McGILL LAW JOURNAL
REVUE DE DROIT DE McGILL
Montréal
Volume 30 1985 *No 3*

Property, God and Nature in the Thonght of Sir John Beverley Robinson

David Howes*

The purpose of this essay is to demonstrate how the legal thought of Sir John Beverley Robinson, Chief Justice of Upper Canada from 1829 to 1862, differed both radically and systematically from that of his American contemporaries. Cases which would have gone one way before, say, a Wisconsin judge, went "the other way" when they came before Robinson, and this because the respective judges belonged to cultures which developed in complementary opposition to each other. Certain analogies are also traced between the structure of Robinson's juristic thought and the contours of his religious and political beliefs in an attempt to elicit the inner form of the mentality of the Loyalist.

Le présent essai cherche à démontrer comment la pensée juridique de Sir John Beverley Robinson, juge en chef du Haut-Canada de 1829 à 1862, se démarque de manière radicale et systématique de celle de ses contemporains américains. Pour une même affaire qui, devant un juge du Wisconsin, par exemple, aurait été jugée selon une orientation quelconque, Robinson arrivait à la conclusion opposée. Ceci s'explique par le fait que les magistrats appartenaient à des cultures différentes qui avaient évolué dans l'antagonisme et la complémentarité. L'auteur fait aussi certains rapprochements entre la structure de la pensée juridique de Robinson et la conceptualisation de ses convictions politiques et religieuses afin d'en extraire le fondement de la mentalité loyaliste.

*B.A. (Toronto), M. Litt. (Oxford), B.C.L., LL.B. (McGill), of the Department of Sociology and Anthropology, Concordia University. The author would like to thank Professors G. Blaine Baker and Morton Weinfeld of McGill University and Rebecca Colman and David Turner of the University of Toronto for having introduced him to many of the questions which he has attempted to answer in this article. This essay was awarded the Wainwright Essay Prize for 1984-85.

Synopsis

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> A realistic history of law in the United States will be a social history of law, taking law as man-made, and as the product of both deliberation and drift, but not of any immanent superior order of reality.
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> — James Willard Hurst[1]

> By those who are sufficiently humble to believe in the existence of a superior intelligence, it is very frequently remarked, as they pass through life, how much better matters have been ordered for them by Providence than they would have been ordered by themselves, if their wishes had availed them.
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> — Sir John Beverley Robinson[2]

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[1]"Legal Elements in United States History" in D. Fleming & B. Bailyn, eds, *Law in American History* (1971) 3 at 28.

[2]*Canada and the Canada Bill; Being an Examination of the Proposed Measure for the Future Government of Canada; With an Introductory Chapter, Containing some General Views Respecting the British Provinces in North America* (1840) at 13 [hereinafter cited as *Canada and the Canada Bill*]. This was Robinson's response to the Earl of Durham's *Report on the Affairs of British North America* of 1839, reprinted in abridged form in G.M. Craig, ed., *Lord Durham's Report* (1963).

Introduction

One of the most distinctive features of Canadian history is the degree to which the conceptions which have shaped its inscription have been imported.[3] This tendency is especially pronounced in the writing of Canadian legal history, where what has been called a "Hurstian approach" currently enjoys a certain vogue.[4]

James Willard Hurst is an American legal historian whose studies of land and lumber law in the nineteenth-century state of Wisconsin are informed by the motif of the "release of individual creative energy" as the dominant value in accordance with which the Wisconsin backwoodsmen hewed the laws which governed them.[5] Common sense would suggest that the legal systems of Upper Canada (Ontario) and Wisconsin share many common traits given their similar geographical location, climate, resources and inheritance of the common law from England.

My argument in this essay, however, is that to take a Hurstian approach to the writing of Canadian legal history would be to elide many important cultural differences.[6] It is, in short, only by turning Hurst's model on its head, *by viewing Upper Canada as the converse of Wisconsin*, that we can arrive at a proper understanding of its laws and legal system. The common law became increasingly uncommon in the course of its migrations.

The theoretical possibility of taking a deductive approach to Canadian history — the idea of arriving at one society's way of interpreting its history by inverting all the terms of a neighbouring society's vision of its past —

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[3]C. Berger, "Introduction" in R. Cook, C. Brown & C. Berger, eds, *Approaches to Canadian History* (1967) vii at vii-viii.

[4]See, *e.g.*, D.H. Flaherty, "Writing Canadian Legal History: An Introduction" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (1981) 3 at 25. [hereinafter *Essays*, vol. 1]; R.C.B. Risk, "A Prospectus for Canadian Legal History" (1973) 1 Dal. L.J. 228.

[5]See, *e.g.*, J.W. Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836-1915* (1964).

[6] The comparison of cultures requires not that we reduce them to platitudinous similarity but that we situate them apart as equally significant, integrated systems of differences . . . . A "culture" can materialize only in counterdistinction to another culture."

J.A. Boon, *Other Tribes, Other Scribes: Symbolic Anthropology in the Comparative Study of Cultures, Histories, Religions, and Texts* (1982) at ix. Alternately put, "one knows there are two cultures where there are two groups of people who, characteristically and repeatedly, assign different meanings to the same act or event". L. Armour & E. Trott, *The Faces of Reason: An Essay on Philosophy and Culture in English Canada, 1850-1950* (1981) at xxiii-xxiv.

has not so far been entertained (systematically) in Canadian historiography.[7] Yet such an approach readily commends itself experientially. An event such as the Revolution of 1776 not only meant different things to the Loyalist and to the Republican; it meant opposition. The primary objective of this article is to reconstruct those oppositions.

As a preliminary indication of the complementary character of the oppositions which situated American and British North American culture apart as "equally significant, integrated systems of differences" for the better part of the nineteenth century, consider the contrast between Hurst's and Robinson's visions of history itself. Whereas the historian views history as "man-made", the historical subject saw it as dictated by "Providence". Robinson, in other words, would have had little difficulty in acknowledging the role of an "immanent superior order of reality" — or what the structural anthropologist would call a "cultural logic" — in shaping the course of events. By a happy coincidence, then, the subject of this essay has left the record of his thought and action open to a structural analysis of them as "the projection or 'execution' of the system in place".[8]

The system which produced the thought of Sir John Beverley Robinson, Chief Justice of Upper Canada from 1829 to 1862, was "the Loyalist tradition". Robinson was the archetype of the Loyalist, one of the few veritable embodiments of that profoundly Canadian myth. His unswerving devotion to the promotion of the interests of the Imperial Crown *was* rewarded (unlike that of others). He was appointed acting Attorney-General in 1812, Solicitor-General in 1815, Attorney-General in 1818, and Chief Justice in 1829. The latter office carried with it the Speakership of the Legislative Council and the Presidency of the Executive Council of the Government of Upper Canada. In 1850, he was made a Companion of the Bath, and finally, in 1854, he was created a Baronet of the United Kingdom, whereby he joined the ranks of the elect.

This fact — Robinson's Loyalist cast(e) of mind — should cause some hesitation with respect to applying American models to the interpretation

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[7]One notable exception is the work of Robin Winks. See R.W. Winks, *The Relevance of Canadian History: U.S. and Imperial Perspectives* (1979). There are other exceptions in other disciplines: G. Grant, "Have We a Canadian Nation?" (1945) 8 Pub. Aff. 161 (political philosophy); S.M. Lipset, *Revolution and Counterrevolution* (1970) at 32ff (sociology); D.H. Turner, *Dialectics in Tradition: Myth and Social Structure in Two Hunter-Gatherer Societies* (London: Royal Anthropological Institute of Great Britain and Ireland, 1978) (anthropology).

[8]M. Sahlins, *Historical Metaphors and Mythical Realities: Structure in the Early History of the Sandwich Islands Kingdom* (1981) at 3. See also M. Gaboriau, "Structural Anthropology and History" in M. Lane, ed., *Introduction to Structuralism* (1970) 156; P. Bourdieu, *Outline of a Theory of Practice* (1977); and, *infra*, note 134 and accompanying text on Robinson's conception of himself as an instrument of Providence.

his legal (political, or religious) thought. As will be shown, a huge gulf separates Hurst's instrumental or functionalist conception of the relationship between law and society from Robinson's conception of himself as an instrument of "Providence". This discrepancy or absence of a "meeting of minds" between historian and subject will in turn be employed to expose the weaknesses of functional analysis.

Most legal scholars in the United States subscribe to the functionalist perspective.[9] The two most central axioms of this viewpoint are that legal systems adapt to changing social "needs" or "interests", and that all societies are evolving in the same direction (the direction of the capitalist, liberal democratic state). The teleology implicit in the functionalist perspective has come under attack in recent years. A number of attempts have been made to show that "[i]f there are evolutionary processes in social life, they are processes whose logic is one of multiplicity, not uniformity of forms."[10] If it can be demonstrated that similar material conditions produced diametrically opposed world views in nineteenth-century Ontario and Wisconsin, this would lend credence to the latter tradition.

