responded to the rise of commerce by generally shaping his decisions — to the extent he considered it possible within the existing constitutional matrix of English law — in the interests of colonial development. In part, this was a matter of process: setting down rules and precedents in a clear and forthright fashion so that businessmen would be able to plan on their strength and predictability. Thus, in *Hamilton* v. *Niagara Dock & Harbor Company* (1842), a decision on the law of corporations, Robinson commented:

> [T]here are many corporate bodies now in the province, created as this has been for promoting specific objects, and it is important thay they should know by what rules the operations must be limited.[113]

In another instance, *Harnden* v. *Proctor* (1852), Robinson justified his detailed exposition of the facts in these terms:

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[112]See Robinson, *supra*, note 3 at 322-323.

[113]*Supra*, note 37 at 386.

> I have stated the facts minutely, because these cases present questions of much interest in a commercial country, such as this is; and if what is decided in one case is to form in any degree a precedent to be acted upon in others, it is essential that all the circumstances which could have influenced the decision should be known.[114]

More importantly, Robinson believed that he had a judicial responsibility to facilitate commerce in matters of substance. He attempted to discharge this responsibility in a variety of ways. First, he attempted to enforce the intent of contracting parties, as opposed to some abstract concept of "just" price or practice; he preferred to regard contracts in terms of bargain rather than exchange. Second, he sought to preserve confidence in bills and notes as media of commercial transaction. Third, he encouraged enterprise by protecting exclusive franchises and enhancing the powers of corporations. Finally, if all else failed, he attempted to strike a commercially intelligent balance between protecting assets for the benefit of creditors and saving debtors from ruin so that they could once again become productive members of society.

At the root of Robinson's approach to contractual interpretation lay what has often been termed the "will theory".[115] This theory holds that contracts are to be construed by "internal" standards (*i.e.* the intentions of the parties to the bargain) rather than "external" standards such as community morality or the judge's understanding of what constitutes a fair exchange. In the early 1800s, the approach was still new in Anglo-American jurisprudence, having only become popular at the turn of the century. It was very much the product of the commercial age. It protected existing bargains regardless of moral merit and at the same time made the enforcement and interpretation of contracts more certain for the parties themselves by emphasizing their own wishes and expectations. In adopting this approach, Robinson placed himself at the forefront of doctrinal development.

Robinson invoked the will theory repeatedly. In *Miller* v. *Dixon* (1835), for instance, he was called on to construe a contract for the sale of land which on its face passed "one-half" of a saw-mill. Relying on the words of

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[114](1852), 9 U.C.Q.B. 592 at 599-600. See also *Silverthorne* v. *Gillespie* (1852), 9 U.C.Q.B. 414 at 424: "This case of much consequence, because it involves principles necessary to be well settled and understood, inasmuch as they apply to a branch of business [*i.e.* shipping] very extensively carried on in this province, and to transactions which are necessarily of daily occurrence . . . ."

[115]On the development of "will theory" in American contract law, see Horwitz, *supra*, note 35 at 160-88. For a history of the theory in England, see P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 398-408. A critical analysis of Horwitz's work is A.W.B. Simpson, "The Horwitz Thesis and the History of Contracts" (1979) U. Chi. L. Rev. 533.

the contract, Robinson rejected the contention that the contract was in fact meant to convey all the mill to the vendee defendant:

> We think the plaintiff is entitled to recover, there being no doubt that the intent of the parties, apparent upon the deed, was that half the mill only should pass, and there being no reason in law why such an intent shall not prevail. The principle that the intention shall govern is just in itself, and is sustained to the fullest extent by adjudged cases.[116]

Intent, however, was not just a question of words; rather, words were mere evidence of intent, and such evidence could be modified by the general usages of trade which made up the context of the agreement.[117] Moreover, as Robinson said in *Brown* v. *Browne* (1851), "when we know what the general usage of trade is in regard to any branch of business, we are to look on the parties as intending to contract with reference to it, unless we have proof that they mean to deviate from it."[118] In the end, contracts were interpreted in a manner which facilitated commercial transactions; they were not construed literally.[119]

Yet usages were not constitutive of law. That view had been on the wane since the late 1700s; in the United States it had proved particularly unworkable because the practices of the merchant community in that country had not only diverged from the English standard but had also become increasingly heterogeneous.[120] Similar developments in early nineteenth century Upper Canada encouraged Robinson to adopt the same attitude. In some instances, this approach protected parties from having the practices of others unwillingly imposed on them, emphasizing once again the legal primacy of intent.[121] In other instances, it helped to ensure certainty in the law, which was itself of significant commercial benefit. Thus, as the Chief Justice was quick to point out in *Ballard* v. *Ransom*:

> [W]hen we come to apply it [*i.e.* a usage], it is certain that we are not to allow it to control general maxims and principles of law bearing equally upon all modes of trade aud dealing; it can be allowed only to have weight for certain purposes, and to a certain extent; it cannot contravene the general and well-

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[116](1835), 4 U.C.Q.B. (O.S.) 101 at 102; see also *Belcher* v. *Cook*, *supra*, note 28 at 426.

[117]See, *e.g.*, *Ballard* v. *Ransom*, *supra*, note 31.

[118](1851), 9 U.C.Q.B. 312 at 314.

[119]On usages, see also *Reynolds* v. *Shuter* (1846), 3 U.C.Q.B. 377; *Higby* v. *Cummings* (1853), 10 U.C.Q.B. 222; *Tilt* v. *Silverthorne* (1854), 11 U.C.Q.B. 619.

[120]On the American rejection of usages as law in the early nineteenth century, see Horwitz, *supra*, note 32 at 190-96.

[121]See, *e.g.*, *Wisconsin Marine & Fire Insurance Company* v. *Bank of British North America* (1861), 21 U.C.Q.B. 284, where Robinson rejected evidence of American commercial practice as a standard by which to measure the rights of the parties under a bill of lading drawn up in Upper Canada.

> established law of the land in a point bearing upon the very justice of the case.[122]

Limitations on freedom of contract were few in Robinson's Upper Canada, but there were enough to remind one that the colony, together with the rest of the English common law world, was still in the process of reconciling the contractual restrictions of an earlier, more communitarian age with the new emphasis on free will and intention. The usury laws survived, and the Chief Justice was willing to enforce them so long as they were on the books. In *Fraser Qui Tam* v. *Thompson* (1845), he even went so far as to say that "in my private judgement ... I am not inclined to look upon them either as oppressive or impolitic".[123] At the same time, however, Robinson was enough of a modernist to dislike having the usury laws abused by any party who entered into a contract voluntarily and then simply changed his mind, especially since the legislature was extending the scope and terms of legal money-lending.

A similar ambivalence was evident in Robinson's treatment of the law of warranty. The will theory of contract represented a departure from traditional idea of implied warranty in the sale of goods. It denied that any warranty could exist barring an express undertaking. The departure made sense in an expanding marketplace where many transactions were impersonal and therefore dependent upon strict written terms. In instances of sale where the vendor of goods was not the manufacturer, Robinson accepted modern doctrine; he preferred to rely on express agreements to establish warranties.[124] He seemed to feel that merchants dealing with products at arms length could assume the risks. On the other hand, when the vendor of an item was at the same time its manufacturer, Robinson was willing to imply a warranty insofar as the quality of the article was under the manufacturer's control.[125] Even on these occasions, however, the Chief Justice was anxious to establish some sort of express engagement in keeping with the doctrinal thrust of the time.[126]

Robinson demonstrated further sensitivity to the needs of commerce in his consideration of the law of bills and notes. In a colony which had little hard currency in circulation, it was extremely important that negotiability of both bills of exchange and promissory notes be encouraged to facilitate commercial transactions. In developing the colonial law in this area, Robinson was much less constrained by English precedent than he was, for example, in the realm of property law. To be sure, England had

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[122]*Supra*, note 71 at 75.
[123]*Supra*, note 58 at 524.
[124]*Bunnel* v. *Whitlaw* (1856), 14 U.C.Q.B. 241 at 248.
[125]*Ibid.*
[126]*Ibid.*; see also *Chisolm* v. *Proudfoot* (1857), 15 U.C.Q.B. 203.

developed a law of bills and notes, but in its more developed economy such instruments were less important than in the colonies. Consequently, many of the finer legal points (and even some basic ones) concerning their transfer and negotiability remained unresolved in English law. By contrast, bills and notes in Upper Canada enjoyed an economic significance analagous to that which they had in the United States. Not only was the case law on such instruments more developed there, but during Robinson's tenure on Queen's Bench it became available in systematized form from the texts of United States Supreme Court Justice, Joseph Story. Robinson drew heavily from these texts, and in the process imported progressive and "instrumental" elements of American law.[127]

First of all, Robinson insisted on a clear literal standard as regards the terms and parties to notes. Where a note changed hands, it was important that its meaning be clear on its face, so it could be conveniently served and enforced. Verbal understandings not apparent on the face of the instrument were inimical to negotiability. Thus, Robinson held in *Davidson* v. *Bartlett* (1844)[128] that a person who signed a note as a joint maker was deemed in law to be a joint maker, even if he testified after the fact that he only meant to sign as surety for the other. The law on the point was not entirely clear in England, but Robinson cited Story to the effect that the writing was clearly determinative in the United States. Robinson adopted a similar approach in *Eward* v. *Weller* (1849),[129] where he rejected evidence of a verbal undertaking between the note-maker and the note-holder concerning the former's liability, an issue which was explicitly contradicted by the maker's signature on the note itself. In an action by the endorsee of the note, Robinson enforced its literal meaning, commenting that "such verbal understanding is inadmissible, otherwise there would be no safety in taking the notes or bonds of parties."[130]

This focus on literal meaning did not reflect judicial rigidity. On the contrary, Robinson was willing to tolerate procedural irregularity in making out notes in the name of commercial convenience. Thus, in *Rossin* v. *McCarty* (1850), Robinson held that it was no objection to the validity of a note, if at the time of its endorsement it had not in fact been signed by the maker:

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[127]See, *e.g.*, *Davidson* v. *Bartlett*, *supra*, note 35; *Beckett* v. *Cornish*, *supra*, note 35; *Bank of Upper Canada* v. *Smith*, *supra*, note 35; *Bank of Montreal* v. *DeLatre*, *supra*, note 35; *McCuniffe* v. *Allen*, *supra*, note 35; *Wilcocks* v. *Tinning*, *supra*, note 35; *Sinclair* v. *Robson*, *supra*, note 35.

[128]*Davidson* v. *Bartlett*, *ibid.*

[129](1849), 5 U.C.Q.B. 610.

[130]*Ibid.* at 612.

> For the convenience of commerce, it is allowed that notes may be made and indorsed in this irregular manner, and that a man may indorse or may accept an imperfect paper which may afterwards be filled up with any amount, and may have parties names inserted as payees or signed as maker of the note, and such filling up and signature will be treated as if made before the acceptance or indorsement, which, in fact, preceded them ... [w]e know [this] to be every day's practice amongst commercial men.[131]

In *Mathewson* v. *Carman* (1843), Robinson went even further. For notes drawn and endorsed in Upper Canada (Canada West) but payable in Lower Canada (Canada East), he refrained from applying the strict English common law. This was done to achieve consistency of practice in the united Canadas:

> The very intimate connexion between the eastern and western parts of Canada, in commercial dealings, renders it a matter, as I conceive, of pressing importance, that but one law should prevail throughout the province in regard to protests and notices upon bills and notes ... The greatest inconvenience will be felt, and often, I am persuaded, heavy losses be sustained by the holders of paper in Lower Canada, if the notary in Lower Canada, acting as I fear he will generally do, in accordance with the law there, shall make a presentment, or send a notice which, though good by the law, will be unavailing here, where the rigid English rule as to time is presently binding upon our courts.[132]

Ultimately, Robinson circumvented the problem by applying the more flexible law of Lower Canada to notes made payable there.

Upper Canada's commercial problems were not restricted to the rules governing instruments of exchange. Forms and structures of enterprise were also at issue. The early nineteenth century commercial revolution did not fundamentally affect the institutional nature of privately-owned businesses or partnerships. The competition it encouraged, however, presented a challenge to the traditional exclusive franchise as a framework for economic organization. At the same time, economic expansion stimulated the development of a new potentially very powerful form — the business corporation.

In English law the franchise had existed for centuries as a royal prerogative granted to individuals for the purpose of carrying on some significant public function, such as the control of a market, care of the forest, or operation of a ferry. Once issued, these grants were generally understood to be exclusive; a party holding a franchise from the Crown had a right of action against others for "disturbance". The grantee's right of property in the franchise, however, could not prevent revocation by the Crown in the name of the public interest. Abuses of monopolistic privilege were thus restrained by a loose form of official regulation.

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[131](1850), 7 U.C.Q.B. 100 at 103.
[132](1843), 1 U.C.Q.B. 259 at 260.

Franchises were used in early nineteenth century Upper Canada to encourage investment in a variety of enterprises which today would be classified as public utilities — turnpikes, mills, canals, ferries, and railways. The state employed this device to attract much-needed capital investment to these projects, holding out the benefit of exclusive enjoyment in return for rent and submission to state supervision.