The most fatal flaw in functionalism, however, is its blindness to the constitutive role of the categories of legal thought.[11] In a very real sense, the "needs" of society only become accessible to consciousness *through the mediation* of a given symbolic scheme or system of categories. Those "needs" which remain refractory to the operations of classificatory thought simply

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[9]Alongside Hurst one could range, for example, C.A. Beard, *An Economic Interpretation of the Constitution of the United States* (1923); H.N. Scheiber, "Property Law, Expropriation and Resource Allocation by the Government: The United States 1789-1910" (1973) 33 J. Econ. Hist. 232. See further R.W. Gordon, "Historicism in Legal Scholarship" (1981) 90 Yale L.J. 1017.

[10]R.W. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57 at 70-1. As Gordon goes on to argue, "if there is no such single process [as, say, the "process of modernization"], there can't be any single set of functional responses to it either". See also M. Feinman, "The Role of Ideas in Legal History" (1980) 70 Mich. L. Rev. 722.

[11] Legal thought is, in essence, the process of categorization. The lawyer is taught to place phenomena into categories such as fact or law, substance or process, public or private, contract or tort, and forseeable or unforseeable, to name but a few. Categorizing phenomena determines how they will be treated by the legal system. ... The task of the legal historian ... is to explore the origins and structure of the categories.

K.J. Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 Buff. L. Rev. 325 at 327.

do not exist for all intents and purposes (including those of the functionalist historian).[12]

The perspective adopted in this essay is most akin to the method known as structuralism in anthropological circles.[13] But rather than treat that approach separately here, the general ideas on history which it imports are interwoven with the concrete happenings that demonstratc them in the text which follows. Part I deals with the problem of the reception of English law in nineteenth-century Ontario and demonstrates that what was transmitted was not necessarily received. Part II explores the way in which a distinctly "American spirit" came to inform the English common law in the nineteenth-century United States (and offers a critique of the prevailing modes of ascertaining that "spirit" in the process). Part III concerns the manner in which Sir John Beverley Robinson embodied that "integrated system of differences" that was the Loyalist (anti-Republican) tradition by way of contrast, and Part IV illustrates how those differences received expression in the context of the cases he decided.

I. Law and the Cultural Construction of Reality

It has been remarked of Robinson that "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", the implication being that this disposition somehow differentiated Robinson's way of thinking from that of his American counterparts.[14] But it is actually just as creative to deny oneself any "creative power" and believe oneself to be applying the "principles" of the English common law to the

[12]Thus, whereas a functionalist historian would attempt to explain which among various historical forces "caused" a particular judicial decision, the approach advocated in this essay

> attempts to describe the structure of legal thought. The difference lies both in using a purely descriptive rather than explanatory approach, and in examining the structure of an entire conceptual scheme rather than the outcomes of particular decisions. The effort is not to explain why a particular side won on a given day, but to describe the conceptual apparatus by which the court justified [or better, arrived at] its decision.

Ibid. at 326. See also D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buff. L. Rev. 209 and A.B. McKillop, "So Little on the Mind" (1981) 19 Royal Soc'y Can. Proc. & Transactions 183.

[13]For an account of how structuralism has displaced functionalism within anthropology, see R.F. McDonnell, "Anthropology and the Study of Religion" in D.H. Turner & G.A. Smith, eds, *Challenging Anthropology: A Critical Introduction to Social and Cultural Anthropology* (1979) 100. For an account of the relevance of structuralism to legal studies in general, see T.C. Heller, "Structuralism and Critique" (1984) 36 Stan. L. Rev. 127.

[14]R.C.B. Risk, "The Law and the Economy in Mid-Nineteenth-Century Ontario: A Perspective" in *Essays*, vol. 1, *supra*, note 4, 88 at 118.

disposition of a particular case (as Robinson did) as it is to imagine oneself to be boldly departing from that tradition (as the American judges did).[15] Both the Canadian and the American judges were engaged in the cultural construction of reality, but their cultures were different. It is only natural that their cultures would instill in them different attitudes towards the law.

It must be stressed, however, that I am not suggesting that Robinson actually did remain faithful to English "principles" throughout, even though he believed he did. The simple reason for this is that British culture was not Canadian culture. This raises the problem of reception in the mind of Robinson and the other Canadian jurists of his time. According to the prevailing modern version of the "doctrine of reception":

> In 1791 the Constitutional (or Canada) Act, (Imp.) 31 Geo. 3, c. 31 split off from the colony of Canada the newly-settled English-speaking areas west of the Ottawa River and constituted them as Upper Canada, a separate colony with its own legislature. That body by (U.C.) 32 Geo. 3, c. 1 immediately repealed "Canadian" [that is, French] law and introduced English law "from and after the passing of this Act" [which Act received assent on October 15, 1792]. ... This 1792 Act established English law (excepting bankruptcy and poor laws, but including the law of evidence) as the rule of decision for all matters of "property and civil rights".[16]

It is misleading as well as naïve (symbolically speaking) to assert that (U.C.) 32 Geo. 3, c. 1 "established English law". That statute *established a difference*, the difference between Upper Canada and Lower Canada (Quebec). Differences are "social facts".

> In the terms employed by structuralists, social facts represent selections from larger sets of possibilities of which societies keep symbolic track, whether consciously or unconsciously, explicitly or covertly. Societies conceptualize themselves as select (in both senses) arrangements, valued against contrary arrangements that are in some way "objectified". ... Cultures themselves are at base dialectical.[17]

Transposed into legal terms, what the above quotation imports is that Upper Canada could have been governed by all the laws of England and all the laws of France. Instead, explicit symbolic track was kept of English law, and French law was rejected because the English-speaking settlers "objected"

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[15]Robinson's judicial creativity may be compared to the literary inventiveness of "Pierre Menard, Author of the *Quixote*", who "did not want to compose another *Quixote* — which is easy — but *the Quixote itself*". J.L. Borges, *Labyrinths: Selected Stories and Other Writings* (1964) at 39. It may also be compared to the diagnostic genius of the medical professional. See M. Taussig, *Reification and the Consciousness of the Patient* (1980) 14B Soc. Sci. & Med. 3.

[16]J.E. Côté, "The Reception of English Law" (1977) 15 Alta L. Rev. 29 at 88. See also, E.G. Brown, "British Statutes in the Emergent Nations of North America: 1606-1949" (1963) 7 Am. J. Legal Hist. 95.

[17]Boon, *supra*, note 6 at 52-3.

to it. Indeed, Upper Canadian society strove to make itself "the image and transcript" of British society, to use Governor-General Simcoe's words,[18] but it failed to achieve this "objective" according to the terms of the very act which constituted it by not "receiving" England's bankruptcy and poor laws. Therefore, Upper Canada established itself as neither French nor (purely) British.

Still, rumours or covert symbolic traces of these other cultures persisted. For example, Robinson himself referred to such French authorities as Pothier in a number of his judgments.[19] What are we to make of this polyjurality given the prescription that for all matters of property and civil rights English law was to provide "the rule of decision"? The motivation behind Robinson's erudition was "unconscious" in the terms employed by structuralists. Similarly, what are we to make of the statement in the much later case of *Drulard* v. *Welsh* that, "till this day there is much unpatented land situate in Windsor which is held under a steady continuation of the old French occupancy"?[20] This anomaly stems from the fact that the lands fronting on the river in the Windsor area, Essex county, were occupied by a settlement of *habitants* who held their concessions under a system of attenuated feudal tenures. The certificates of occupation which attest to the existence of these concessions all contain the words *Cens et Rente* and *Lods et Vente*, and are on record at Detroit from 1734. The fact that a good number of these concessions have not yet been commuted into patented grants in free and common socage is a further example of the degree to which cultures are dialectical at base.

But there is another more radical sense in which it is illusory to speak of English law as having been "received" on October 15, 1792. The challenge and hence the concerns which confronted the Loyalist settler carving out an existence in the midst of the Canadian wilderness were very different from those which occupied the English legal system. Nature had not yet been subdued, and even the relatively rugged area of the Lake District presented itself as "serene" in comparison with the wilds of Upper Canada to an observer such as Robinson. Consider the following "Lines on an April visit to Windermere on a fine evening, immediately after a storm" (hardly

[18]Cited in G.M. Craig, *Upper Canada: The Formative Years 1784-1841* (1963) at 29.

[19]See, *e.g.*, *Rochleau* v. *Bidwell* (1831), Draper 345 at 358 (U.C.K.B.); *Bank of Upper Canada* v. *Boulton* (1834), 4 U.C.Q.B. (O.S.) 158 at 163; *Doe ex dem. Jones* v. *Capreol* (1835), 4 U.C.Q.B. (O.S.) 227 at 240. For an alternative account of Robinson's polyjurality as the expression of "a well-developed and subtle legal supra-nationalism" or "deliberate and principled borrowing of ideas" see G.B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law & Hist. Rev. 165.

[20](1906), 11 O.L.R. 647 at 652 (Ont. Div. Ct).

a compelling title) which he wrote in 1817 after a "poetical fit" had gripped him:

> The clouds are fled, the storm is o'er,
> The winds are hushed that swept thy shore,
> 'Tis evening, and thy mountains gleam
> Beneath the sun's departing beam,
> The mists the clouds had scattered wide,
> Are gilded as they mount their side.
> More lovely now each charm appears,
> 'Tis beauty smiling through her tears.
> Sweet lake, whose bosom clear, serene,
> Reflects each feature of the scene,
> One who ne'er thought to wander here,
> A stranger greets thee, Windermere.
>
> Born in a land where winter reigns
> Stern as o'er bleak Siberia's plains,
> Where summer's bright and genial sky
> Might rival that of Italy,
> I oft have stray'd where deep'ning wood
> Frowns o'er St. Lawrence' noble flood,
> Or where Niagara's torrents roar —
> Sublimest work in nature's store.
> On Abr'ham's plains where Britain's pride —
> Lamented Wolfe — in victory died.
> But could I hope to wander here,
> On thy sweet margin — Windermere?[21]
>
> ...

The contrasts in this poem, sweet versus stern, smiling versus frowning, serene lake versus roaring falls, and so on, are indicative of the contrasts between the two environments. But the most illuminating feature of this poem is the insight it gives us into Robinson's perception of himself as "a stranger" who wanders on the "margin" of the lake just as he occupied a marginal or liminal status with respect to British society in general. This liminality is reflected in the doctrine he articulated in the case of *Doe Anderson* v. *Todd*: "it would be easy to enumerate a long list of [English] statutes, all actually capable of being acted upon in this country, but 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

[21]Cited in C.W. Robinson, *Life of Sir John Beverley Robinson* (1904) at 122. It may be inferred from the words which accompany this poem that the first verse is an allegorical description of Emma Walker's body, the Englishwoman who was to become Robinson's wife.

attempted to be enforced here, and have never been taken to apply to us".[22] One can imagine few more forceful statements of judicial law-unmaking. What is the point of having a reception statute in the face of pronouncements like this one? To what extent did Robinson regard himself as free to choose which law to apply? Did he, for example, evidence the same pragmatic spirit as his American counterparts in this regard?[23]

In 1893, Frederick Turner traced the roots of "that practical, inventive turn of mind, quick to find expedients, ... that restless, nervous energy" so characteristic of the response of the American intellectual to the experience of life on the frontier.[24] Other historians, Willard Hurst among them, have followed Turner's lead, treating America's geography as the key to its mentality. The next part of this essay is devoted to describing that mentality and adducing evidence of how Robinson's intellect crystallized in opposition to the frontier.

II. Law and the Conservation of Energy

In *Law and the Conditions of Freedom in the Nineteenth-Century United States*, Willard Hurst attempted to show how a dynamic, instrumentalist conception of law came to supplant the static, protective conception which prevailed during the colonial era. Whereas seventeenth- and eighteenth-century statutes tended to emphasize community security and morality by legislating against treason, compelling church attendance, restricting the alienation of land, and setting standards of quality and measure to ensure the reception of locally produced goods in foreign markets, those of the nineteenth century were designed to facilitate private initiative. The Revolution of 1776 marked the turning point — elevating the value of the individual over that of the well-ordered community — by abolishing feudal land tenure, forbidding the granting of any titles of nobility, extending the suffrage, and entrenching a bill of rights.

But it would be mistaken, Hurst argued, to regard the nineteenth century as dominated by a purely negative laissez-faire (or "hands-off" to the state) legal and economic policy. It was not "freedom from" the American

[22](1845), 2 U.C.Q.B. 82 at 87. The years Robinson passed at Lincoln's Inn preparing for admission to the English Bar may be viewed as the liminal stage in this uniquely lawyerly rite of passage which precedes being "called". It would have been during this period that the seeds of the doctrine articulated in *Doe Anderson* v. *Todd, ibid.* were sown. See the chapter entitled "Betwixt and Between: The Liminal Period in *Rites of Passage*" in V.W. Turner, *The Forest of Symbols: Aspects of Ndembu Ritual* (1967) at 93.

[23]See M.J. Horwitz, *The Transformation of American Law 1780-1860* (1977) at 4-30.

[24]F.J. Turner, *The Frontier in American History* (1920) at 37. But see R.W. Winks, *The Myth of the American Frontier: Its Relevance to America, Canada and Australia* (1971).

people desired but "freedom to". They were obsessed with the idea of "possessing liberty" which, in practice, meant "that law should increase men's liberty by enlarging their practical range of options in the face of limiting circumstance".[25] The vastness of the continent (read: obstacle to the creation of state- and nation-wide markets), the dearth of people (read: labour power), and the scarcity of fluid, mobile capital all seem to have been regarded as personal affronts. And they were affronts to be taken personally given the widely disseminated belief that "[h]uman nature is creative, and its meaning lies largely in the expression of its creative capacity; hence it is socially desirable that there be broad opportunity for the release of creative human energy."[26] Thus, the middle class insisted that government and law help them (to help themselves) in overcoming "the facts of distance and scarcity of means relative to opportunities".[27]

The years 1800 to 1875 were the years of contract according to Hurst. The expansion of contract meant "increasing the scope of individual discretion in the management of resources", a development consistent with the "release of energy policy", and expressive of "the increasing dominance of the market in social organization".[28] The policies to which the courts gave effect in their decisions during this era reflected a pervasive concern for market-functioning. One such policy was to encourage entrepreneurs by reducing risks. In order to reduce risks damages had to be restricted, an end which was accomplished by substituting the courts' "objective" appreciation of the terms of a contract or particular course of conduct for that of the parties — the courts' "objective" being, of course, to promote economic development.

One of the further effects of the rise of contract was the transformation of land into a commodity. In this regard, it is ironic that we tend to associate the nineteenth century with the elaboration of the doctrine of vested rights since, according to Hurst, "[d]ynamic rather than static property, property in motion or at risk rather than property secure and at rest, engaged our principal interest."[29] This preoccupation was manifest in the abolition of primogeniture and entail, the granting of control over property to married women, and so on, none of which measures provoked any serious objection from adherents of the doctrine of vested rights.

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[25]J.W. Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956) at 6 and 53.

[26]*Ibid.* at 5.

[27]*Ibid.* at 44. See generally L.B. Hartz, *Economic Policy and Democratic Thought: Pennsylvania 1776-1860* (1948); O. & M. Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts 1744-1861* (1969); H.N. Scheiber, *Ohio Canal Era: A Case Study of Government and the Economy, 1820-1861* (1969).

[28]*Ibid.* at 14, 9 and 14.

[29]*Ibid.* at 24.

However, the subversive kind of interpretation which Hurst has given to the doctrine of vested rights may itself be subverted. Consider the following passage: "In the field of commercial transactions, especially, absolute concepts of property rights as a form of individual liberty [or "freedom from"] yielded to doctrines intended to enforce the security of transactions. [In this way,] contract law invoked the compulsive force of the state to set a framework for dealing".[30] What this passage implies is that as property became more fluid (*i.e.* transferable) the law of contract became more fixed. All that "really" took place historically, then, was the *conversion* of eighteenth-century property law into nineteenth-century contract law. Both the "objective" theory of contract and the "absolute dominion" theory of property (to be discussed shortly) present themselves as immutable, but they are immutable only in the sense that they are total transformations (inversions) of each other. The American legal system as constituted (and in the process of reconstituting itself) did not, therefore, allow for the escape, or release, of any of its energy. All that can be discerned are the traces of a kind of suprahistorical (physical) "law for the conservation of energy" operating through the courts. It is intriguing that Hurst should thus have articulated the legal equivalent of the first law of thermodynamics, and it would be interesting to know whether the development of Canadian law reveals the opposite tendency (contract into property).[31] Suffice it for the moment to say of the American legal system as Heraclitus said of the universe in general: "It rests by changing."[32]

In *The Transformation of American Law, 1780-1860*, Morton Horwitz's concern, like Hurst's, was to document the shift from a protective, antidevelopmental attitude to an instrumental, procommercial stance on the part of the courts. Perhaps the best way to gain access to Horwitz's reconstruction of American legal thought *circa* 1820 is to allow it to crystallize in contradistinction to Chief Justice Robinson's thought. For example, in

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[30]*Ibid.* at 15.

[31]This possibility, which is inspired by inverting Maine's "law" to the effect that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*", is entertained further, *infra*, note 99 and accompanying text. See Sir H.S. Maine, *Ancient Law* (1917) at 100 in conjunction with Lévi-Strauss's analogy of the passenger in a train in C. Lévi-Strauss, *Structural Anthropology*, vol. 2, trans. M. Layton (1978) 323 at 339-41. It is significant in this regard that the Upper Canadian Legislature passed "An Act to Prevent the further introduction of slaves and to limit the term of Enforced Servitude in this Province" in 1793, that is, some seventy years before slavery was abolished in the United States. Whatever the political motives behind this Act might have been, what it marks is the fact that Upper Canadian society was not status based, but contract and honour based; thus a kind of meritocracy predicated, as we shall see, on strict adherence to the terms of the convenant with the mother country.

[32]Cited in A. Wilden, *System and Structure: Essays in Communication and Exchange* (1972) at 68. See also the chapter entitled "Beyond the Entropy Principle in Freud", *ibid.* at 125ff.