Chief Justice Robinson understood the importance of franchises to the colony and fought to preserve them even at the price of overturning jury verdicts in the process. This is precisely what happened in *Kerby* v. *Lewis* (1841).[133] Kerby was the grantee of a Crown franchise to operate a ferry across the Niagara River between Fort Erie Rapids, Upper Canada, to Black Rock, Michigan in the United States. In defiance of the grant, the defendant Lewis started to run his own ferry over a nearby route, causing a loss in profits to Kerby. Kerby sued for disturbance of his franchise right. Lewis demurred, holding that the Crown could not in fact grant a ferry right over a waterway separating the province from a foreign country, and that infringement of such "right" gave rise to no cause of action. Robinson rejected the argument:

> [C]ommon sense and common law point out where the government can reasonably grant a franchise, and where they cannot .... The convenience and safety of the public, and various objects of good policy, demand that the passage across narrow waters should be placed under regulation, such as can only be effectually done by means of establishing public ferries; and all these reasons apply with equal force where the river separates us from a foreign shore .... The enforcement of our revenue law, the apprehension of fugitive offenders and deserters from the military service, and the regular and safe transmission of the mails, are all objects of public interest, to which the regulation of ferries is made subservient; and, besides these, is the object of ensuring to travellers the means of crossing the water without delay in safe boats, managed by experienced persons, and paying reasonable fares ... .[134]

In these circumstances, an exclusive Crown franchise was the only means of protecting the public interest. This was not just a formalistic conclusion based on the state of the existing doctrine. Rather, it was a realization that free competition would lead to disaster:

> [I]f all were left to chance, and no one could be protected in an inclusive right, it would not be worth the while of any person to make and maintain such provision for the public accommodation as would enforce dispatch and safety; competition would at one time reduce the charge of ferrying so low, that no one would find it for his advantage to keep a sufficient establishment for that purpose, and when this competition had driven all but one or two from the

[133](1841), 6 U.C.Q.B. (O.S.) 207; (1843), 6 U.C.Q.B. (O.S.) 489; (1843), 1 U.C.Q.B. 66; (1843), 1 U.C.Q.B. 285.

[134](1841), 6 U.C.Q.B. (O.S.) 207 at 209-10.

> employment, then the power to extort would succeed, and there would never be certainty if the thing were to regulate itself.[135]

Robinson defended exclusivity in a different way in *R.* v. *Davenport* (1858).[136] The Crown had granted a ferry franchise to the defendant Davenport in return for rent. The franchise itself was "at pleasure". The defendant operated the ferry service from 1838 until 1842, at which time the Crown granted a lease of the same ferry to one Baby. Baby set up his ferry close to the defendant's, running first with a scow for teams, then a small boat for passengers, and afterwards a steamer. Baby's service almost ruined the original franchisee. For a time, Davenport's ferry could not even cover his expenses. The situation was temporarily resolved when Baby and Davenport agreed to charge a uniform and higher fare. Soon after that, the Crown entered a claim against Davenport for unpaid rent. Davenport countered that he owed none after 1842, the grant of the ferry lease to Baby being in effect a revocation of his own right. Robinson agreed. He could not conceive of a franchise existing in two parties competitively — such a thing would, to say the least, be "strangely inconsistent".[137]

The commercial revolution did not simply put pressure on traditional forms of economic organization; it also encouraged their transformation. Such was the case with the corporation, a legal device which had been developed in medieval England to distinguish collectivities from their members. Early corporations were generally not economic in nature, being principally boroughs, universities, and ecclesiastical orders. Business enterprises were only organized as corporations in the late sixteenth century; it took the better part of the following 250 years for the practice to become common.

In Upper Canada, the colonial legislature chartered some sixty business corporations prior to 1841; the dimensions of the commercial boom were reflected in the fact that forty-two of these were brought into existence between 1831 and 1838.[138] In this context, and given the relative novelty of the corporate form in the colony, it is hardly surprising that significant questions concerning its precise nature and powers soon came before the courts. These were among the most important questions that the Upper Canadian judiciary considered in the early nineteenth century. Corporations, particularly in the form of banks, roads and railway companies, were at the forefront of the colony's economic development. Insensitive handling of their legal difficulties stood to harm not just the enterprises themselves, but Upper Canada as a whole.

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[135]*Ibid.* at 210.

[136](1858), 16 U.C.Q.B. 411.

[137]*Ibid.* at 414.

[138]R.C.B. Risk, "The Nineteenth-Century Foundations of the Business Corporation in Ontario" (1973) 23 U.T.L.J. 270 at 271.

Chief Justice Robinson was generally sympathetic to the new enterprises. In an early challenge to the legality of corporations in the colony, he declined to apply the *Bubble Act*, which had inhibited the development of company law in England prior to its repeal there in 1825. In *Bank of Upper Canada* v. *Bethune* (1835), he pointed out that the Act, which had been passed in 1729 in the panic following the bursting of the so-called "South Sea Bubble" investment scheme, had been levelled solely at fraudulent combinations of persons pretending to create transferable stock.[139] By definition the Act was not applicable to colonial corporations created by provincial statute for the public good, such as the Bank of Upper Canada. In any event, the Act at issue was by this point no longer in force even in England. The Chief Justice concluded:

> [W]hen the parliament of the mother country repealed the original and principal act of 6 Geo. I, declaring that it was expedient to leave such practices and schemes to be dealt with according to the common law, they did, in my opinion, undo all that they had done by that statute, and they neither meant to leave it in force nor did leave it in force, in any one part of the British dominions more than in any other.[140]

Robinson's comments in *Bank of Upper Canada* v. *Bethune* reflected what has since come to be known as the "grant" theory of the corporation — the idea that the corporation was not, in law, a natural person, but rather an entity created by the legislature for the execution of a specified public purpose. The Chief Justice put the point expressly in *Bank of Montreal* v. *Bethune* (1835): "Corporations have no natural existence — they are the mere creations of positive law, and are established for the maintenance and regulations [*sic*] of some particular objects of public policy."[141] As such, they were creatures of limited power: "[T]hey exist only by virtue of their charter, and have no other capacity than such as is necessary for carrying into effect the purposes for which they were established."[142] The approach was conventional, but within its confines Robinson demonstrated an appreciation of the contingencies of trade, recognizing that the business corporation was a new phenomenon requiring laws and rules which were more relaxed than previous corporate law. In *Bank of Upper Canada* v. *Widmer* (1832), for instance, he focused on the commercial nature of the bank and

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[139](1835), 4 U.C.Q.B. (O.S.) 165 at 173-74.

[140]*Ibid.* at 172.

[141] (1836), 4 U.C.Q.B. (O.S.) 341 at 352. See also *McDonell* v. *Bank of Upper Canada*, *supra*, note 24 at 279: "[C]orporations are mere creations of law; the intention of charters granted to trading corporations especially, is to confer certian facilities, privileges, and exemptions, which may encourage and enable them to prosecute their objects effectually ... though this ... is generally done more for the sake of the public, who are to be benefited by their operations, than for the sake of the corporations ... ."

[142]*Bank of Montreal* v. *Bethune*, *ibid.*

concluded that it warranted a broader interpretation of directors' discretion than was appropriate for non-commercial corporate bodies:

> [W]hen we consider the objects of this trading corporation, established merely for transactions of a mercantile nature, it is evident that for the preservation of good faith in their dealings, to give confidence in them, and to facilitate their daily business, it is indispensable that the directors should fully represent, and be able to bind, the stockholders ... [I]t is impossible not to admit that they are acting under different circumstances from the committees of charitable institutions, or the managers ... of many other corporations.[143]

Robinson nevertheless understood that there were situations in which corporate powers had to be limited in the interests of stockholders, merchants not favoured with public privileges, and the colony as a whole. As Robinson emphasized in *McDonell* v. *Bank of Upper Canada* (1850):

> [T]he legislature has in each case to take care that they set just bounds to the facilities and privileges granted, in order that such corporation may not interfere prejudicially with private individual enterprise, and may not, so far as depends on the solvency of the corporation, endanger the public interest by engaging in imprudent transactions which may involve it in ruin.[144]

Robinson was particularly cautious about extending the power of banks, which in the years before the railways were the most important corporations in the colony. Set up to provide capital funds for investment, banks also issued vast sums in notes intended for general circulation. As a result, the

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[143]*Supra*, note 28 at 275-76. See also *Kingston Marine Railway* v. *Gunn* (1846), 3 U.C.Q.B. 368 at 370. Robinson's recognition of the unique nature of the business corporation led him to protect it from certain public intrusions into its affairs, the grant theory notwithstanding. For instance, he denied that the election of company directors could be reviewed by a *quo warranto* proceeding. Thus, in *R.* v. *Hespeler* (1854), 11 U.C.Q.B. 222 at 228: "This railway company is established by statute, it is true ... so are all our banks and insurance companies, and a great number of corporations of less general interest. The preamble [of the charter in this case] shews that it was not merely for the private gain of the petitioners that this railway company was incorporated, but because it was also thought desirable on public grounds. But the same thing may be said of almost every statute incorporating any of our trading corporations; no doubt they all have the public good in a measure in view. We have not omitted either to consider, that this statute requires that the line of railway shall be approved of by the Governor in Council, which is another argument that the legislature regarded it as a matter affecting the public welfare. We think that these, which are scarcely peculiarities in this act, are not sufficient to give the jurisdiction in question." The inspiration behind this decision was probably similar to that which had seized Joseph Story and the Supreme Court of the United States in *Dartmouth College* v. *Woodward*, 17 U.S. (1 Wheat.) 518 (1819).

[144]*Supra*, note 24 at 279. See also *Kinloss (Municipality of)* v. *Stauffer* (1858), 15 U.C.Q.B. 414 at 417: "[I]t should be the endeavour of courts of justice to restrain ... corporations ... to transactions such as the charter contemplates, for otherwise the corporate privileges, and the immunities given to them for other purposes, might be unfairly extended and abused, to the prejudice of those who have no such privileges granted to them; and the public funds and interests, which they are entrusted to manage, might be sacrificed and ruined by their embarking in business which the legislature never contemplated."

financial welfare of the colony came to depend on their solvency. In *McDonell*, Robinson denied that the Bank of Upper Canada had any power to hold ships, vessels or capital stock of a corporation as security for debt or a mortgage. Such holdings were expressly prohibited by the bank's charter, which restricted it to land. The Chief Justice was clearly concerned that taking lesser kinds of security might "involve the bank in business of a very precarious and hazardous nature".[145] In the context of a similar problem in *Lyman* v. *Bank of Upper Canada* (1852), he elaborated:

> The Legislature incorporated the Bank with particular powers and privileges necessary for carrying on a certain description of business, quite distinct from the business of shipowners, and those who deal with them, may know, and are bound at their peril to take notice, what it is that their charter enables them to do; otherwise all the funds which have been contributed by a body of shareholders for one purpose might be squandered in an application to other purposes, to the injury of all embarked in the undertaking; and in the case of a bank which it is intended shall have power to issue bills to circulate as money, the whole public have an interest in their being confined to the business for which they were incorporated; for, in case of their becoming insolvent by engaging in affairs foreign to their charter, thousands are involved in the loss, as being holders of their bills.[146]

The *vires* problem was intimately related to another great issue in early nineteenth century corporate law: the problem of contractual capacity. Traditional doctrine dictated that in order to protect shareholders, corporations could not enter into or be bound by contracts not under seal. Obviously, this formal requirement was a considerable impediment to business in a commercial age. Robinson recognized this, and in general sought to fit corporate contracts into the contemporary exceptions which had been built into the rule. "We have," he commented in *Dempsey* v. *Toronto (City of)* (1849), "gladly availed ourselves of whatever can be found in English decisions, having a tendency to remove a technical difficulty that would in general be found to militate against the claims of justice."[147] The Chief Justice traced the development of the law in *Bank of Upper Canada* v. *Widmer*:

> [W]hen we look into the early authorities on the powers of corporations, and the manner of exercising them, we find it very strictly laid down that they can only act by deed under their seal; when we look a little further we find exceptions gaining ground, at first very trifling, and afterwards more important, all proceeding from a gradual extension of the principles of the common law, as

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[145] *McDonell* v. *Bank of Upper Canada*, *ibid.* at 289.
[146] (1852), 8 U.C.Q.B. 354 at 358.
[147] (1849), 6 U.C.Q.B. 1 at 7.

> new subjects arose for their application .... It is impossible that it could be otherwise ... .[148]

Some of the more modern exceptions included executed contracts where a benefit had already been transferred, common minor agreements where the formality of a seal would be absurd, and those others "founded either on necessity or on grounds of convenience, so obvious as to seem irresistible."[149] By virtue of this last category, Robinson noted,

> corporations of a mercantile character ... have been allowed to become parties to bills and notes, as makers, indorsers, or acceptors, without the use of their seal, from a conviction that their business could not otherwise be conducted without very great difficulty, and that the dealing in such negotiable securities is, in the present day, and in commercial countries, a matter almost of necessity in conducting mercantile business.[150]

The exceptions had in fact grown so broad that Robinson at one point confessed himself "at a loss to say what are the acts which a corporation like this can not do without deed under seal, unless it be the divesting themselves of some interest ... or the binding themselves by an executory agreement."[151] Here, however, the Chief Justice drew the line. To extend the exceptions any further would permit them to swallow the rule. Robinson insisted on the importance of the executed/executory distinction in particular, characterizing it as "highly reasonable ... and founded on good sense".[152] Without the distinction, he believed that corporations might be defrauded of vast sums without proof that any contract had ever been made. He rejected the opportunity for judicial reform provided to him by English and American decisions tending to eliminate the difference. Robinson preferred instead to invoke long-standing precedent. He said:

> If I were thus to set entirely aside one principle so well known, and so long and consistently acted upon, I know not why I might not as well feel at liberty to disregard every other principle of which I do not approve, and deliver the law, not as I find it to be, but as I think it ought to be.[153]

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[148]*Supra*, note 28 at 284. In the specific context of the case, Robinson continued: "The corporations that existed in very modern times, were for the most part of a nature and for purposes wholly different from those which belong to banking institutions. A Dean and Chapter, or a Mayor and Burgess, might answer all the objects of their charter without feeling inconvenience from the application of rules and principles, under which a bank would find it impracticable to move." *Ibid.* at 285.

[149]*Supra*, note 43 at 387.

[150]*Ibid.*

[151]*Bank of Upper Canada* v. *Widmer*, *supra*, note 28 at 288.

[152]*Blue* v. *Gas & Water Company* (1849), 6 U.C.Q.B. 174 at 175.

[153]*Hamilton* v. *Niagara Harbor & Dock Co.*, *supra*, note 37 at 398.

In such a judicial muddle, the resolution of uncertainty lay not with the courts, but with the legislature.[154]

The courts, however, were rarely asked to enforce executory contracts. More often than not the Chief Justice found himself dealing with partly executed contracts or transactions which clearly fell under the established exceptions to the seal requirement. Robinson was clearly committed to maintaining these exceptions, and was in this respect more progressive than his more traditionally-minded colleagues on the Upper Canadian Court of Common Pleas. Indeed, when the English Court of Exchequer attempted on one point to reconcile the seal requirement with decisions assimilating executed and executory contracts, in effect holding that henceforth all corporate contracts had to be under seal, Robinson balked:

> I think this change in our law, attempted to be introduced without legislative authority, is by no means yet established in England, but that the weight of authority, if we look at the decisions of all the courts, is very much against it down to the present moment; and before I could bring myself to concur in holding against the decisions of courts for a series of five hundred years ... that a corporate body can avail themselves of the property and labour of others, and accept and apply it to their own legitimate purposes, within the scope of their charter, and yet refuse to pay for what they are enjoying because they never bound themselves under their seal to pay for it, I must see either an act of parliament abolishing what certainly till lately was undisputed law, or must feel myself bound by a decision to that effect by some higher tribunal, whose judgements have by the constitution a direct authority overruling us.[155]

In this context, it would be misleading to construe Robinson's disinclination to enforce executory corporate contracts not under seal as indicative of general insensitivity to the needs of commerce. The Chief Justice went a considerable distance to accommodate those needs; at the end of the day, however, his sense of commercial caution and judicial duty to established principle prevailed. This was not as remarkable as some writers have suggested. Given the constitutional confines of the colonial legal system, Robinson had to acknowledge limitations.

The legal challenge Robinson faced in the rise of the business corporation was only complicated when the Chief Justice was forced to deal with "foreign" enterprises operating in Upper Canadian jurisdiction. The problem was relatively novel in the English common law; in *Genesee Mutual Insurance Co.* v. *Westman* (1852), Robinson commented that it was "a little surprising" how silent English text writers and English cases had been on the point of a foreign corporation's competency to carry on business in

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[154]*Ibid.* at 395.

[155]*Clark* v. *Hamilton and Gore Mechanics' Institute, supra,* note 46 at 181.

England.[156] In this situation, Robinson went back to the initial principles of the grant theory. First, he considered that corporations were creations of positive law with limited powers. In the eyes of local courts, foreign corporations acting within Upper Canada without the approval of the legislature were therefore acting *ultra vires* just as Upper Canadian corporations were when they operated outside the strict bounds of their locally-granted charters. Second, Robinson recalled the public dimension of corporate charters. In some instances, the public purpose of a corporation could be defeated if a foreign enterprise was permitted to operate in direct competition with it. Robinson was clearly concerned about this possibility, probably for the same reasons he offered in protecting exclusive franchises. Thus, in *Genesee Mutual,* he declared:

> All reasoning is against the right of transferring the exercise of corporate powers from one country to another. The creation of corporate bodies for banking, insurance, manufactures and other business of that kind involves the concession of privileges, which used to be dealt out sparingly, though much more so in former times than at present; but, generally when an association of this kind is first sanctioned for some particular purpose, it is gravely, and sometimes anxiously discussed, whether another shall be created or permitted to interfere with it, or whether there may or may not be a limited number of other such corporations ... .[157]

In *Bank of Montreal* v. *Bethune,* where he forbade the Bank from operating in Upper Canada, Robinson considered the possibility that the presence of the Lower Canadian institution in the colony might "diminish the business and profits of our own chartered banks".[158] Note the political angle here. Robinson was concerned that the introduction of foreign corporations would result in a loss of local control and decision-making power:

> These are questions, too, in which the population of a country usually takes a lively interest ... but it would be idle to be discussing such matters in the legislature here, if it were competent for every foreign corporation to transfer their business to this country, and to do in a corporate capacity in this country whatever their foreign charter contemplates their doing in their proper country. These foreign corporations, too, would be ... subject to none of those conditions or restrictions which our legislature might think it indispensable to enforce upon such corporations, as they might consent to create, and we should have no check upon them for any abuse of their charters which they might commit in their transactions conducted here.[159]

While it encouraged the development of new forms of enterprise, the commercial boom of the early nineteenth century brought increased commercial risks. There was much to gain, but also much to lose. Unfortunately,

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[156]*Supra,* note 27 at 493.

[157]*Ibid.*

[158]*Supra,* note 141 at 349.

[159]*Genesee Mutual Insurance Co.* v. *Westman, supra,* note 27 at 493-94.

many small businessmen and farmers in Upper Canada found that they could not survive in the new age. Some simply refused to honour their financial obligations and submitted themselves to the legal process; others attempted to flee the jurisdiction. In company with the other members of the Upper Canadian judiciary, Chief Justice Robinson was left to balance the desire among creditors to protect their investments against the desire among debtors to re-establish themselves as productive members of society.[160]

Robinson preferred not to deprive creditors of reasonable remedies. For example, he insisted that a creditor had grounds for arrest as soon as rumours of his debtor's flight began to circulate. It was not necessary, as Robinson put it in *Wanless* v. *Matheson* (1857), that "the creditor ... wait till his debtor has not only completed his arrangements for a flight, but has ... actually fled from his house, and is making his way with all speed to a foreign country ... ."[161] Under the same rationale, creditors deserved to have provincial statute provisions respecting the granting of "gaol limits" for arrested debtors strictly enforced, because actual practice had "a tendency to diminish the creditor's chance of obtaining payment of his debt."[162]

On the other hand, the Chief Justice was solicitous towards honest debtors. He disapproved of imprisonment for debt, which he characterized as "detrimental to both parties, and contrary to humanity and christian feeling ... ."[163] Robinson realized that close confinement of a debtor could "ruin his health and irreparably injure his interests.[164] So long as such an extreme penalty existed, however, he sought to guard debtors against abuse of process. Thus, in *Tannahill* v. *Mosier* (1832), he permitted an arrested debtor to introduce into evidence a counter-affidavit contradicting a claim of dubious legitimacy, acknowledging that, although this had never been done before in the Upper Canadian courts, he could not allow people to "lose their liberty, and perhaps in consequence their lives" through the actions of less than honest creditors.[165]

An eighteenth century formalist would not have reasoned in this manner. In that age, dishonour of debt was considered a moral failing to be

[160]Problems of debtor-creditor law bedevilled the Upper Canadian legal community in the mid-nineteenth century. For some contemporary comments, see "Imprisonment for Debt" (1844) 1 U.C. Jurist 1; "The Insolvent Law" (1844) 1 U.C. Jurist 385; "Shall We Have a Bankruptcy Law?" (1858) 4 U.C.L.J. 2; "Imprisonment for Debt" (1858) 4 U.C.L.J. 51; "Imprisonment for Debt, 'The 91st Clause'" (1859) 5 U.C.L.J. 121.

[161](1857), 15 U.C.Q.B. 278 at 279.

[162]*Evans* v. *Shaw* (1829), Draper 14 at 21 (U.C.K.B.).

[163]*Bell* v. *Ley, supra,* note 33 at 10. Robinson realized that close confinement of a debtor could "ruin his health and irreparably injure his interests."

[164]*Tannahill* v. *Mosier* (1832), 2 U.C.Q.B. (O.S.) 483 at 490.

[165]*Ibid.* at 489.

punished.[166] Robinson, however, had no interest in ruining debtors in the name of "justice". In his mind, the law of Upper Canada existed to protect creditors and debtors alike for the good of the community.

Robinson's generally sympathetic approach to the legal problems of the colonial merchant community upsets not only the prevailing Tory-formalist thesis concerning his legal thought, but it also challenges the more general notion that Robinson "relegated commercial values to a secondary role in society".[167] On the contrary, the Chief Justice's decisions on commercial questions reflect his deep commitment to the colony's commercial prosperity and development.[168] In the words of one Upper Canadian barrister who appeared before him many times, Robinson was "ever for a liberal interpretation of the laws affecting banking and commerce, regarding these matters as of the utmost importance to the advancement of the Province."[169] His heroes were commercially progressive jurists such as Lord Mansfield. In one 1849 case, Robinson spoke admiringly of this famous jurist:

> [H]ow great was the advantage to jurisprudence, when any occasion arose for an exposition from [him], of the principles which should govern commercial transactions and the application of them.[170]

Admittedly, Robinson was not as innovative as some of his American contemporaries, but, as he pointed out several times, he was legally and constitutionally constrained where they were not. The situations in which he sought refuge in precedent for a traditional and ostensibly anti-commercial position were, for the most part, exceptional. Moreover, it is even possible to regard the exceptions as instances where Robinson acted less out of blind attachment to precedent than out of genuine concern for the economic future of the colony. Robinson preferred an approach to development which placed a higher premium on the protection of investment than on rapid high-risk growth. Yet, considering the peculiar economic circumstances of the colony, its narrow capital base, and the comparative vulnerability of its enterprises, his caution was defensible. The challenge in interpreting Robinson's decisions in the commercial law area is not to mistake his caution for a precedent-bound disregard for progress and prosperity.

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[166]On attitudes towards debt in Massachusetts in the late eighteenth and early nineteenth centuries, see W.E. Nelson, *Americanization of the Common Law* (Cambridge, Harvard University Press, 1975) at 41-45, 147-154.

[167]Cook, *supra*, note 12 at 89.

[168]Robinson's judicial enthusiasm for Upper Canadian commerce and development was reflected in his personal views in his book, *Canada and the Canada Bill* (London: J. Hatchard & Son, 1840).

[169]Read, *supra*, note 9 at 136.

[170]*Kerr* v. *Coleman* (1849), 6 U.C.Q.B. 218 at 223.

IV. The Law of Transportation

In the early nineteenth century, Upper Canadian prosperity came to depend on the development of an extensive domestic transportation network. The raw materials and surplus foodstuffs constituting the colony's bounty had to have some means of reaching the towns where they could be consumed, or, in some cases, transhipped abroad. Imported or domestically manufactured goods had to be distributed to the hinterlands. In this context, the survival and success of Upper Canada's shipping, canal, road, and railway companies became a pre-requisite to progress.

Robinson's rulings on legal questions involving the colony's transportation interests demonstrated the same sensitivity to colonial circumstances that is evident in many of his decisions involving matters of property and commerce. The law of transportation necessarily cut across both areas. Its commercial aspect was obvious: the waterways, roads and railways were lifelines of trade. At the same time, however, the development of an extensive transportation network required interference with previously bestowed property rights. The problem here was how to reconcile such rights with the newer needs of the community. Robinson believed in private property, but he was never so doctrinaire as to allow it to stand in the way of great public improvements.

Long before such improvements were necessary or even possible, however, Upper Canada's principal trade routes were the rivers. Navigation permitting, shipping companies carried goods across the colony, into the interior, and then through Lower Canada to the United States and even England. As Chief Justice, Robinson made every effort to facilitate shipping by interpreting the traditionally onerous law of common carriers in a way that saved shipping companies from its burdens; at the same time, he sought to shift liability for loss from carriers to insurers.