1840 the Gentlemen of the Grand Jury presented Robinson with a paper for communication to the Lieutenant-Governor. This paper turned out to be "an expression of opinion upon various subjects of general policy". The Chief Justice reacted in the following manner:

> I have a strong reluctance as a judge to be made the channel of such a communication, and from respect to the Grand Jury I will state my reasons.
>
> The business of this Court is to administer justice, and we cannot too closely confine ourselves to it. His Majesty's subjects should all feel that they stand here upon an equal footing. We have to do with *rights* in this place, and with opinions only so far as they bear upon those rights. To deviate to the debatable ground of politics would be departing from our proper sphere.[33]

It might seem strange for these words to come from one who as Chief Justice was *ex officio* Speaker of the Legislative Council and for a time President of the Executive Council, but for Robinson the separation of law and policy-making was clear in theory (if not, of course, in reality and, possibly, in practice).

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".[34] 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. He regarded the function of his office as being exhausted by doing justice in the individual case, and did not labour under the self-conscious delusion that the impact of a decision extends beyond the individual case to anything like the extent that his nineteenth-century American counterparts did.

Above all, Robinson was concerned that none would have reason to fear judicial discretion or, for that matter, the arbitrariness and unpredictability of jury decision-making: "[Y]ou will excuse my stating frankly to you that opinions on the subjects discussed in this representation would more properly, as I think, be withheld by you while acting in the capacity of Grand Jurors. Every man in the community is interested in guarding the administration of justice from suspicion, misconstruction, or reproach."[35]

It is not as though Robinson were unaware of what was transpiring in the United States, for he referred to American authorities as often as he did

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[33]Robinson, *supra*, note 21 at 314.
[34]Horwitz, *supra*, note 23 at 1.
[35]Robinson, *supra*, note 21 at 315.

to French authorities.[36] But this polyjurality had its limits because, in the final analysis, Robinson regarded himself as bound by (U.C.), 32 Geo. 3, c. 1, s. 2 which prescribed that the "rule of decision" in each case was to be discovered by searching the decisions of the English courts. As he remarked in *Street* v. *Commercial Bank of the Midland District*,

> [t]he American courts ... find no insuperable difficulty in relieving themselves from the mere force of English authority, when they think adjudged cases at variance with general principles. We are clearly bound by such authority, when we can shew no dispensation from it. ... The tribunals of the United States ... 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.[37]

The allusions to French and American authorities took place, therefore, within and according to the encompassing framework of the "pattern" that could be discerned in the decisions of the courts of England. The allusions were not "deviations" (since it would have been unconstitutional to "deviate") — they were but further refractions (independent confirmations) of the "pattern". At least, this is how Robinson rationalized the unconscious promptings, the alterities and rumours of other cultures, embedded in the culture of Upper Canada.

Horwitz aptly sums up the countervailing attitude of the American judiciary *circa* 1820 in the following passage: "judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change."[38]

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[36]See, *e.g.*, *Doe dem. Hill* v. *Gander* (1844), 1 U.C.Q.B. 3; *Davidson* v. *Bartlett* (1844), 1 U.C.Q.B. 50; *Beckett* v. *Cornish* (1847), 4 U.C.Q.B. 138; *Wilcocks* v. *Tinning* (1850), 7 U.C.Q.B. 372; *Lewis* v. *Brooks* (1851), 8 U.C.Q.B. 576; *Marmora Foundry Co.* v. *Jackson* (1852), 9 U.C.Q.B. 509; *Sinclair* v. *Robson* (1858), 16 U.C.Q.B. 211; *Maulson* v. *Topping* (1858), 17 U.C.Q.B. 183. For the most part, Robinson relied on American treatise writers for authority in commercial matters. This reflects a lacuna in the English treatise writing of the time as well as a hiatus in the Chief Justice's own thinking: "[T]rade and revenue are not all that constitute the happiness of a people ... . [E]ndangering other objects in the hope of benefiting these [as the American people had done], we may find that we have purchased even wealth at too high a price." *Canada and the Canada Bill*, *supra*, note 2 at 111.

[37](1844), 1 Grant 169 at 189 (U.C. Ch. Ct). See also *Baldwin* v. *Roddy* (1832), 3 U.C.Q.B. (O.S.) 166; *Doe ex dem. Jones* v. *Capreol*, *supra*, note 19 at 227; *Baldwin* v. *Montgomery* (1843), 1 U.C.Q.B 283; *Maulson* v. *Commercial Bank* (1845), 2 U.C.Q.B. 338; *Davis* v. *Barnett* (1853), 10 U.C.Q.B. 50.

[38]Horwitz, *supra*, note 23 at 30.

Robinson was also preoccupied with "promoting socially desirable conduct", but the conduct he enjoined was of a wholly different sort.[39]

One of the most engaging chapters of Horwitz's book is Chapter 2, "The Transformation in the Conception of Property". This chapter documents how nineteenth-century American judges turned Blackstone's "absolute dominion" conception of the right to property on its head.

"There is nothing which so generally strikes the imagination", Blackstone wrote in the *Commentaries*, "and engages the affections of mankind, as the right of property; or 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".[40] In and of itself, this passage is perfectly ambiguous, but the meaning ascribed to it was dictated by the agrarian context in which it was written. "Absolute dominion" connoted the power to prevent one's abutters from using their lands in such a way as to disturb the peaceful enjoyment of one's own estate. "Natural use" was the rule and any action which tended to disturb the existing order of things or "nature's plan" (such as obstructing the natural flow of a stream) attracted liability.

But in the early nineteenth-century United States, the "natural use" doctrine proved to be an impediment to the prevailing conception of material progress. The question became one of how to facilitate interference with the property rights of others in the interests of increased productivity. *Palmer* v. *Mulligan* marked this "shift in premises". In that case it was decided that the natural flow of water could be obstructed for milling purposes by an owner of the streambed situated upstream. This implied that the courts would henceforth protect virtually any enjoyment *except for* a peaceful one. All one needed to have on one's side (or up one's creek) was "progress" (if not God or nature as per the older view), and the courts would see to it that this use was sanctioned.

There was nothing less "absolute" about a land owner's dominion under this new dispensation than under Blackstone's. If anything, his dominion was extended beyond the boundaries of his own property and over those of his abutters (providing his was the more productive use). It is precisely this lack of respect for boundaries, however, which would have troubled a Blackstone or a Robinson, a point we shall return to later.

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[39]It could be said that while American judges were concerned with maximizing productivity and the accumulation of capital, Robinson sought to maximize morality. See P. Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (1984) at 171-5.

[40]*Commentaries on the Laws of England*, vol. 2, 14th ed. by E. Christian (1803) at 2.

The American judges had to experiment somewhat before they arrived at the ideal solution to the problem of invading the property of the other in the interests of maximizing economic welfare. The first doctrine to supplant the "natural use" doctrine was the rule of priority of use (or "first in time is first in right"). This rule gave at least the first user freedom to develop his lands as he saw fit. But it also conferred upon him the power to arrest a future conflicting use which, in the estimation of the judges, might have proved more productive. The danger in conferring such a monopolistic or exclusionary right, according to the prevailing judicial opinion, lay in the fact that "the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry".[41]

In order to promote competition and rivalry the right to property had to be invasionary rather than exclusionary. This policy underlay the development and eventual triumph of the "reasonable use" doctrine according to which the reasonableness of a mill's interference with the flow of water determined whether an action would succeed or not. Interference thus became the norm, as opposed to the exception, and the injuriousness of the use became a question of degree.

The Robinson court was also called upon to decide a series of mill-dam cases. The most remarkable feature of these judgments is the manner in which the facts are represented — as if the intention were to exclude any suggestion that boundaries had been transgressed. In *Brown* v. *Street*, for example, the party who emerged as the one to have shown the most respect for existing boundaries was the defendant! Brown brought an action against Street in 1840 for overflowing his gore lot. The deed to Street's predecessor in title, however, showed that Brown had granted the latter a privilege to as much of the gore lot as might be overflowed by the construction of a mill-dam. Moreover, "[i]t appeared, that more than twenty years before this action was brought, boundaries had been placed to mark the height of water agreed upon, as necessary for the purpose of the proposed mill", and that despite an alteration defendant had made to the mill, the water had not overflowed the boundary marks.[42]

Robinson acknowledged in his judgment that the deed concerned "may not operate to pass the estate in the land intended to be overflowed [to the defendant] ... but it may well operate as a license under seal to overflow the

[41] *Palmer* v. *Mulligan*, 3 Cai. R. 307 (N.Y. Sup. Ct 1805). Cited in Horwitz, *supra*, note 23 at 37.