The law of common carriers dictated that any "carrier" — any party that operated or held itself out as a carrier of goods for hire — was absolutely liable for any loss of goods carried, except for losses caused by acts of God or the king's enemies. This scheme was obviously severe because it rendered due diligence in the transport of goods irrelevant to the issue of liability. In the early nineteenth century, English and American courts, operating under the pressures of commerce and modern contractarian ideology, began to develop ways to get around the strict terms of the law.[171] In Upper Canada, Robinson took full advantage of the new methods of avoidance. In the first place, he tended to give ambiguous interpretations to traditional exceptions. Thus, in *Smith* v. *Whiting* (1834), he declined to "attempt too great refine-

[171]See Horwitz, *supra*, note 32 at 204-07.

ment in drawing the line" between excepted "acts of God" on the one hand and unexcepted "dangers of navigation" on the other. He hoped thereby to discourage litigation and at the same time save carriers from losses which could be more conveniently borne by insurers.[172] In the second place, he was willing to grant carriers the full benefit of liability exemption clauses. In *Harnden* v. *Proctor* (1852), for instance, he gave a broad interpretation to an exemption clause relating to dangers of navigation in order to protect the carrier from a negligence claim.[173]

Where the generally recognized exceptions to common carriers' liability did not apply, or where there was nothing in the contract between the shipper and the shipping company, Robinson tended to avoid the "common carrier" classification altogether. In *Ham* v. *McPherson* (1842), for example,[174] the plaintiffs were the owners of flour consigned to the defendants for shipment downriver from Kingston to Montreal. Because of ice build-up, navigation on that route was impossible; the plaintiffs therefore requested that the defendants put the flour into storage until the river cleared. The defendants did so, but during the winter an accidental fire broke out and destroyed the flour. The plaintiffs commenced an action against the defendants as common carriers. Robinson knew he faced a dilemma. His ultimate sympathies, however, lay with the defendants. Although he denied "any feeling which should incline us to strain the law in this case in favour of either party",[175] his analysis was remarkable for its repeated references to the "rigid", "rigourous" and "inflexible" nature of the law of common carriers. This perspective, combined with his obvious doubts about the fairness of applying traditional carrier law, encouraged him to question whether the defendants held the goods in their capacity as common carriers or as "warehousemen". If the latter, they could escape liability merely by showing that reasonable care had been taken. Robinson left the final determination to the jury, being careful to add, however, that he thought that the defendants were warehousemen at the time of the fire, and, further, that

> it would be contrary to natural justice to hold that the defendants undertook to insure the flour against accidents which no care of theirs could prevent, or that they were more liable than any other person who might have agreed to store the flour for the convenience of the plaintiff.[176]

In addition to considering the legal difficulties facing common carriers, cases like *Ham* v. *McPherson* underscored the problems which plagued the waterways of the colony. The ice which gripped the Kingston-Montreal route

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[172](1834), 3 U.C.Q.B. (O.S.) 597 at 600.
[173]*Supra*, note 114 at 600.
[174](1842), 6 U.C.Q.B. (O.S.) 360.
[175]*Ibid.* at 365.
[176]*Ibid.* at 376.

for five months of every year was one obvious problem; another was the treacherous rapids and falls of the St. Lawrence. If these perils could be overcome, the grain-producing western parts of the province could be better connected to the overseas market and Upper Canadian farmers could begin to compete with their American counterparts on an equal footing. Such considerations, together with security concerns which dominated the decades immediately following the end of the War of 1812, encouraged the construction of the Upper Canada's first great public project — the canals.

The first of these, the Welland Canal, was chartered by the Upper Canadian legislature in 1824. The second, the Rideau, was authorized by statute a few years later. The colonial government invested directly in the former with private entrepreneurs; because of the military significance of the link between Lake Ontario and the Ottawa River, the latter was financed almost exclusively by London.[177] The construction of the canals was no easy task, physically or legally. The challenge to early nineteenth century technology was obviously great. At the same time, the canals presented the Upper Canadian government, and subsequently the courts, with legal problems because private lands had to be expropriated to permit construction. The legislature had taken care to provide compensation to landowners in this instance, but difficulties inevitably arose in dealing with both displaced and neighbouring proprietors.

In considering the legal problems arising out of canal construction, Robinson consistently showed concern for the viability of the projects, and a determination that their success would not be jeopardized by a narrow insistence on private rights.[178] The choices he made were fundamentally reflective of his judicial thought. In this context, private landed property represented tradition and the values of a pre-industrial economy. It was static capital; that is, its value laid more in itself than in the wealth it could generate. By contrast, the canals represented change and the promise of prosperity. They were dynamic growth capital designed to facilitate industrial development. In tending to favour the canals over private property, Robinson therefore opted for a progressive rather than a conservative vision of Upper Canadian society.[179]

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[177]See Brode, *supra*, note 14 at 120.

[178]Robinson took exceptional pride in the canal system of the colony. In 1840, in an effort to dissuade the British Government from adopting the recommendation of the Durham Report to unite the Canadas, he characteristically praised the Rideau Canal as "a splendid monument, not of a nation's liberality merely, but of her forecast. In point of design, material and workmanship, it is second to no work on the American continent... ." Robinson, *supra*, note 168 at 53.

[179]In making his choice, the Chief Justice was not entirely disinterested as he was one of the early backers of the Welland Canal Company. See Brode, *supra*, note 14 at 120.

In *Phillips* v. *Redpath* (1830), for instance, Robinson was called upon to decide whether the defendant Redpath, employed in the construction of the Rideau Canal, had committed a trespass against the plaintiff by tearing down a frame building he had erected on land supposedly required for the Canal. In the case itself, it appeared that the defendants were not protected by statutory authority, since the only reason for their intrusion was that the plaintiff "was a Yankee, and should keep no tavern there".[180] At a more general level, however, Robinson declared:

> The Rideau Canal is a public work of great importance to the province in several points of view, and that its accomplishment will confer immense advantages upon this country there can be no doubt. Like other great and general benefits, however, it cannot be attained but with some partial sacrifices — and of necessity private interests and convenience must for the sake of such objects be made to yield to the public welfare.[181]

Robinson adopted a similar approach in a second case involving the Rideau Canal, *Malloch* v. *Principal Officers of Her Majesty's Ordinance* (1846). Here the plaintiff Malloch brought an action of ejectment against the defendant officers for having expropriated the canal land which had been granted to him after the passage of the Rideau Canal Act. In light of the importance of the project, Robinson was prepared to interpret the defendants' power of seizure broadly:

> The legislature passed in 1827 the Act ... for granting certain facilities to the government for the construction of the the Rideau Canal. They recite in it that "the work would tend most essentially to the security of the Province by facilitating measures for its defence, as well as promote greatly its agricultural and commercial interests;" and when this double public advantage is considered, we cannot doubt that the legislature intended, that the discretionary powers which they were about conferring upon the military officers, to be intrusted by His Majesty with the superintendence and charge of the canal, should be such as would enable them to carry out the design on what they might consider an efficient and proper scale .... [T]he question of the land being necessary or not necessary, must be governed by their judgement and not by the judgement of any court, or the opinion of any person public or private, and this appears to me to be not only legal but highly reasonable, when we consider the great public interests involved on the one hand, and, on the other the care taken to

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[180]*Supra*, note 24 at 79.
[181]*Ibid.* at 71-72.

> secure to every individual whose property may be taken possession of, a just compensation for its value.[182]

Even when statutes provided compensation, however, Robinson was willing to read the relevant clause to prevent an undue drain on public funds and the defeat of the project at issue. This willingness reflected the extent to which he was prepared to let developmental concerns trump private rights and interests. In *Commissioners of Public Works* v. *Daly* (1849), for instance, Robinson had to consider legislation permitting compensation for damage "to property, arising from the construction, or connected with the execution of" the Cornwall canal.[183] He declined to apply it in favour of a village landowner who claimed compensation for depreciation in the value of his property because the canal had dispensed with the need for land carriage through the village, "thereby depriving the people of the village of a great source of employment in transporting ... merchandize."[184] Robinson admitted that the words of the statute seemed designed to include all damage to property that could conceivably be traced to the canal. At the same time, however, he maintained that it was

> unreasonable to imagine that the legislature really intended that compensation should be made from the public funds for the kind of damage alluded to, proceeding from a valuable public improvement, for there is no end to the extent to which such claims might be carried, and on very plausible grounds. In point of fact such injuries, we know, are not in general compensated, though they must follow more or less from almost every great improvement.[185]

The early nineteenth century canal boom in Upper Canada was paralleled by developments in overland transportation. Special companies were chartered to lay down modern "macadamized", planked, or gravelled roads to replace many of the original mud tracks cut through the colonial wil-

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[182](1846), 3 U.C.Q.B. 387 at 388-89. Robinson was not alone in either his broad interpretation of the seizing powers of Crown officers, or in his approval of the canal enterprise. Note, *e.g.*, Sherwood J., in *Mittleberger* v. *By* (1832), 2 U.C.Q.B. (O.S.) 379 at 381: "The powers conferred on the agents of the government, for the purpose of constructing the Rideau Canal, are certainly very great, for they may take the property of private persons without their consent, to advance the public service. Many consider this law unjust, because they asset it deprives the owner of a part of his property without any compensation. I cannot say I am of this opinion; I think the canal, when completed, will give general satisfaction, and no public work based on such an extensive plan could ever be accomplished without vesting the servants of the government with powers in some degree proportionate to the difficulty of its execution, and the importance of its objects." The *Rideau Canal Act*, (1827) 8 Geo. 4, c. 1, section II, however, provided compensation for "damage which [a landowner] may reasonably claim in consequence of the ... Canal ... being cut and constructed in and upon [his] ... lands". In the event of no agreement between the Crown and the landowner, section IV made compensation claims subject to arbitration. Sections V-VIII provided for further appeal to a special jury.

[183]*Supra*, note 24 at 44.

[184]*Ibid.* at 46.

[185]*Ibid.* at 47.

derness. In many instances, these routes became toll roads with the road company leasing toll-gates to individuals. As he had done in the case of canals, Robinson tended to protect these enterprises by limiting their legal obligations and shielding them from the nuisance and expense of litigation. He expressed this point clearly in *Nichols* v. *King* (1849):

> This kind of enterprise, by public companies undertaking, at their own charge, the improvement of roads in different parts of the country, is beneficial to the community .... [I]t would tend to discourage such undertakings, if groundless actions against them are encouraged ... .[186]

Thus, in *Stewart* v. *Woodstock and Huron Plank and Gravel Road Company* (1858), Robinson declined to find that the lessor road company had a duty to protect the value of the plaintiff lessee's toll-gate by clearing snow off its road. He said:

> The defendants cannot be held to have undertaken to insure against snow-storms. The person who leased the road, whether by bidding at a public auction or otherwise, must be supposed to know that we have snow-storms in winter, as well as other impediments at other times, which make travelling inconvenient, and keep people in a great measure from using the road for a time; and they may be supposed fairly, we think, to make their engagement under a sense that it will be prudent to make allowance for those casualities. Letting snow lie on a macadamised road does not, in our opinion, come under the notion of suffering the road to go out of repair.[187]

Similarly, Robinson was prepared to interpret statutory obligations narrowly to limit the responsibility of road companies which had made existing junctions impassable by the construction of their roads. In *R.* v. *Woodstock and Dereham Plank and Gravel Road Company* (1859), for instance, he declined to make a finding of nuisance against the road company for failing to grade their road to match the grade of a cross-road. The Chief Justice held that parliament had required the company to make the road a certain grade, and there was nothing in the statute requiring them to do more. The decision, however, seemed to rest as much on the significance of the road to the colony as on the words of the statute calling for the construction of the road:

> [W]e cannot hold that a leading road through the country, such as that of the plaintiffs could not receive such necessary improvement, if it would render a crossroad or street of a village which led into it, and not beyond it, no longer practicable at the junction ... .[188]

Important though they were, the economic significance of the canals and roads of the colony paled when compared to the nineteenth century's

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[186](1849), 5 U.C.Q.B. 324 at 325.
[187](1858), 15 U.C.Q.B. 427 at 429.
[188](1859), 18 U.C.Q.B. 49 at 50-51.

greatest innovation in transportation technology: the railway. An experiment which began in the late 1830s with small local lines expanded in the 1840s and 1850s into a full-scale railway boom which gripped the province in a fit of charter-granting, land speculation, and, ultimately, railroad construction. Here, it seemed, was the secret to the colony's success.

The very existence of the lines raised a plethora of legal questions relating to their status, powers and obligations. In this context, Robinson desired to establish the duties and responsibilities of the railways "as early as possible".[189] This was hardly an arbitrary exercise unbounded by precedent or statute: in addition to various company charters, and, after 1851, the Railway Clauses Consolidation Act (a general incorporation act for railways), there already existed precedents from the English railway experience, not to mention case law that was emerging in the United States. Robinson, however, relied on the precedents infrequently. Indeed, many of his railway decisions involved no precedents at all. This was perhaps because the Upper Canadian statutes on which the local law was based differed in significant respects from their English counterparts. In particular, Robinson seems to have recognized that the English statutes were more burdensome on the companies. As a result, he probably felt that in the interest of the colony and its development it was best not to attempt to follow the English example too closely.[190]

There can be little doubt that Robinson was a great supporter of the roads. In virtually every area of law related to railways and their operations he showed considerable sensitivity to their position and needs. This was true even at the level of investment. In *Bowes* v. *Toronto (City of)* (1856), for instance, the question arose whether the Mayor of the City of Toronto was guilty of conflict of interest in investing £50,000 worth of city debentures in stock of the Ontario, Simcoe & Huron Union Railway, and in taking personal profits from those shares. Remarkably, Robinson refused to lay down a general rule that public officials could not take advantage of their positions in this way, or that they had to keep their public responsibilities and private interests separate. He noted that

> [r]ailways and canals have not been promoted in England or this country wholly by the votes of persons who could have no private interests which might conflict

[189] *Renaud* v. *Great Western Railway Company* (1854), 12 U.C.Q.B. 408 at 422.

[190] For insight into Robinson's appreciation of both English and American authorities on railway law, see *Campbell* v. *Great Western Railway Co.* (1858), 15 U.C.Q.B. 498. On liability for injury or death to livestock, Robinson wrote at 503: "You will find that the American decisions on the subject are not uniform, but that many of them take ground more in favour of the railway companies than is upheld in England, holding that they are entitled to their track, and may use it regardless of anyone; and our own act of last session seems to have nearly that effect."

> with their public duty, or who had not acquired rights and interests with the express view of being benefitted by those improvements which they have been publicly advocating ... . It would be a very slow progressing country, I apprehend, in which all public enterprises and improvements should be left to be suggested and advanced by those who neither had, nor believed they had, any personal pecuniary interest in pushing them forward, or who, while they were intrusted with the public duty, acquired no interest which could be affected by the course which they might publicly take. Doubtless wherever there is a conflict of interest and duty, there is much danger of abuse ... but this cannot be avoided, I fear, without confining men in their transactions within a narrower field than has been found practicable.[191]

Once the money to build a railway became available, a railway company had to obtain the land through which it would eventually build. The railway charters of early nineteenth century Upper Canada generally provided for a system of private expropriation by the companies, with compensation being determined by compulsory arbitration in the event of disagreement. This avoided the inconvenience of particular landowners holding out for exorbitant sums. At the same time, it offered individuals some protection from the overwhelming economic power of the companies.