[42] (1844), 1 U.C.Q.B. 124 at 125.

land, or as the grant of an incorporeal hereditament".[43] As this passage shows, Robinson remained uncertain as to the exact nature of defendant's right, or how exactly it should operate. The tone of his writing also suggests that he was impatient to see the case resolved. One suspects that the reason for his impatience lay in the fact that he always strove for precision and exactness in his judgments. Robinson was not the type to multiply boundaries beyond necessity (to paraphrase Ockham),[44] yet in this case he was confronted with two equally valid lines of demarcation: the property line and the water line. In the end he opted for the boundary line which had not been blurred, the one which seemed more cut and dried. "It is part of our human condition to long for hard lines and clear concepts. When we have them we have to either face the fact that some realities elude them, or else blind ourselves to the inadequacy of the concepts."[45]

Robinson appears to have felt most at ease in those cases where he was called upon to apply the doctrine of prescription. This doctrine satisfied his longing for "hard lines" since, unlike the doctrine of "reasonable use", that of prescription did not admit of degrees: a party either acquired a right after twenty years uninterrupted use, or he did not.[46] Robinson's American counterparts were opposed to the doctrine of prescription because, like the rule of priority of use, its application tended to produce monopolistic and exclusionary results. Their vision of society as founded upon competition and rivalry was not shared by Robinson, however, who took a more organic view: even from the perspective of a plaintiff, "to have a mill built in his

[43]*Ibid.* at 125-6. Robinson's dissenting opinion in *Beaver* v. *Reed* (1851), 9 U.C.Q.B. 152 may be interpreted as an extension of the logic in *Brown* v. *Street, supra,* note 42, to include parol licences. A licence of this sort could be used as a shield, but not as a sword: *Robinson* v. *Fetterly* (1852), 8 U.C.Q.B. 340; *Canada Company* v. *Pettis* (1852), 9 U.C.Q.B. 669. For the connection of this estoppel-like doctrine with the doctrine of "natural use" see *Adamson* v. *McNab* (1948), 6 U.C.Q.B. 113. Robinson appears to have drafted a number of these agreements while at the Bar (which may account for why he was so anxious to have them upheld). See, *e.g., Eastwood* v. *Helliwell* (1835), 4 U.C.Q.B. (O.S.) 38. See also J. Benidickson, "Private Rights and Public Purposes in the Lakes, Rivers and Streams of Ontario 1970-1930" in D.H. Flaherty, ed., *Essays in the History of Canadian Law,* vol. 2 (1983) 39 at 365.

[44]See, *e.g., Doe dem. Hill* v. *Gander, supra,* note 36; *Gallagher* v. *Brown* (1846), 3 U.C.Q.B. 350; *Sherwood* v. *Moore* (1847), 3 U.C.Q.B. 468; *Doe dem. Beckett* v. *Nightingale* (1848), 5 U.C.Q.B. 518.

[45]M. Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (1978) at 162.

[46]See, *e.g., McLaren* v. *Cook* (1846), 3 U.C.Q.B. 299; *Buell* v. *Read* (1848), 5. U.C.Q.B. 546 (the closest Robinson ever came to formulating a doctrine of "reasonable use"); *McNab* v. *Adamson* (1849), 7 U.C.Q.B. 100; *Bowlby* v. *Woodley* (1852), 8 U.C.Q.B. 318; *McKechnie* v. *McKeyes* (1852), 10 U.C.Q.B. 37; *Haley* v. *Ennis* (1852), 10 U.C.Q.B. 404.

neighbourhood ... might be a great convenience to himself and tend to enhance the value of property".[47]

Robinson's idyllic vision, in fact, simply prevented him from making a purposive, functional analysis of common law rules with an eye to the relative efficiency of competing uses. The following passage from *Dean* v. *McCarty*, a hypothetical situation where the Chief Justice considers the question of who should bear the loss in the event of a fire spreading out of control, illustrates this point.

> For example, a man may have a very valuable mill, and a neighbour having a small piece of woodland adjoining to it, of trifling value compared to the mill, in the process of clearing sets fire, which, unfortunately, by a sudden rise or change of wind, spreads so as to consume the mill in spite of all the exertion that can be used. It may be said, here is a case in which one of two innocent men must bear a serious loss, and that the misfortune would more properly fall upon the one who was a voluntary agent in setting the cause of the injury in motion, than upon him who had no share whatever in producing it. ... Still, I apprehend, that such a case must go to the jury, like all other cases of the kind, upon the question of negligence. If the principle is a sound one, it must be applied throughout.[48]

This passage reads like a parody of American judicial reasoning. The frankness with which Robinson discusses the question of who should bear the loss is quite modern, but the manner in which he left the question open would have horrified an American judge. One cannot, therefore, regard *Dean* v. *McCarty* as a case in which older notions of strict liability for nuisance are being replaced by the more "cost sensitive" regime of negligence. It was not self-evident to Robinson that it would be more "efficient" or "productive" to promote one use (milling) over the other (clearing the land), and one must accept this as an indication of the extent to which standards of efficiency and the like are culture-bound.

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[47]*Beaver* v. *Reed*, *supra*, note 43 at 157. Robinson's views on competition were diametrically opposed to those of his American countemporaries. For example, in a case concerning the infringement of an exclusive right of ferry between Upper Canada and New York, the Chief Justice had this to say on the subject of government regulation:

> It is quite obvious that if 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 accomodation as would enforce dispatch and safety; competition would at one time reduce the cost 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 employment, then the power to extort would succeed, and there would never be certainty if the thing were left to regulate itself.

Kerby v. *Lewis* (1841), 6 U.C.Q.B. (O.S.) 207 at 210. See also *Nelson* v. *Cook* (1854), 12 U.C.Q.B. 22.

[48](1846), 2 U.C.Q.B. 448 at 449.

The fact that Robinson did not participate in the same appreciation of the demands of the hypothetical situation posed in *Dean* as his American counterparts is indicative of more than just the non-universality of such concepts as "efficiency". It exposes the radical contingency of the functionalist method in American historiography, a method which must assume the existence of such concepts in order to proceed. Indeed, one of the major faults of mainstream American scholarship is that while it provides detailed accounts of *what* the American judges said and did, it rarely explicitly addresses the question of *how they were able to* say and do the things they did. Perhaps this is too Kantian a problem for the "Pragmatic Instrumentalist" to appreciate as fully as he should, but the point deserves emphasis: the facts of a case never speak for themselves — they are recognized, and this recognition rests on the specific means of discriminating and relating "facts" peculiar to a given culture and era which must be discovered by the historian, not presumed.

The reason for the silence at the centre of most functionalist accounts is simple: the instrumentalist tends to end up sharing the same assumptions as his subjects. Primary among these assumptions has always (in American scholarship) been the idea that legal rules may be used as tools to achieve certain practical ends. But what ends? How did America's antebellum judges *recognize* the ends which the rules they designed were intended to serve? And which end? How did they choose between these ends when more than one possible end presented itself to them?[49]

To put the matter another way, most American legal reasoning is result-oriented. What this means in practice is that the reasoning takes place *after* the desired result has been determined, not before. It is for this reason that we find so many policy considerations being invoked in the course of American judgments: they are there to justify the result, but they do not determine the result, since it is the result (which has already been achieved by other means) which determines which among them will be invoked. Logically, then, one ought to read American judgments backwards, but even this textual strategy will not help to clarify the prior question of how it is that an American judge recognizes the desired result in the individual case. To answer this prior question one must examine what is left unsaid.

[49] The trouble with the utility standard . . . is that the relationship between means and ends on which it relies is very much like a chain whose every end can serve as a means in some other context. . . . [I]t gets caught in the unending chain of means and ends without ever arriving at some principle which could justify the category of means and end, that is, of utility itself.

H. Arendt, *The Human Condition* (1958) at 153-4. See also McDonnell, *supra*, note 13 at 101; M. Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (1962) at 286-94; M. Sahlins, *Culture and Practical Reason* (1976); G. Grant, *English-Speaking Justice* (1985) at 83; D. Sugarman, "Law, Economy and the State in England, 1750-1914: Some Major Issues" in D. Sugarman, ed., *Legality, Ideology and the State* (1983) 213; and Gordon, *supra*, note 9.

The unsaid is that which is taken for granted, the assumptions about the nature of the world and things in it which are so generally shared that they do not need stating. It is by virtue of this frame of unquestioned constructs constituting the background of everyday life that Robinson on the one hand and his American counterparts on the other were able to recognize certain "facts" as significant and certain results as following inexorably from them. The sources of law are not to be found in cases and statutes, but in the cultural background of the judicial personage.

III. The Law of Survival of the Moralist

"The form of the Loyalist myth suggests a Christian *typos* of suffering (the Revolution), redemption (the acquisition of Canada), and ultimate vindication (success in 1812, material growth), all in the service of a convenant (fealty to Crown and British institutions brings national survival under imperial aegis)."[50] What Dennis Duffy identifies as "the form of the Loyalist myth" in this seminal passage from *Gardens, Covenants, Exiles*, could also be called the underlying structure of assumptions of the Loyalist tradition. There is a causal proposition contained within this nexus of beliefs: Be loyal and the garden will flourish; disobey the precepts of the covenant and the garden will be transformed into a barren wasteland overrun by pests and mired in confusion.

When viewed against the background of the above set of associations, the doctrine which Robinson articulated in *Street* v. *Commercial Bank* takes on a deeper cultural significance. To "deviate" in one's reasoning from the authority of the "pattern" discernible in the English case law would be to breach the covenant, and so invite confusion and disaster. It was not solely in the legal doctrines he espoused that Robinson sought to uphold the covenant, however, since every major event in his life and all of his deeds may be interpreted as conforming to the *typos*.[51]

John Beverley Robinson was born at Berthier, Lower Canada, in 1791. His father, Christopher Robinson, was a prominent Loyalist from Virginia who served in the Queen's Rangers during the Revolutionary War. The

[50]D. Duffy, *Gardens, Convenants, Exiles: Loyalism in the Literature of Upper Canada/Ontario* (1982) at 93. Duffy's penetrating analysis of the structure of the Loyalist imagination shares many of its deepest insights in common with the conclusions arrived at by such anthropologists as Mary Douglas and Sir Edmund Leach when they turned their attention to the interpretation of the cosmology of the Israelites. See the chapter entitled "The Abominations of Leviticus" in M. Douglas, *supra*, note 45 at 41; and Sir E. Leach, "Genesis as Myth" in J. Middleton, ed., *Myth and Cosmos: Readings in Mythology and Symbolism* (1967) at 1.

[51]For biographical details, see Robinson, *supra*, note 21; Brode, *supra*, note 39; R.E. Saunders, "Sir John Beverley Robinson" in *Dictionary of Canadian Biography*, vol. 9 (1970) at 668; and J. Jarvis, *Three Centuries of Robinsons* (1953).

father lost more than just the war as a result of his fealty to the Crown, and he appears never to have recovered from being despoiled of his estate in Virginia: valued at 64,000 pounds sterling, he received only 17,000 pounds in compensation from the Commissioners appointed to investigate claims for losses arising out of the war. As he lamented in a letter to a friend, "I was born to better prospects."[52] One wonders in the light of such moroseness where his son got the idea that United Empire Loyalists were animated by "a feeling of satisfaction and pride in the exertion and sacrifices by which their fidelity was proved".[53]

The interval the Robinson family passed at Berthier, Lower Canada, may be regarded as the period of their exile in the wilderness after the exodus from the United States.[54] In 1792, they moved to Kingston, Upper Canada — the promised land — where the father took up an appointment as deputy surveyor general of the woods and reserves. The acquisition of Canada by the Loyalists was no less momentous an event than the entry of the Israelites into the Land of Canaan, or so it would appear from Robinson's description in *Canada and the Canada Bill*: "[W]hen we turn to Upper Canada, we find a country of large extent, with a soil unsurpassed in fertility, and a climate that admits of the cultivation of the very finest wheat; abounding in valuable timber, and in the most useful minerals, with the advantage of navigable waters running through it, and around it, in a manner that cannot be seen without admiring so beautiful an arrangement of nature." Upper Canada was paradise regained. Admittedly, the land did not flow with milk and honey, but there was always the St Lawrence River with "its clear and wholesome waters ... fit for every domestic use".[55]

The Robinsons moved from Kingston to York in 1798, where the father died suddenly, and young Robinson was sent back to Kingston to live with the Reverend John Stuart. He was immediately enrolled in a school that had been opened there by the Anglican priest John Strachan, and quickly became the latter's dearest protégé. In later life, Robinson became as "High" a Tory as he was an Anglican. This disposition may be attributed to Strachan's enduring influence. Indeed, so close was the association between the two that Strachan saw their relationship as persisting after death. In a note in 1848, the (by then) Bishop of Toronto wrote: "I have caused a tomb containing two vaults to be erected in the ground I purchased in the cemetery

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[52]Robinson, *supra*, note 21 at 9.

[53]*Canada and the Canada Bill*, *supra*, note 2 at 25.

[54]Of course, Lower Canada was no less a garden than Upper Canada, since both were protected by the covenant, but Robinson had serious reservations about those who tended the garden there. See *ibid.* at 27, 101, 108, 134-7 and 150.

[55]*Ibid.* at 20-1.

... . As there is, in fact, no choice between the two, I have assigned the west to you, and the east to myself."[56]

Strachan deliberately instilled in his pupil the public-minded virtues of a statesman. In view of the latter's career as an elected member of the House of Assembly during the 1820's, the confidence which the priest had in his protégé becoming a wielder of temporal power appears to have been well placed. From 1820 to 1829, Robinson was actually the leader of the "Tory party" (such as it was) and the chief spokesman of government in the Assembly.[57] Strachan evidently pictured himself as a mediator of spiritual authority by way of contrast, but this did not prevent him from enjoying his seat on the Legislative Council (from 1820 to 1841) or his position as a director of the Bank of Upper Canada. It is little wonder, given his position, that Strachan viewed the deistic founding fathers of the United States as having committed a serious error in severing the connection between church and state. Throughout his life Strachan fought to have the Church of England recognized as the "established Church" of Upper Canada. The idea of a "separation of powers" (spiritual/temporal) was totally foreign to his conception of the church-state, or dual sovereignty.[58] In fact, the notion of a "separation of powers" generally was alien to the original political culture of Upper Canada since, as will be recalled, Robinson united the executive, legislative and judicial functions of governance in his person (at least until 1840).[59]

[56]Robinson, *supra*, note 21 at 400. Strachan's insistence upon the east/west arrangement of the vaults appears to have been motivated by a long-standing tradition in Christian mortuary art (and iconography in general) according to which secular figures are symbolically associated with the west and sacred figures with the east. See R. Needham, *Reconnaissances* (1980) at 63ff.

[57]See S.F. Wise, "Upper Canada and the Conservative Tradition" in E. Firth, ed., *Profiles of a Province: Studies in the History of Ontario* (1967) 20.

[58] As teacher to a whole generation of political leaders, as churchman, polemicist and political in-fighter, and as a member of the executive government, John Strachan, more than any other man was responsible for the framing of Tory policy in church and state, and for the rationale by which it was defended .... [I]t was Strachan's belief that the prescriptions he defended in church, state and society were part of the providential order, that Upper Canada had a special mission to preserve them in North America, and that any opposition to them was a sign of the grossest and most blasphemous infidelity, and of a dangerous sympathy for the condemned revolutionary society of the United States.

S.F. Wise, "God's Peculiar Peoples" in W.L. Morton, ed., *The Shield of Achilles: Aspects of Canada in the Victorian Age* (1968) 36 at 56. Robinson inherited the view that "religion [read: the Anglican Church] is the only secure basis on which civil authority can rest" from Strachan, and he defended it just as vigourously. See *Canada and the Canada Bill*, *supra*, note 2 at 42-3.

[59]Although, officially, Robinson relinquished the presidency of the Executive Council in 1831, his ability to capture the confidence of succeeding Lieutenant-Governors has led at least one commentator to remark that "Lord Goderich's dispatch of 1831 mandating the separation of the judiciary from the executive might never have been written". See Brode, *supra*, note 39 at 203-4.

The notion of a unity or concentration of powers is one of the features that serves to bring out the contrasts between the polities of Upper Canada and the United States which it is the purpose of this part and the next to reconstruct. The Conversion Table (Appendix) summarizes these contrasts and illustrates how the two polities constituted themselves in opposition to each other. The notion of a fundamental unity of powers also helps to account for the existence of the so-called oligarchic rule of the Family Compact (of which Robinson and Strachan constituted the core): power had to be concentrated, not dispersed. And if power had to be concentrated then so did land, as we shall see.

Robinson left Strachan's tutelage at the age of sixteen to article at York in the office of the Solicitor-General and later the Attorney-General. His "abilities" were immediately remarked upon by Chief Justice Powell (and Powell's daughter, Anne). When war loomed on the southern horizon in 1812, the esteem in which he was held led to his receiving a lieutenant's commission in the militia. He distinguished himself in the battle at Queenston where numerous others fell, among them the Attorney-General Macdonnell. It was on Powell's recommendation that Robinson was appointed acting Attorney-General at the age of 21 without yet having been called to the Bar.

Robinson's first task as the public official responsible for the administration of the civil affairs of the province was to prosecute for treason those settlers who had aided and even joined the enemy during the war. He did so methodically: of the nineteen who were brought to trial at Ancaster, fourteen were convicted and eight of those convicted were executed.[60] Robinson's own convictions about the covenant with the mother country must have been enhanced by the process of convicting others for their betrayal. The war, after all, had been a test of that covenant.

The fact that Upper Canada survived the war as a political and cultural entity "signified the role that morality played in history".[61] The victory (however marginal) vindicated Loyalist principles. Survival also generated a particular mentality, that of the garrison (as opposed to the frontier). Duffy has described this mentality as follows: "On the one hand stands a group of insiders needing to bury any mutual enmities of the past, seeking by compromise and reconciliation to arrive at a common front against envious outsiders; on the other dwell the outsiders and their insider allies."[62]

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[60]See E.A. Cruickshank, "John Beverley Robinson and the Trials for Treason in 1814" (1929) 25 *Ont. Hist.* 191.

[61]Duffy, *supra*, note 50 at 8. It is enough, for the moralist, that he survives; it is for the fittest to evolve. See M. Atwood, *Survival: A Thematic Guide to Canadian Literature* (1972).

[62]*Ibid.* at 8-9.