Robinson's attitude toward compulsory arbitration was noticeably critical. He was especially concerned that third-party arbitrators might overvalue property to the detriment of the lines. The Chief Justice emphasized the peculiarity of the statutory process in *Great Western Railroad Company* v. *Baby* (1854), where the company sought judicial relief from a high award:

> In considering in any cases of this description how far it may be proper for us to interpose upon the merits, on a complaint that the award is outrageously excessive, it seems to me to be a material consideration that the submission to arbitrate under this and similar statutes can hardly be said to be the voluntary act of the parties. It is in a manner compulsory; either party has it in his power to drive the other to arbitration. The force therefore of the remark, that the arbitrators are judges of the parties' own choosing, is in such cases very much diminished ... [W]herever we would hesitate on a submission between parties, about setting aside an award upon the ground of its being manifestly outrageous in amount, or unjust otherwise ... the consideration that the submission was in a measure compulsory should have a strong influence in turning the scale.[192]

In *Great Western* v. *Baby*, Robinson rejected a £10,000 valuation of two lots of one and one-third acres along a proposed rail line, holding that such an award did not reflect the fact that the line would add "immensely" to the value of the owner's adjacent non-expropriated property.[193] To uphold

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[191](1856), 6 Grant 1 (U.C. Ch. Ct.) at 16. On this case and the controversy surrounding it, see Romney, *supra*, note 76 at 143. See also P. Baskerville, "Entrepreneurship and the Family Compact: York-Toronto, 1822-1855" (1981) 9:3 Urban Hist. Rev. 15.

[192](1854), 12 U.C.Q.B. 106 at 117-18.

[193]*Ibid.* at 119.

the award in this context would be to "make the company pay a ruinous price to the proprietors, in consequence of the very advantages which the company has at its own expense created."[194] In another case involving the same company, *Great Western Railroad Company* v. *Dodds* (1854), Robinson applied a similarly restrictive approach to land valuation where the landowner held no adjacent property; in such cases, the arbitrators were only to award the value of the land without the improvement. Thus, the landowner would be "at least as well off as if the company had not brought the railway there, and had not required any of their land."[195]

When compensation for the land had been agreed upon and paid, construction of the actual line could begin. At this stage, Robinson recognized the importance of protecting contractors and the contracting process. This would ensure that construction did not get bogged down in uncertainty and dispute. In this spirit, in *Jarvis* v. *Dalrymple* (1853), he enforced the strict terms of a construction contract against a sub-contractor:

> It is of consequence that parties should be held to the terms of their contract, or no one would be able to proceed with confidence in executing the works which are now in progress, and which are so important to the community. It would encourage litigation of a very harassing kind, and probably to a great extent, if parties were allowed thus to escape from their own agreements ... .[196]

Similarly, in *Nelson* v. *Cook* (1854), Robinson refused to hold a contractor liable for trespassing on lands which he knew had been deeded to the railway company:

> The hardship and inconvenience would be great of holding contractors and labourers liable in such cases as trespassers, for they could never think it necessary to inquire whether the Company had or had not acquired their right of way in each individual case.[197]

Successful completion of the construction process, however, did not mean that a railway's problems were at an end. On the contrary, while completion brought rewards it also brought new challenges. A rail line was not merely a project, but also a business. Bulk goods had to be shipped at a profit to the towns and ports of the colony. At the same time, passengers had to be carried safely and punctually to numerous destinations. Chief Justice Robinson appreciated these things; his decisions on commercial and passenger traffic demonstrated sensitivity to business realities and a concomitant desire for a practical and workable rail transport system.

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[194]*Ibid.* at 120.
[195](1854), 12 U.C.Q.B. 133 at 134.
[196](1853), 11 U.C.Q.B. 393 at 399.
[197](1854), 12 U.C.Q.B. 22 at 31.

In *Rogers* v. *Great Western Railway* (1858),[198] for instance, Robinson had to consider the liability of the railway for delay in shipping a load of furs from Toronto to New York. The delay occurred after the shipment had left the defendant's own line at the border. The Chief Justice upheld the clause in the railway company's contract which protected it from this eventuality; more significantly, he held further that even if the contract between the company and the consignor had contained no such clause, the company would only be liable for loss occurring on its own line. Robinson intervened again on behalf of the same road in *Griffin* v. *Great Western Railway* (1858). He held that there had to be clear evidence that the company had properly received the goods before an action for compensation for damage to such goods could be heard. As Robinson put it:

> It must be most important to railway companies, if they are to be responsible for the safe transportation of live animals, and especially of horses, that they should be delivered to them in such a manner as shall give them an opportunity of having the terms of their undertaking settled and understood, and moreover of seeing that the horses are safely handed over to the charge of those servants of theirs whose business it is to attend to them.[199]

The development of an efficient passenger service also required attention to practical considerations. This was particularly obvious in "ticket" cases. For example, in *Duke and Wife* v. *Great Western Railway* (1857), the plaintiff Maria Duke purchased a ticket on the company's line between St. Catherines and Windsor. At Grimsby, an intermediate station, she failed to produce her ticket when the conductor asked for it. Pursuant to the company's regulations, she was obliged to leave the train. In court, Robinson refused to apply the standard rule that what was known to the principal (the company) regarding the plaintiff's payment was in law known to the company's agent (the conductor). To invoke that rule, he argued, would be "against reason":

> [I]t is better and more reasonable that a passenger should now and then have to suffer the consequences of his own want of care, than that a system should be rendered impracticable which seems necessary to the transaction of this important branch of business. It is not for the sole advantage, or for the pleasure or caprice of the railway company that these things are done in such a hurry. The public, whether wisely or not, desire to travel at the rate of four or five hundred miles a day, and that rapidity of movement cannot be accomplished without peculiar arrangements to suit the exigency, which must sometimes be found to produce inconvenience. If the passenger in this case, who I have no doubt lost her ticket, could claim as a matter of right to have it believed on

[198](1858), 16 U.C.Q.B. 389.
[199](1858), 15 U.C.Q.B. 507 at 512.

> her word that she paid her passage ... everybody else in a similar case must have the same right to tell the same story ... .[200]

The benefits of railways to trade, settlement and the general convenience of Upper Canadians were obvious. At the same time, however, those benefits could not be gained without sacrifice. The railroads changed the face of the land; their operation necessarily posed a danger to property and even to human life. As Chief Justice of the colony, Robinson had to reconcile the demands of justice in individual claims with the practical imperative of protecting the overall commercial viability of the companies.

The railroads had a considerable impact on traditional transportation routes within the province. They obstructed highways, made existing junctions unworkable, and often required bridges that made rivers unnavigable. Robinson nevertheless hesitated to fix liability on the lines for these things. He preferred instead to hold that, in the manner of their construction, the roads had been authorized under statute, or, alternatively, that the plaintiff lacked standing in nuisance because the "injury" had been suffered by the public. In *McDonell* v. *Ontario, Simcoe and Huron Railroad* (1854), for instance, the plaintiff landowner alleged that by erecting a bridge over a public highway, the railroad had in the process blocked his own access to it. The Chief Justice, however, found for the company:

> The fourteenth clause of the [incorporating] act precisely authorizes that to be done which was done in this case, and which is complained of as an injury in the second count, that is, the raising the common highway by an embankment so as to carry it above the railway. It was lawful, therefore, for the company to do this; and more than that, they were bound to do it, for the safety and convenience of the public.[201]

In *Ward* v. *Great Western Railway* (1856), persons who were in the habit of using another public highway sued the defendant railway for obstruction. Again, Robinson held that the works complained of were authorized by statute, and hence the plaintiffs could not recover. Going further, he pointed out that in any event these plaintiffs had no right of action because the highway did not pass through the plaintiffs' lands:

> It follows that no individual could bring an action for his share of the inconvenience, except where there is some clear ground for distinguishing his case from that of her Majesty's subjects in general; some special damage which has not been suffered by others. Now ... there is nothing peculiar in the case of any one of the plaintiffs .... For all that appears, there may have been many others having occasion to use the road more frequently than, or quite as frequently as, the plaintiff; and if the plaintiff were allowed to recover upon this declaration and evidence, we do not see on what principle we could say that

[200](1857), 14 U.C.Q.B. 377 at 384.
[201](1854), 11 U.C.Q.B. 271 at 279.

> there may not be some hundreds or thousands of others having the same right to a separate civil action.[202]

As a result, Robinson saved the company from expensive litigation.

If the existence of the lines posed one type of problem, their actual running posed others. In the first place, the trains were pulled by steam locomotives which burned coal, and which invariably (at this stage in their technological development) threw off sparks in the combustion process. Not infrequently, these sparks set off brush fires which damaged crops and farm buildings. Farmers could be ruined by such blazes. On the other hand, it was not technologically or economically feasible for railways to eliminate the sparks. What was to be done? Robinson believed that the companies were required to keep their lines clear of materials which might aid combustion — logs, brush, and rubbish — but apart from these things, he refused to hold the companies liable for fires if they had taken reasonable care in the running of their engines. Thus, in *Hewitt* v. *Ontario, Simcoe and Huron Railroad* (1854), Robinson stated:

> In actions of this nature it is always necessary to be borne in mind, that it is more than railway companies can be expected to undertake, that the business which they are conducting should be always so managed as to prevent accidents, though undoubtedly they are bound to do what they can to prevent mischief to others.[203]

The burden of loss was therefore placed on farmers. The Chief Justice made this explicit in a later case against the same line, *Hill* v. *Ontario, Simcoe & Huron Railroad* (1855), where he told the jury that a farmer

> had a right to use his barn and barn-yard as farmers generally use them, [but] that if he chose to allow it to remain near the track he must submit to the risk which would exist as a consequence of the Legislature having intrusted the defendants with an agent of a dangerous character, provided they used all the appliances and precautions which could be expected reasonably from them.[204]

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[202](1856), 13 U.C.Q.B. 315 at 320. Yet another strategy of avoidance was to deny the existence of a nuisance altogether. Thus, in *R.* v. *Great Western Railroad Company* (1855), 12 U.C.Q.B. 250 at 252, Robinson declined to find a nuisance where a railway had built a bridge slightly more narrow than the original street: "If the passage being narrowed must of necessity constitute a nuisance, then we should have to apply such a principle without discrimination, for we would have as judges no discretion to exercise, but must go by the rule, and the bridge being a foot or an inch narrower than the street must be held to be inevitably fatal; and the consequence would be that as a part of the judgement in all such cases must be that the nuisance be abated, every bridge by which the former highway has been carried above the railway must be pulled down, and that not merely in the case of this line of railway, but of many others, for there are many railway acts in which the very same words are used in relation to bridges as in the one now in question."

[203](1854), 11 U.C.Q.B. 604 at 608.

[204](1855), 13 U.C.Q.B. 503 at 503-04.

This is not to suggest that the Chief Justice was unmindful of the dangers of the roads. He demonstrated particular concern in instances involving, or potentially involving, danger to persons. Accidents resulting in personal injury were often attributable to the high speed at which trains moved through the countryside. This practice made it difficult for trains to stop at crossings or other points where people, animals or wagons were on the tracks. Here Robinson insisted on strict safety standards. Railways were to install crossing gates where needed and provide cattle guards and fences to separate their lines from adjacent lands.[205] Moreover, "conductors" (in the sense of engine drivers) were responsible for ensuring that the speed of the train was reduced near highways. They were never to assume that the track ahead was clear. As Robinson said in *Renaud* v. *Great Western Railway* (1854), a case involving the death of several farm animals owned by the plaintiff:

> [W]hen the conductor of [the] train approached this highway, he could have no reason for expecting that he would find anything placed there for the purpose of keeping people and cattle from getting upon the track. He knew well that there was no protection of the kind here. Now, if the collision with the plaintiff's cows had happened, as it might, to have thrown the engine or some of the cars off the track, producing such a deplorable casualty as has lately occurred on the same railway, would it be thought satisfactory to the mutilated passengers, or the relations of those who were killed, to be told by the conductor, that he took it for granted all the people or cattle that might be on the road on either side of the track would take care of themselves; that every animal, rational and irrational ... would be fully aware of the approaching danger, able to calculate accurately both time and distance, certain to judge correctly of the course ... to take, and to be careful in acting up to the exigency.[206]

This remonstrative attitude was exceptional. Overall, Robinson supported the roads much more than he criticized them. This support was all the more remarkable because it occurred in an atmosphere of increasing institutional tension between judge and jury. Robinson started out with profound respect for the jury system. Selection of jurors in Upper Canada was originally at the discretion of district sheriffs who chose from eligible householders. In practice, jurors were often citizens of considerable property and social standing.[207] It was in this context that the Chief Justice declared in *Armour* v. *Boswell* (1842):

> The trial by jury is the great pillar on which our freedom and security rests. It has contributed more than any other of our civil institutions, more, I believe than all of them, to elevate the English character. The protection it throws

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[205]See, *e.g.*, *Bradly* v. *Great Western Railway Company* (1854), 11 U.C.Q.B. 220; *Wilson* v. *Ontario, Simcoe & Huron Railway Company* (1854), 12 U.C.Q.B. 463.

[206]*Supra*, note 189 at 423-24.

[207]P. Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature, 1791-1899* (Toronto: Osgoode Society, 1986) at 291-95.

> around life, property and reputation, produces a confidence and a feeling of security and independence, which is the foundation of prosperity and happiness. In proportion as these advantages are valuable, we ought to guard the source from which they mainly flow, and not suffer respect for trial by jury to be impaired.[208]

During this period, however, the usefulness of the jury system was already being seriously questioned. In *Armour* v. *Boswell*, Robinson decided that the only way to preserve respect for it was to overrule the jury and order a new trial. In other instances, the Chief Justice found himself doing the same thing. Robinson began to appreciate that there were problems with the system. In *McDonald* v. *Cameron* (1847), he commented that jurymen

> are, in truth, more exposed than the court is to improper importunities. They are open to the influence of prevailing impressions, transient and mistaken as they often are; and they may sometimes err even on the side of good morals and humanity, by carrying a laudable and amiable feeling to excess ... .[209]

By 1852, Robinson's doubts had turned into cynicism. Two years previous, the colony's new Reform government had passed a bill shifting the task of jury selection to elected officials in the districts. This democratized the selection process and extended jury eligibility to the average male ratepayer. In a letter to J.B. Macauley, the Chief Justice observed that under these conditions juries were inclined "to favour any available weakness which disposes necessary to believe that the poor are always in the right — at least when they find themselves engaged in a contest with the rich."[210]

In the railway cases, the jury problem took on new dimensions. High damage awards and verdicts against the lines threatened to cripple the new enterprises. In this context, Robinson tended to uphold only those jury verdicts and awards which, if not favourable to the roads, were at least reasonable. In other instances, he entered non-suits or ordered new trials. Thus, in upholding the jury's decision in *Wilson* v. *Ontario, Simcoe & Huron Railroad* (1854), Robinson commented that "it is satisfactory that the damages are reasonable, for these occurrences are unfortunate in their effect upon the interests of a company whose exertions have conferred great benefit upon the community".[211] By contrast, Robinson had no trouble in setting aside a jury order for £1000 in *Hewitt* v. *Ontario, Simcoe & Huron Rail-*

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[208](1842), 6 U.C.Q.B. (O.S.) 352 at 359.
[209](1847), 4 U.C.Q.B. 1 at 3.
[210]Quoted in Brode, *supra*, note 14 at 257.
[211](1854), 12 U.C.Q.B. 463 at 465.

road.[212] In *Morley* v. *Great Western Railway* (1858), he intervened to strike down a £5000 sum awarded for a fatality.[213]

At a general level, it would seem that juries were sympathetic towards the victims of the new technology, while judges such as Robinson were more concerned with corporate solvency and the future of the colony's transportation network. Indeed, the jury/judge conflict worsened as the railway boom progressed; most of Robinson's orders for non-suits or new trials in favour of railways (notably, he appears never to have made any similar order in favour of non-railway parties) were made in the late 1850s when the boom was in full swing. It was perhaps no coincidence that articles debating the legitimacy and utility of civil juries began to appear during this period in the colony's legal periodical, the *Upper Canada Law Journal*. An 1856 editorial went so far as to declare that "the indiscriminate application of trial by jury in *civil* cases is a great evil, and we rejoice to see the day approaching when it will be confined to cases where it may serve a useful purpose."[214] An article in May of the following year expressly laid the blame for the problem at the feet of the reform legislation referred to earlier. Difficulties, the editors suggested, were

> becoming more formidable every year since the duty of selection was taken from Sheriffs and transferred, to the most part, to the ballot box. At every Court men are found acting who are wholly unfit for the task imposed by law upon them as jurors, and as a natural result verdicts are so uncertain and capricious that no sane lawyer would hazard a decided opinion upon the result of a case to be decided by jury.[215]

The solution to the problem, the *Journal* ventured, lay in the replacement of jury trials by trial by judge alone:

> It is hazarding too much to say that jurors are better fitted than judges to determine all questions of fact.... Judgement is the result of reason. The power to reason accurately is not possessed in a higher degree by farmers, mechanics, or tradesmen, than by Judges — men of learning — men of ability — whose

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[212]*Supra*, note 203.

[213](1858), 16 U.C.Q.B. 504. For other railway cases in which Robinson overturned jury verdicts in favour of new trials or non-suits, see *Gillis* v. *Great Western Railway* (1854), 12 U.C.Q.B. 427; *Jack* v. *Ontario, Simcoe & Huron Railroad* (1857), 14 U.C.Q.B. 328; *Purdy* v. *Grand Trunk Railway* (1858), 15 U.C.Q.B. 571; *Detler* v. *Grand Trunk Railway* (1858), 15 U.C.Q.B. 595; *Augur* v. *Ontario, Simcoe & Huron Railroad* (1858), 16 U.C.Q.B. 92; *Ferris* v. *Grand Trunk Railway* (1858), 16 U.C.Q.B. 474; *Wallace* v. *Grand Trunk Railway* (1858), 16 U.C.Q.B. 551; *Simpson* v. *Great Western Railway* (1859), 17 U.C.Q.B. 57; *Utter* v. *Great Western Railway* (1859), 17 U.C.Q.B. 392; *Thompson* v. *Grand Trunk Railway* (1859), 18 U.C.Q.B. 92; *Huntsman* v.*Great Western Railway* (1860), 20 U.C.Q.B. 24; *Browne* v. *Brockville and Ottawa Railway Company* (1860), 20 U.C.Q.B. 202; *Tyson* v. *Grand Trunk Railway* (1860), 20 U.C.Q.B. 256.

[214](1856) 2 U.C.L.J. 174.

[215](1857) 3 U.C.L.J. 98.

> previous study and training peculiarly befit them for the task .... Were trial by Judge in all civil cases to be optional we should less frequently hear of perverse verdicts .... We should less frequently hear of second, third, and fourth trials to the impoverishment of the suitor. The administration of justice would be more speedy and less expensive than at present ... .[216]

Robinson never openly disavowed the civil jury as an institution. Nevertheless, he often lectured juries, and even scolded them when they failed in their duty. More importantly, when his reprimands failed to work, he simply set their verdicts aside. In his last decade on the bench in Upper Canada, the railway cases forced the Chief Justice to do this at an unprecedented rate. The practicalities of progress had finally overtaken the rhetoric of respect.

The confrontation between Robinson and the juries in the railway cases dramatizes the fact that for all the Chief Justice's good intentions, there were both "winners" and "losers" in his judicial strategy. Significantly, many of the winners were members of Robinson's own social group, the Family Compact.[217] Among these men were the colony's large landowners (Section II), the leading merchants (Section III) and the local financiers who backed

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[216]"Trial by Jury on its Trial" (1858) 4 U.C.L.J. 75 at 77. The Upper Canadian debate was doubtless encouraged by developments in England where the civil jury was under attack for many of the same reasons. For instance, the 1853 report of the English common law commissioners acknowledged the argument that "twelve men, taken at hazard from the body of society, unused to judicial duties or forensic discussions, cannot possess the same aptitude for judicial investigations as a judge, in whom a professional education, the habit of considering the effect of evidence, a long course of training and experience, have developed all the faculties which are required for the judicial office"; as quoted in A.H. Manchester, *A Modern Legal History of England and Wales 1750-1950* (London: Butterworths, 1980) at 97.Direct colonial references to contemporary English controversies were rare, indicating that the Upper Canadian debate was more than simply derivative. The English experience with the *Common Law Procedure Act, 1854* (U.K.), 17 & 18 Vict., c. 125, however, provided the inspiration for a private members' bill introduced in the Upper Canadian assembly in 1858 to eliminate jury trials in civil cases unless one of the parties to a suit demanded it. The colonial government ultimately chose not to go this far, but *The Upper Canada Jurors' Act of 1858*, 22 Vict., c. 100 nevertheless increased the property qualification for jurors in an attempt to "obtain a better class of jurors than are now obtained". See Romney, *supra*, note 207 at 297. The jury trial requirement in all civil cases was finally abolished, except on demand or by judicial order, by *The Law Reform Act of 1868*, 32 Vict., c. 6.

[217]Romney suggests this in his assessment of *Bowes* v. *Toronto (City of)*: "[U]nderneath Robinson's superficially progressive, 'instrumentalist' wish to free elected officials from the harsher constraints of fiduciary obligation for the sake of promoting economic growth, there lurked a deeply conservative impulse to vindicate privileges which Robinson himself had once enjoyed, but which the trend to responsible government had recently all but eradicated in England and Upper Canada". Romney, *supra*, note 64 at 183.

many of the colony's important capital projects (Section IV).[218] The losers tended to be from the less powerful strata of society: squatters who struggled to wrench a living from land they could not buy, private businessmen forced to compete against privileged public corporations, and small farmers who suffered as railways destroyed their crops and killed their animals. The law, however, was not uniformly harsh or merciless. In the context of the railway cases, Robinson insisted on protecting innocent passengers by strictly enforcing safety requirements. Even though many of his decisions reflected a substantial bias in favour of established wealth and power, the Chief Justice was moreover never conscious of participating in any class conspiracy.

The suggestion that Upper Canadian law evolved in the general interests of the Family Compact goes far in explaining the nagging inconsistencies in Robinson's approach to legal doctrine. The Chief Justice's determination to shape the existing laws of commerce and transportation in favour of development was clear, but his willingness to alter traditional laws of property to the same purpose was much less pronounced. Changes were made, but the judge who was responsible for *Dean* v. *McCarty* (1846)[219] was equally responsible for *Weller* v. *Burnham* (1853).[220] The members of the Family Compact, however, were not very interested in agricultural advancement. Their concerns were "overwhelmingly in the commercial and governmental activities of the emerging cities."[221] Admittedly, they often speculated in unimproved land — the Durham Report of 1839 noted that they owned much of the undeveloped land of the province — but they "showed no inclination to retain and develop it".[222] As speculators, they displayed little enthusiasm for doctrinal changes that would have favoured clearing and cultivation only to diminish the value of their holdings in the process.[223] Robinson responded to these concerns by retaining traditional laws such as waste and dower. At the same time, he attempted to promote the colony's economic development in other ways by offering progressive interpretations of commercial and transportation law. In these areas, however, entrenched doctrine was more likely to compromise the Compact's urban-commercial interests. These interests dominated consistently whenever they came into conflict with the interests of landed property (recall the transportation cases in particular). This is not to suggest that class concerns were at the root of

[218]McRae defines the Family Compact as follows: "[T]he heads of departments in the colonial administration, judges, most barristers, and the bishop or ranking churchman of the Church of England. But this is not all, for closely associated with this official oligarchy we find the leaders of the commercial and banking community." McRae, *supra*, note 11 at 241.

[219]*Supra*, note 70.

[220]*Supra*, note 75.

[221]McRae, *supra*, note 11 at 241.

[222]*Ibid.* at 241-42.

[223]Recall the discussion in Section II, *supra*.

Robinson's legal thought — pre-classical legal ideology was not a mere cipher for the political, social and economic preferences of the Family Compact. Within the framework of this ideology, Robinson's own class perspective may have predisposed him to accept change in some contexts while causing him to be more conservative in others, all in the name of the community.

Conclusion

This attempt to reconstruct Robinson's legal thought from his reported decisions has suggested that, notwithstanding conclusions in the recent literature, Robinson was patently not the "converse of Wisconsin". He was not a precedent-bound colonial magistrate who clung to an outmoded eighteenth century formalism. Rather, he was a jurist well aware of modern doctrines and basically committed to the idea that law should reflect colonial circumstances and facilitate progress and prosperity. His approach to law and the judicial enterprise led him to share much with his American contemporaries; they too were concerned with social development and making traditional law relevant to the conditions of a new commercial age.

This is not to suggest that there were no limits to Robinson's willingness to recast the existing law. On the contrary, Robinson refused to introduce fundamental legal reforms if they required the wholesale rejection of existing principles. Fundamental reform was the task of the legislature or the English courts, and it was to these institutions that Robinson considered himself constitutionally bound. Similarly, the Chief Justice often declined to depart from precedent. This tendency reflected more than constitutional obligation; it also revealed Robinson's faith in the substantive sense of the rules. Robinson believed that legal certainty and economic restraint were at times more important to the peace, order and even commercial welfare of society than was change or aggressive growth.

This belief manifested itself in a variety of situations. For instance, Robinson did not deny that the English laws of waste and dower were applicable in Upper Canada. He declined to undermine existing notions of the exclusivity of franchises to permit unregulated competition. He refused to free corporations from the seal requirement which was strictly enforced in the context of executory contracts. He also insisted that railway companies be held liable for injuries to persons.

Understood solely in the context of "Tory touch" notions of Canadian history, such instances might be interpreted as evidence of a fundamental difference between the legal philosophy of Robinson and his American judicial counterparts. Not only was Robinson more supportive of economic development than these instances would suggest, but American judges were not as aggressively "instrumentalist" in the early nineteenth century as some

Canadian scholars have implied. In this sense, "Wisconsin" never existed. American jurists of the early nineteenth century displayed both "instrumentalist" and "formalist" tendencies. This demonstrates that commitment to change and respect for principle were intertwined in the legal thought of the time, and that innovation and conservatism could alternatively serve the interests of legally-favoured groups.[224] In this respect, the intellectual similarities between Robinson and his most prominent American counterparts were significant.