Robinson's attitudes towards "insiders" and "insider allies" reveal two very different facets of his character. We have already glimpsed his paternalistic, conciliatory attitude towards recalcitrant plaintiffs in the context of the mill-dam cases. Conversely, it was Attorney-General Robinson who presented the petition which led to the expulsion of Barnabus Bidwell (one time member of the Massachusetts State Legislature) from the Upper Canadian House of Assembly, thus setting the tone for subsequent debates over the alien question.[63]

This act of ritual expurgation was motivated by Robinson's Loyalist convictions (and, of course, "the law"), a set of convictions which received their most eloquent expression in Robinson's condemnation (as Chief Justice) of Samuel Lount and Peter Matthews to death by hanging for their part as rebel leaders in the December uprising of 1837. The Rebellion of 1837 was the third Loyalist war (a repeat of 1812 and 1776), and Robinson was among those who went down into the streets to join the ranks of the militia called out to resist MacKenzie's rebels.

The Chief Justice's address to the prisoners appears to have been galvanized by this experience, for his language was as much exhortatory of others as condemnatory of the prisoners. He charged them with "conspiring to introduce confusion and bloodshed where nothing else should have been found but contentment and peace". He traced the cause of their "dreadful fall" to "your willful forgetfulness of your duty to your creator, and of the purposes for which life was bestowed on you", that duty being to be "humbly thankful to a kind Providence, which had cast your lot in this free, and prosperous country", as opposed, interestingly enough, to England, where they might have had to work in the mines under conditions of abject poverty. The prisoners had breached their covenant with God; they had "indulged in a feeling of envy and hatred towards [their] rulers". Possessing none of the qualities of the "insider" they were accordingly executed.[64]

Of course, treason is a crime against the King, not the "King of Kings".[65] Robinson's confusion of the two was no doubt partly for effect, but it was also motivated by the notion of a fundamental unity of powers remarked

[63]See Craig, *supra*, note 18 at 93-100, 114-23 and 188-9. See also the chapter entitled "The Alien Debates" in Brode, *supra*, note 39 at 118ff.

[64]Address of the Honourable Chief Justice Robinson; on passing sentence of death upon Samuel Lount and Peter Matthews, "Robinson Papers" *MS* 4, Reel 4, Public Archives of Ontario. See further A.B. McKillop, *A Disciplined Intelligence: Critical Inquiry and Canadian Thought in the Victorian Era* (1979) at 65-73, for there are some intriguing parallels between Robinson's views and those of Canada's first philosopher, James Beaven. The structure of Beaven's thought has been described as "rational federalism", a characterization which is equally applicable to Robinson's ratiocination. See Armour & Trott, *supra*, note 6.

[65]*Pace* Romans 13:2.

on earlier. Furthermore, Robinson appears to have conceptualized the relationship between God and colonist and King and colonist in identical terms: just as one ought to be thankful to "a kind Providence" for one's lot in life, so the inhabitants of Upper Canada "dwell" (or ought to dwell) upon the name of King George III "with veneration and love, such as a child entertains for a just and indulgent parent".[66]

Imperial relations may be construed in many different ways: master/slave, parent/child, etc. It is indicative of Robinson's prejudices as a Loyalist that the analogy between imperial relations and familial relations figured most prominently in his mind. Similarly, the Rebellion of 1837 was an event susceptible of more than one interpretation. To the Loyalist it was an illegitimate act of treason against God and King. To the Republican it was a legitimate attempt to throw off the tyranny and oppression of British colonial rule. The Patriot invasions from the United States in 1838 were motivated by the second interpretation:

> Assuming that the rebellions represented a widespread popular movement that had been put down by British regulars, and that the provinces still yearned to be free, Americans instinctively extended their sympathy ... to the downtrodden Canadians. ... A mood of Manifest Destiny was seizing the United States, and one of its aspects was the belief that Americans had a moral obligation to extend the "area of freedom" throughout the North American continent.[67]

Thus, American foreign policy was structured by the same considerations as the domestic policy examined in Part II. It was "creative" and "invasionary" at base. This tendency may be accounted for by reference to the following quotation: "[A]s modern people come to believe themselves to be the absolute source of themselves, all systems of order and meaning which appear to human beings as myth become other to them, and so in the very act of their sovereignty [for example, the declaration of independence] they experience the world as empty of meaning."[68] If there is no meaning "out there", then meaning must derive from within, and it is in accordance with this assumption that we have found "the release of individual creative energy" to be the dominant motif of American land policy.

For Robinson, however, whose life "acquired significance as an exemplar of 'Loyalism'",[69] the world was full of meaning: Upper Canada was a garden, the special covenantal status of which had been confirmed by the blood spilled in 1812 and again in 1837. Furthermore, Robinson did not

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[66]*Canada and the Canada Bill, supra*, note 2 at 25. For Robinson's conception of the family generally, see *Sprague* v. *Nickerson* (1843), 1 U.C.Q.B. 284.

[67]Craig, *supra*, note 18 at 249-50.

[68]G. Grant, "Value and Technology" in Canadian Conference on Social Welfare, *Proceedings* (1964) at 23. See also G. Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (1965).

[69]Duffy, *supra*, note 50 at 7.

regard the people of Upper Canada as the "absolute source of themselves", since, "[i]n the minds of the Compact leaders Upper Canada was not a mere 'possession' of Great Britain but part of the British nation overseas, where British subjects had the same rights and obligations as at home."[70] As Robinson retorted to those who thought the idea of Britain defending Canada impracticable: would not Great Britain defend the Orkney Islands? "Canada must be defended from a sense of the national honour, just as an individual protects his property, at the peril of his life, against a small encroachment as well as a large one. Nations, like individuals, if they would be respected, must know no other rule."[71]

The homology Robinson posits between individual and nation in the above quotation reveals how foreign the idea of a nation state was to his mode of thought. The equation of nationality with the limits of empire, moreover, constituted Robinson as a kind of dyadic subject in contradistinction to the monadic subjects of the republic to the south. For Robinson the interests of the whole had to take precedence over those of the parts. *Gardiner* v. *Gardiner* illustrates this point. In that case, the wording of the British statute 5 Geo. 2, c. 7, which made real property in the hands of the executors of an estate liable for the payment of debts in the same manner as personal property, left open the question of whether the heir had to be a party to the proceedings between creditor and executor.

Robinson was not blind to the fact that the British Parliament, in passing the Act, "had in view the single object of advancing trade by securing the British creditor".[72] At the same time, he could not conceal his "repugnance to the principle of real estate being made chattels for the payment of debts", especially in view of "how important it is, that in a province which

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[70]Craig, *supra*, note 18 at 109.

[71]Robinson, *supra*, note 21 at 245. Given this identification of self with other, one must question the adequacy of Louis Hartz's characterization of English Canadian society as liberal with a "tory touch". See L.B. Hartz, *The Founding of New Societies: Studies in the History of the United States, Latin America, South Africa, Canada, and Australia* (1964) at 32. Hartz, for all his talk of dialectics, appears to assume that a Whig can be defined as a separate entity and that the Whig possesses some sort of "essence" which accounts for his reappearance under slightly different guises in two such contrary societies as Canada and the United States. But it is pointless to search for "essences" since, when pushed to extremes, as in the case of D.V.J. Bell, "The Loyalist Tradition in Canada" (1970) 5(2) J. Can. Stud. 22, the conclusion inevitably dawns that there is none to be found. This non-conclusion (that Canada is a non-nation suffering from an identity complex) merely proves that what we ought to be focussing on are not essences but relationships. See P. Watzlawick, J.H. Beavin & D.D. Jackson, *Pragmatics of Human Communication* (1967) at 19-47; G. Horowitz, *Canadian Labour in Politics* (1968) at 3-57; J. Fellows, "The Loyalist Myth in Canada" in Canadian Historical Association, *Historical Papers* (1971) 94; A. Wilden, *The Imaginary Canadian: An Examination for Discovery* (1980); and the Conversion Table which appears in the Appendix to the present essay.

[72]*Gardiner* v. *Gardiner* (1832), 2 U.C.Q.B. (O.S.) 554 at 586.

must be chiefly agricultural, the proprietors of estates should be encouraged to set a just value and feel a secure confidence in their possessions ... *but we must study to prevent any feeling of this kind from influencing our judgment*".[73]

Ultimately, the Chief Justice succeeded in repressing his personal feelings towards the interpretation of this statute which denied an heir the right to be a party to the proceedings. But there could be no denying that the statute was "in itself a total and absolute departure from the principles and practice of English law ... a block thrown in at random, or rather one that we are forced to admit into the structure we have erected".[74] These final words reflect Robinson's dual subjectivity: given his nationality he was subject to two sets of laws — one indigenous, the other imperial — and the articulation between these two "structures" was anything but smooth in those cases where "objects" conflicted.

Whereas local interests could and should be subordinated to those of empire, they were not to be subjected to those of the neighbouring republic. Thus, in *Genesee Mutual Insurance Company* v. *Westman*, one of the first cases of an American company attempting (though not empowered) to act as a multinational corporation, Robinson held that the foreign charter concerned could not be acted upon in the province because "a foreign legislature", in this case New York, "can make no law creating a lien on legal estate in Canada".[75]

It is apparent when one compares this case with the preceding one that extraterritoriality was a function of the "nationality" of the law in question. The Chief Justice was loathe to see the already permeable boundary with the United States weakened any further.