Three American judges of the early nineteenth century might be singled out for comparison with Robinson: James Kent, Chief Justice of the New York Supreme Court from 1804-1814 and Chancellor of the State from 1814-1823; Joseph Story, Associate Justice of the Supreme Court of the United States from 1811-1844; and Lemuel Shaw, Chief Justice of the Supreme Judicial Court of Massachusetts from 1830-1860. Like Robinson, all three men were legislators prior to their appointment to the bench.[225] As successful lawyers, each demonstrated a commitment to established interests and a concomitant resistance to the rising tides of democracy and revolutionary social change.[226] As judges, all three exercised a profound influence on American law, an influence which, in the instances of Kent and Story at least, spilled directly over into the courts of Upper Canada.[227]

James Kent, the senior of the three jurists, had already retired when Robinson became Chief Justice in 1829. He may nevertheless be considered a contemporary of Robinson because his famous *Commentaries*, published

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[224]On the syncretism of instrumentalism and formalism in nineteenth century American jurisprudence, see H. Scheiber, "Instrumentalism and Property Rights: A Reconsideration of American 'Styles of Judicial Reasoning' in the 19th Century" (1975) Wis. L. Rev. 1. There is evidence that notable members of the English judiciary similarly mixed these two approaches during the late eighteenth and early nineteenth centuries. Even a progressive jurist such as Lord Mansfield was quite capable of deferring to precedent and principle. For instance, on a point of corporate law, Mansfield pronounced that "certainty is one great object of all legal determinations, and particularly to be wished for in that branch of the law which concerns corporations, (because such questions are often agitated with a heat and spirit not to be satisfied by the best reasons of the soundest discretion, and only to be checked by the authority of rules and precedents, deliberately settled upon former occasions)." *R.* v. *Daws*; *R.* v. *Marten* (1767), 4 Burrow's Reports 2120 at 2121.

[225]For a comparative analysis of Kent, Story and Shaw, see G.E. White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York: Oxford University Press, 1976) at 34-63.

[226]*Ibid.* at 37.

[227]Story's influence on Robinson has already been noted. See *supra*, notes 35 and 36 and accompanying text. Kent's influence on Robinson and his peers was less striking, although nonetheless evident. Robinson made explicit use of Kent's *Commentaries on American Law*, *infra*, note 228, in *Beaver* v. *Reed*, *supra*, note 98 at 165; *Rogers* v. *Hooker* (1857), 15 U.C.Q.B. 63 at 71. In *Matthews* v. *Holmes*, *supra*, note 86 at 137, Robinson referred admiringly to Kent as a "very learned and experienced judge".

between 1826 and 1830, had a profound influence on American law during the decades immediately following their publication. Kent, like Robinson, believed that the common law was a "collection of principles" born of "cultivated reason".[228] The best evidence of these principles lay in decisions of courts of justice — in particular the English courts. American judges were generally bound to follow previous decisions as it was through adherence to precedent that "people in general ... [could] buy and trust and deal with each other."[229] To do otherwise would be to "disturb and settle the great landmarks of property".[230] At the same time, however, Kent, like Robinson, admitted that there were important limits to the notion of *stare decisis*:

> It is probable that the records of many of the courts ... are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by perpetuity of error. Even a series of decisions are not always a conclusive evidence of what is law; and the revision of a decision very often resolves itself into a question of mere expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it ... . We must look to the principle of the decision, and not to the manner in which the case is argued upon the bench ... .[231]

Similarly, Kent recognized that the law had to adapt to changes in social conditions:

> Considering the influence of manners upon law, and the force of opinion, which is silently and almost insensibly controling the course of business and the practice of the courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society, as well as of the footsteps of time.[232]

This was not to say, however, that all traditional notions and values were to be arbitrarily overthrown. In a declaration that would have been characteristic of Upper Canada's Chief Justice, Kent said:

> It would, no doubt, be at times very convenient and perhaps a cover for ignorance, or indolence or prejudice to disregard all English decisions as of no authority, and set up as a standard my own notions of right and wrong. But I can do no such thing. I am called to the severer and more humble duty of laborious examination and study ... .[233]

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[228]J. Kent, *Commentaries on American Law*, 3d ed., vol. 1 (New York: E.A. Clayton, 1836) at 470-71.

[229]*Ibid.* at 475.

[230]*Ibid.*

[231]*Ibid.* at 476.

[232]*Ibid.* at 478.

[233]*Manning* v. *Manning*, 1 Johns. Ch. 527 (1815) (N.Y. Ch. Ct.).

If an error was made or confirmed in this process, it was "the province of the legislative and not of the judicial power to change the law."[234] Legislation was to be construed broadly, that is, the real intention of the legislators was to prevail over the literal meaning of terms.[235] This method of interpretation was clearly facilitative: when a power was given by statute, every thing necessary to its end or effect was to be implied.[236]

Private rights of property deserved particular judicial protection in this approach to statutory interpretation. Since Kent felt that wealthy and independent landowners were the backbone of national prosperity,[237] the protection of property rights was considered to be essential to progress:

> The sense of property is graciously bestowed on mankind, for the purpose of rousing them from sloth, and stimulating them to action; and so long as the right of acquisition is exercised in conformity to the social relations, and the moral obligations which spring from them, it ought to be sacredly protected. The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the production of taste, the elections of charity and the display of the benevolent affections.[238]

Although adamant in his views, Kent was, however, never so doctrinaire as to insist that private property rights had to stand in the way of the public interest:

> [T]here are many cases in which the rights of property must be made subservient to the public welfare .... So, lands adjoining the canals which have been recently made in New York were made liable to be assumed for the public use, so far as was necessary for the great object of the canals .... In these and other instances, the interest of the public is deemed paramount to that of any private individual ... [;] private interests must be made subservient to the general interest of the community.[239]

In the commercial arena, Kent's views were also similar to those of Robinson. Contracts were to be interpreted according to the intentions of the parties. To determine intention, recourse would be not only to the words of the agreement, but to common usage:

> The mutual intention of the parties to the instrument, is the great, and sometimes the difficult object of enquiry .... To reach and carry that intention into effect, the law, when it becomes necessary, will control even the literal terms

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[234] *Ibid.*

[235] *Supra*, note 228 at 461.

[236] *Ibid.* at 463.

[237] J. Dorfman, "Chancellor Kent and the Developing American Economy" (1961) 61 Colum. L. Rev. 1290 at 1292.

[238] *Supra*, note 228, vol. 1 at 319.

[239] *Ibid.* at 338-40.

> of the contract, if they manifestly contravene the purpose .... If it be a mercantile case, and the instrument be not clear and unequivocal, the usage of trade will enable us frequently to determine the precise point of particular terms ... .[240]

Kent was consistently responsive to the concerns of the merchant community. He held Lord Mansfield in high esteem (as did Robinson — recall Section III), and, as a result, sought to interpret the law in the interests of commerce.[241] He extended and protected the use of negotiable instruments, and of bills of exchange and promissory notes, explaining that "as they serve the purposes of cash ... they may be truly said to enlarge the capital stock of wealth in circulation, as well as increase the trade of the country."[242] His generally supportive attitude toward trade, however, did not preclude him from restricting contract, competition and enterprise in name of the "public interest". He firmly believed in the wisdom of the laws forbidding usury.[243] He defended exclusive franchises, commenting in one case that "[t]his power to encourage the importation of improvements by the grant of exclusive enjoyment for a limited period is extremely useful and the English nation have long perceived and felt its beneficial results."[244] He advocated freer use of the corporate form for business, but still insisted on certain restrictions because he feared that the corporation might supplant private enterprise and check the "free circulation of labour".[245] Finally, while generally supportive of creditors' rights, he attempted to protect debtors from exploitation, commenting at one point that the relation between debtor and creditor "has in all ages of the world produced fearful consequences".[246] Commerce was to be encouraged, but at the end of the day Kent feared the political domination of "master capitalists" over masses of propertyless workers.[247]

Joseph Story was perhaps more supportive of corporate enterprise than was Kent,[248] but in many other areas he held views very similar to those of the New York Chancellor; consequently, there existed common ground between Story and Robinson. Some of that common ground was the result

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[240]*Ibid.* at 554-55.

[241]See J.T. Horton, *James Kent: A Study in Conservatism 1763-1847* (New York: Appleton-Century, 1939) at 157.

[242]See Dorfman, *supra*, note 237 at 1304 n. 89.

[243]*Ibid.* at 1301. See also *Thompson* v. *Berry*, Johns. Ch. 395 (1817) (N.Y. Ch. Ct.) at 399: "I should apprehend dangerous effects upon the public morals, if creditors were left at liberty to demand what rate of interest they please, and compound interest when they please, without being under any admonition of human laws. I consider the statute against usury to be a check to hard-headed avarice, and a protection thrown around the necessitous."

[244]Horton, *supra*, note 241 at 172-73.

[245]Dorfman, *supra*, note 237 at 1293.

[246]*Thompson* v. *Berry*, *supra*, note 243 at 395.

[247]Dorfman, *supra*, note 237 at 1292.

[248]*Supra*, note 225 at 51.

of direct influence: Story, more than any other commentator of the age, had a profound effect on Robinson's decisions, especially in the area of bills and notes, where his works encouraged the Upper Canadian Chief Justice to expand the limits of negotiability in the interests of enterprise.[249] Socially and politically, both men were conservatives committed to religion and morality and fearful of democratic tendencies.[250]

"Law" to Story was very much the product of reason and principle. This approach to law guaranteed rights of property in the moral interest of the community and ensured that property would remain "the foundation of the whole dynamic moral structure of free enterprise and free government".[251] At the same time, however, law — as a guarantor of the common good — was a practical instrument to be used to meet the needs of real people, in particular businessmen.[252] Writing in the *North American Review* in 1825, Story declared:

> It is obvious, that the law must fashion itself to the wants and in some sort to the spirit of the age. Its stubborn rules, if they are not broken down, must bend to the demands of society.[253]

The essence of the judicial task was, in the manner of Lord Mansfield, to adjust old law to new circumstances and balance change with stability.[254]

In light of these similar conceptions of law and the judicial enterprise, it is not surprising that Story — notwithstanding the erudition of his judgments — imposed many of the same commercial restrictions as his contemporary in Upper Canada. This was perhaps most apparent in Story's consideration of franchise rights. Dissenting in the famous case of *Charles River Bridge Co.* v. *Warren Bridge Co.*,[255] he insisted that such rights had

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[249]See, *e.g.*, *Davidson* v. *Bartlett*, *supra*, note 35; *Beckett* v. *Cornish*, *supra*, note 35; *Bank of Upper Canada* v. *Smith*, *supra*, note 35; *Bank of Montreal* v. *DeLatre*, *supra*, note 35; *McCuniffe* v. *Allen*, *supra*, note 35; *Wilcocks* v. *Tinning*, *supra*, note 35; *Sinclair* v. *Robson*, *supra*, note 35.

[250]On the life and thought of Joseph Story, see J. McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* (Norman: University of Oklahoma Press, 1971); R.K. Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985).

[251]Newmyer, *ibid.* at 144.

[252]*Ibid.* at 116.

[253]*Ibid.* at 115. See also Story's essay, "Codification of the Common Law", where Story defines law as "a system of elementary principles and of general juridical truths, which are constantly expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and uses of the country". As quoted in W. Lapiana, "Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America" (1986) 20 Suffolk U.L. Rev. 771 at 774.

[254]Newmyer, *supra*, note 250 at 246.

[255]*Charles River Bridge Co.* v. *Warren Bridge Co.*, 36 U.S. (11 Pet.) 419 (1837). For a discussion of Story's decision in this case, see Newmyer, *supra*, note 250 at 217-35.

to be exclusive. No one, he argued, would invest business capital in risky ventures unless the legislature guaranteed some protection of the investment from other entrepreneurs. When this argument failed to persuade his colleagues on the Supreme Court, Story lamented that principle guided by reason had given way to legislative whim. Commerce unrestrained by the moral authority of law could only encourage "darkness, and ominous conjectures",[256] and promote the disintegration of the community.

Lemuel Shaw, in association with Daniel Webster, for a time defended the original franchisee in *Charles River Bridge*; he did not, however, share Story's despair at the outcome of the case.[257] This is not to suggest a stark contrast between Shaw on the one hand and Story and Robinson on the other. Rather, it is simply to note that, of the three American jurists considered here, Shaw was probably least disturbed by the restrictions on established property rights in the interests of economic growth. In part, this was a product of his age; Shaw, the youngest of the three men, came to the bench just as the second great wave of American post-Revolutionary commercial expansion was cresting.[258] At the same time, although he was capable of occasionally inveighing against the "irregular action of mere popular will",[259] he was less fearful of the rising democratic tide.

At a more general level, Shaw obviously shared much with his own American predecessors. Like all of them — and Robinson — he believed that law was a creature of reason and principle. This was its strength:

> It is one of the great merits and advantages of the common law that instead of a series of detailed practical rules ... [i]t consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy modified and adapted to the circumstances of all the particular cases that fall within it.[260]

Like Robinson, Shaw did not display the scholarly tendencies of Kent or Story; his decisions, unlike theirs, were not littered with references to previous case law or supported with extensive historical research. This did not reflect disdain for the cases or for the values that lay beneath them, but rather a conviction that by themselves they could set a trap for an unwary jurist and, if applied mechanically, could potentially harm the community. Reason and principle, on the other hand, provided both men with the tools with which they could shape a legal environment sympathetic to and fa-

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[256]Newmyer, *ibid.* at 218.

[257]L.W. Levy, *The Law of the Commonwealth and Chief Justice Shaw: The Evolution of American Law 1830-1860* (Cambridge: Harvard University Press, 1957) at 16, 232.

[258]*Ibid.* at 315.

[259]*Supra*, note 228, vol. 1 at 55.

[260]*Norway Plains Company* v. *Boston and Maine Railroad*, 1 Gray 263 (1854) (Sup. Jud. Ct. Mass.) at 267.

cilitative of development. In this way, old law could be reconciled with new circumstance:

> [A]lthough steamboats and railroads are but of yesterday, yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modification as new circumstances may render necessary and beneficial.[261]

In the process of reconciliation, however, precedent was not to be summarily abandoned. The following *dictum* from an 1830 case was not atypical:

> In the general absence of a bankruptcy law, a series of judicial decisions has taken place upon this subject, extending over a period of nearly thirty years .... Under this system, and its reliance upon it, contracts and transfers have been made, rights and remedies acquired, to a large extent; and it would be inconsistent with the plain principles of justice now to disturb them, or to change the law, in any mode other than by a legislative act, which should look only to the future, and guard by adequate provisions, all acquired and existing rights.[262]

Robinson would have understood.

Shaw and Robinson were particularly concerned with the development of transportation infrastructures. Both jurists sought to ease the burdens on carriers by regarding them as mere warehousemen wherever possible. For instance, Robinson's approach to the problem of common law liability in *Ham* v. *McPherson*,[263] decided in 1842, was mirrored by Shaw considering the position of a railroad company in an 1845 case.[264] Both jurists also cited statutory authority to protect railways against nuisance actions. In an 1849 decision concerning the liability of a railway for obstructing a river after it had built a bridge, Shaw commented:

> The public have a right to regulate the use of public navigable waters for the purpose of passage; and the erection of a bridge ... by the authority of the legislature, is a regulation of a public right, and not the deprivation of any private right, which can be a ground for damages.[265]

Robinson eventually made the same point in such cases as *McDonell* v. *Ontario, Simcoe & Huron Railway* (1854), and *Ward* v. *Great Western Railway* (1856).[266] Similarly, Shaw decided in 1854 that, English law notwithstanding, a local railway was not liable for damage to goods sustained before

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[261]*Ibid.*

[262]*Russell* v. *Woodward*, 10 Pick. 407 (1830) (Sup. Jud. Ct. Mass.) at 412.

[263]*Supra*, note 174.

[264]*Thomas* v. *Boston and Providence Railroad*, 10 Met. 472 (1845) (Sup. Jud. Ct. Mass.).

[265]*Davidson* v. *Boston and Maine Railroad*, 3 Cush. 91 (1849) at 106.

[266]*McDonell*, *supra*, note 201, and *Ward*, *supra*, note 202.

those goods reached their ultimate destination on a connecting line.[267] Without reference to the Shaw decision, Robinson decided this question the same way in *Rogers* v. *Great Western Railway* four years later.[268]

The extensive similarities that seem to exist between the legal approach of Robinson on the one hand, and that of Kent, Story and Shaw on the other cannot be explained using the "Tory touch" paradigm of Canadian legal history. It will be recalled that this interpretation — in its grand form — posits a fundamental divergence in Canadian and American culture in the late eighteenth and nineteenth centuries, one reflecting the expulsion of "Tory" elements from the United States and their establishment and congealment in Canada. In the legal sphere, it suggests that, while American jurists were freed from English precedent after the Revolution and began to reshape the existing law in the economic interests of a rapidly developing society, Canadian colonial judges were content to defer to English authority and only rarely took the initiative in adapting English law to their own circumstances.

The present analysis obviously encourages a re-thinking of such notions. At the level of legal history, it supports the potential of a more sympathetically comparative approach to the study of Canadian legal history which concedes the existence of differences between American and Canadian legal cultures while being more sensitive to broad ideological and philosophical similarities between them.

This approach is underdeveloped in the literature that draws on Hartzian social fragment theory. This theory posits that the Thirteen Colonies themselves were primarily bourgeois-liberal fragments cast off from the turmoil of seventeenth century England.[269] Taking root in American soil, these fragments became ideologically "immobilized". The "Tory touch" thesis is simply an extension of this analysis. Those aspects of conservative Tory ideology that were originally submerged within the American colonies were cast off in the Loyalist migrations after the Revolution. Eventually, a new country — Canada — was created by the Loyalists and their descendants. The key point here is not similarity between the cultures, but rather difference.

After 1965, however, the basic view of American history as "three hundred years of liberal immobility"[270] began to come apart. Marching

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[267]*Nutting* v. *Connecticut River Railroad*, 1 Gray 502 (1854) (Sup. Jud. Ct. Mass.).

[268]*Supra*, note 198.

[269]See L. Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace & World, 1955); L. Hartz, ed., *The Founding of New Societies, supra*, note 11.

[270]L. Hartz, "The Fragmentation of European Culture and Ideology" in Hartz, ed., *The Founding of New Societies, ibid.*

under the banner of "republicanism", younger scholars such as Bernard Bailyn and Gordon Wood (to name two of the most prominent) shifted the focus of academic attention from liberal-capitalism to a more traditional, deferential, communitarian strain of thought which the American colonists and revolutionaries had inherited not from the English political mainstream but, rather, from seventeenth century theorists of the British opposition.[271] Here, it was argued, lay America's true founding ideology — an ideology which permeated American thought so deeply that it was the basis of social and political consensus almost until the outbreak of the Revolution.

While Bailyn and Wood were writing in the United States, certain Canadian academics such as David V.J. Bell and H.V. Nelles[272] were questioning the implications of Hartzian theory as an adequate explanation for Canadian history. In particular, they pointed to the predominance of the liberal heritage in Canada as well as in the United States.[273] Other critics attempted to avoid ideology entirely, explaining particular historical tendencies and events in terms of simple economic self-interest.[274]

Taken together, American republicanism and recent Canadian scholarship represent a powerful historiographical convergence which suggests that, while liberalism and Loyalism were never irrelevant, the differences between American and Canadian culture during the late eighteenth and

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[271]B. Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967); G.S. Wood, *The Creation of the American Republic, 1776-1787* (New York: W.W. Norton & Co., 1969). For surveys of more recent "republican" historiography, see R.E. Shalhope, "Towards a Republican Synthesis: the Emergence of an Understanding of Republicanism in American Historiography" (1972) 29 Wm. & Mary Quarterly 49; R.E. Shalhope, "Republicanism and Early American Historiography" (1982) 39 Wm & Mary Quarterly 334.

[272]D.V.J. Bell, "The Loyalist Tradition in Canada" (1970) 5 J. Can. Stud. 22; H.V. Nelles, *The Politics of Development: Forest, Mines and Hydro-Electric Power in Ontario, 1849-1941* (Toronto: Macmillan of Canada, 1974).

[273]"There were some important differences in outlook between Loyalists and Revolutionaries, but they did not correspond to the categories denoted by "conservative" and "liberal". To the contrary, a careful analysis of the pre-revolutionary debate between Whigs and Tories reveals that both groups *shared* liberal (Lockeian) assumptions about the nature of sovereignty, good government, the right of resistence, etc. The debate did not juxtapose one ideology against another; instead it featured the conflict of two views of the existing situation derived from identical premises . . . . Thus, the Loyalists resembled fairly closely the persecutors from whom they fled." Bell, *ibid.* at 22-23.

[274]See, *e.g.*, K.C. Dewar, "Toryism and Public Ownership in Canada: A Comment" (1983) 64 Can. Hist. Rev. 404. Dewar attempts to explain the movement in favour of the public ownership of utilities in the early twentieth century as a function of "business pragmatism". At 417, he writes: "[T]he movement's concern was for a stable and low-cost fuel supply which would ensure economic growth and prosperity. From that basic concern arose a willingness, evident at the very outset of the power movement to consider a broad range of alternative tactics, from the organization of bulk purchases of power from private generating companies to public ownership."

early-nineteenth centuries have been overstated. This is arguably as true of legal thought in the two countries as of political, social and economic thought.[275] If Robinson's attitudes are at all indicative, Canadian judges of the period were not nearly so narrow, deferential and precedent-obsessed as historians have presumed. They were aware of the social dimensions of law and attempted to interpret legal rules and principles in a way that promoted the colony's economic development. At the same time, notable American judges such as Kent and Story and even Shaw, were restrained in their legal innovation and in their support for aggressive economic growth. Rather, they subscribed to a moral vision of law which recognized an objective, organic common good apart from the aggregation of private interests and which appreciated the importance of commercial restraint. These convergent ideological predispositions, arguably inherited from the years before the Revolution, were directly reinforced by the flow into Upper Canada of a significant number of American reports and treatises during most of the nineteenth century — a phenomenon which has only recently been documented by Professor G. Blaine Baker of McGill University.[276] The extent of cross-border intellectual influence on the developing Canadian legal community went well beyond Robinson's personal reliance on Joseph Story.

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[275]For a recent perspective on the alleged distinctiveness of Canadian political thought and behaviour, see *ibid.* at 414-15: "[T]he more one looks at the experience of other western capitalist societies, the less peculiar Canadian political practice appears . . . . Surveying the literature on state action in the United States, R.A. Lively concludes, 'The broad and well-documented theme reviewed here is that of public support for business development. Official vision and public resources have been associated so regularly with private skill and individual desire that the combination may be said to constitute a principal determinant of American economic growth.' If we accept these characterizations . . . Canadian state action is cut adrift from the anchor of national peculiarity." See also Nelles, *supra*, note 272 at 494: "On close examination the much discussed Toryism that Ontario Hydro is supposed to represent looks much like some varieties of American corporate liberalism. It might as well have the same name."

[276]See Baker, *supra*, note 10 at 234-39. For contemporary accounts of the use of American reports and texts in mid-nineteenth century Upper Canada, see O. Mowat, "Observations on the Use and Value of American Reports in Reference to Canadian Jurisprudence" (1857) 3 U.C.L.J. 3; "Mr. Mowat's Lecture — American Reports and Law Books" (1857) 3 U.C.L.J. 16. Although the Law Society of Upper Canada did not institute a formal program to acquire American material until 1856, there is evidence to suggest that a considerable market for American texts and reports had developed by the 1840s. For instance, one Canadian customs investigator was able to report in 1843 that the bulk of duty collected from books imported from the United States came from American law texts. See Baker, *supra*, note 10 at 237. The use of American authorities in Upper Canada was parelleled in the other colonies. In Nova Scotia, the Chief Justice was relying on Supreme Court jurisprudence from Massachusetts as early as 1835. See *Jackson* v. *Campbell* (1835), 1 N.S.R. 18 (S.C.). A year later, the New Brunswick Supreme Court was making liberal use of Kent's *Commentaries* and Dane's *Abridgement*. See *Hanington* v. *McFadden* (1836), 2 N.B.R. 260 (S.C.).

None of this is to say that Robinson or his Upper Canadian contemporaries were intellectually identical to Kent, Story, Shaw or other American judges of the period. Significant differences in approach unquestionably existed. Some of these resulted from the peculiarities of their respeetive constitutional systems. Most obviously, Robinson was constitutionally bound by English precedent while American judges were not. Moreover, Robinson was constitutionally required to defer to the local legislature, whereas his American counterparts functioned in a context which permitted and even encouraged judicial review of legislative action. The ability to review and hence to resist such action was of particular significance to jurists like Kent and Story, especially during the era of Jacksonian democracy. As a result, they came increasingly to regard themselves as guardians of established property against the mob — a responsibility which did not weigh so heavily on the members of the Upper Canadian judiciary. For instance, while Story protected the exclusivity of the franchise in *Charles River Bridge Co.* by protecting the original franchisee against legislative interference with his property rights, Robinson preferred to accomplish the same thing in *R.* v. *Davenport* by deferring completely to the legislative grant.

Behind these constitutional differences lay a different attitude toward English practices and values. American jurists of the early to mid-nineteenth century sought to preserve much of their English legacy, but affinity to England proved stronger in Upper Canada. Robinson's rhetoric of constitutional deference reflected a profound respect for the mother country and her traditions which simply did not exist in the United States. This, perhaps, was the greatest impact of "Loyalism", especially if one understands it not so much as a legal or social ideology than as a predisposition towards English culture, of which the common law was but one dimension.

Constitutional and cultural distinctions aside, there existed between Upper Canada and the United States a subtle yet significant legal continentalism (or, as Blaine Baker has put it, a "pan-Americanism"),[277] characterized by a shared concern with law as an instrument of gradual economic development and supported by a common ideological heritage and professional literature.[278] This continentalism not only helps to explain the sim-

[277]See Baker, *supra*, note 10 at 234.

[278]The most notable form of legal continentalism — the citation of American case law and texts — became even more common in Ontario in the decades immediately following Robinson's death. The accession of Robert Harrison in 1875 to the position of Chief Justice of Queen's Bench resulted in a tripling of judicial references to American case law. See J.M. MacIntyre, "The Use of American Cases in Canadian Courts" (1964-66) 2 U.B.C. L. Rev. 478 at 482. Reliance on American sources became less pronounced after Harrison's untimely death in 1878; during the 1890s, the increasingly imperialist and centralist English judiciary reversed its previously sympathetic attitude toward American authority and even began to discourage its use in courts throughout the Empire. See, *e.g.*, the Court's highly critical comments in *Re*

ilarities apparent in the attitudes of leading Canadian and American jurists, but it also suggests the usefulness of a comparative approach to the study of this period in Canadian legal history. The legal thought of Sir John Beverley Robinson, Canada's greatest nineteenth century jurist, provides but a starting point in this enterprise.

Missouri Steamship Company (1889), 42 Ch. Div. 321 (C.A.). Given the important role of the Judicial Committee of the Privy Council in Canadian legal affairs, many members of the Canadian judiciary, including the Canadian Supreme Court, found the new view persuasive. Only Nova Scotia, the province with the closest historical and legal links to the United States, managed to resist imperial pressure and preserve a meaningful degree of continentalism until the late 1920s.