Robinson devoted a great deal of energy to the promotion of boundary strengthening technologies. For example, he was one of the principal subscribers to the Welland Canal Company (which nearly ruined the province's treasury). As S.F. Wise has remarked, "[t]he Tories, in entering into [public as well as personal] collaboration with private initiative in the development of the Welland and other canals, were responding to a general desire for public improvements, and in particular to the threat posed by the building

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[73]*Ibid.* at 574 and 598 [emphasis added].

[74]*Ibid.* at 602. But see *Doe ex dem. Jessup* v. *Bartlet* (1832), 3 U.C.Q.B. (O.S.) 206; *Ruggles* v. *Beikie* (1832), 3 U.C.Q.B. (O.S.) 347.

[75](1852), 8 U.C.Q.B. 487 at 497. See also Robinson's dissenting opinions in *Warrener* v. *Kingsmill* (1852), 8 U.C.Q.B. 407 and *Kingsmill and Davis* v. *Warrener and Wheeler* (1852), 13 U.C.Q.B. 18. It is worthy of note that local interests were not to be subjected to those of the neighbouring province either. See *Bank of Montreal* v. *Bethune* (1836), 4 U.C.Q.B. (O.S.) 341.

of the Erie Canal, which, if not countered, would drain off the commerce to the south and New York."[76]

The boundary strengthening technique which occupied Robinson the most, however, was the channeling of emigration from the British Isles. British emigrants were needed, it was thought, to counterbalance the American presence on both sides of the border. Thus, sponsoring emigration was part of the general military strategy involving the construction of canals (such as the Rideau) and the manning of garrisons which has been called "defensive expansion".[77]

Robinson's views on emigration were also intimately linked to his labour (as opposed to exchange) theory of the wealth of nations. "If a country, however governed, desires to grow rich, she must expect to do so by the patient labour of her people ... [whence the] constitution of the individual will be generally a more material consideration than the constitution of the state."[78] The constitution best suited to succeed in Upper Canada, according to Robinson, was that of

> the able bodied labourer, the industrious and sober mechanic, and any person of whatever class, who, deriving from some source a moderate income, upon which in [England] they could barely subsist, may enjoy in Upper Canada, upon the same income, a greater abundance of the comforts of life, and may with prudence and economy be at the same time gradually forming a property which, in case of their death, will secure their families against absolute destitution.[79]

Upper Canada thus constituted a haven for Britain's unemployed, a place where "the neglected, heedless and starving pauper ... [could] be transformed into the peaceful, industrious, and respectable yeoman" through the agency and "enlightened generosity" of those British statesmen, who, like Sir Robert Wilmot Horton, would take it upon themselves to design and finance schemes of colonization.[80]

A marked inversion in attitudes towards the poor had taken place sometime between 1792 and the date of the above remarks, 1840. It will be recalled that Upper Canada explicitly rejected the English Poor Law when it was founded, a measure which appears to have been motivated by "a

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[76]*Supra*, note 57 at 29. See also H.G.J. Aitken, "The Family Compact and the Welland Canal Company" in J.K. Johnson, ed. *Historical Essays on Upper Canada* (1975) 153; and R.E. Saunders, "What was the Family Compact?" (1957) 49 Ont. Hist. 165.

[77]H.G.J. Aitken, "Defensive Expansion: The State and Economic Growth in Canada" in W.T. Easterbrook & M.H. Watkins, eds, *Approaches to Canadian Economic History* (1978) 183.

[78]*Canada and the Canada Bill, supra*, note 2 at 61-62. See also the cases referred to *supra*, note 36.

[79]*Canada and the Canada Bill, ibid.* at 50-1.

[80]*Ibid.*

rigid punitive ethic that saw poverty as a fault to be excluded as vigorously as possible".[81] Yet Robinson describes Upper Canada as a colony willing to receive the mother country's unemployed with open arms. The idea of including the poor is the converse of that of excluding poverty. Is this transformation to be accounted for by reference to some burgeoning spirit of humanitarianism? Or was it dictated by the slowly percolating notion of population as a crucial social and economic resource which had to be organized and made productive, namely, that Britain's idle poor could become Canada's industrious yeomen?

Robinson evidently regarded himself and was regarded as a great humanitarian. He was called upon, for example, to give the address upon the founding of the Toronto Lunatic Asylum in August, 1846. In this address he noted that the "more pressing wants" for roads, harbours, gaols and schools had meant that no provision could be made for the insane prior to 1830. But even in the days before 1830 there was a space for the lunatic:

> Some few who were wholly destitute, or who were too violent to be controlled, by such means as can be used in private families, were from necessity received into the common gaols; and being sheltered there only because they could be nowhere else — were helpless ... intruders upon the precincts of crime — without any system for their supervision — without any attempt towards their cure — left to the chance sympathies of a world from which they were hid, what desolate years of misery must they in some cases have endured, and what wretched discomfort must their presence have occasioned others![82]

The last line of this address comes as a shock. "The presence of the mad appears as an injustice, but *for others.*"[83] The "humane" treatment of the other, the criminal, called for the separation of the criminal from the insane. General confinement had been a mistake. It had to be replaced by the more "humane" and "scientific" specific confinement of the gaol, the penitentiary *and* the asylum to permit the rehabilitation of the criminal on the one hand and the supervision of the lunatic on the other.

It would appear that general confinement only comes to be seen as an error once population has come to be regarded as a potential component

[81]J.C. Levy, "The Poor Laws in Upper Canada" in D.J. Bercuson & L.A. Knafla, eds, *Law and Society in Canada in Historical Perspective* (1979) 23 at 35.

[82]Address upon the Founding of the Lunatic Asymlum, 22 August 1846, "Robinson Papers" *MS* 4, Reel 5, Public Archives of Ontario.

[83]M. Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (1978) at 228.

of the nation's wealth.[84] Robinson's remarks on the impending establishment of a penitentiary to complement the common gaols in 1832 confirm this point. According to Robinson, "idleness is the parent of most crimes". Thus, "mere imprisonment", which was all that the common gaols could offer, was not enough. But with the establishment of the penitentiary, "[t]he effect of imprisonment will be increased considerably if the convict be made to spend his days in labour, instead of consuming them in profitless and unwholesome inactivity." Moreover, finding himself working within the walls would force upon the convict "the obvious and salutary reflection that he had much better have been applying the same exertion in gaining an honest living" without. Last, but by no means least, the specific confinement of the penitentiary and the work enjoined there would "make their imprisonment less burthensome to the community", since the prisoners would thereby be "made to contribute, in some degree, to the public good".[85]

The effect of imprisonment on the miscreant appears to have differed little from the effect of the environment on the British emigrant. "To the unthrifty and heedless", or those young gentlemen with a "proneness to idleness and dissipation", the "experiment" of emigration could mean ruin.[86] It would take another quarter century before the harshness of the environment would be recognized as a *positive* factor with respect to inculcating the moral virtues necessary to survial (foresight, thrift, self-reliance, etc.).[87] Human nature, then, far from being inherently creative (as in Hurst's Wisconsin), had to be cultivated: "The diffusion throughout the province of well-educated and respectable families, and the more general introduction of those habits and objects which give refinement and interest to life, will banish the dull weariness which drives so many to vicious indulgences, as a mere resource for occupying time."[88] And human energy, rather than being released, had to be directed: Robinson would admit that "[n]othing can

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[84]This idea was developed by the late Michel Foucault in *Madness and Civilization: A History of Insanity in the Age of Reason, ibid., Discipline and Punish: The Birth of the Prison* (1979) and *Power/Knowledge: Selected Interviews and Other Writings* (1980). As Robinson's comments on the transformation of the starving pauper into the industrious yeoman illustrate, human needs had come to be seen as the means for the increase of the state's power. The British pauper who was willing to work for low wages and consume little had to be included and disciplined (rather than excluded (or interned) and left to his own devices) for the sake of increased force and productivity in Upper Canada. The emerging "disciplinary technology" of the penitentiary would make productive those "idle" bodies which did not respond to the North American environment in the desired manner.

[85]Charge to the Grand Jury, 15 October 1832, "Robinson Papers" *MS* 4, Reel 4, Public Archives of Ontario.

[86]*Canada and the Canada Bill, supra*, note 2 at 33-4.

[87]C. Berger, "The True North Strong and Free" in P. Russell, ed., *Nationalism in Canada* (1966) 3.

[88]*Canada and the Canada Bill, supra*, note 2 at 34.

justly deprive the people of the United States of the credit of being a remarkably energetic, active, and enterprising race", but he wondered if that energy was not misdirected given the fact

> that Irishmen have dug in America an astonishing number of canals, and made a prodigious extent of railroads, which Englishmen have paid for [with their loans]; and when these material ingredients in a public work are allowed for, namely, the labour of constructing them, and the charge of that labour, the balance of merit that remains seems pretty much confined to the ingenuity of the contrivance, and to a vast energy in borrowing.[89]

The energy had been misspent. Those to the south had not attained "*the secret of creating real wealth*", for "under every form of government, wealth must consist of the gradual accumulation of labour".[90]

The reason for this lack of direction appeared self-evident to Robinson: the levelling spirit had negated any counteracting checks. The American constitution was unbalanced. The system of government Robinson admired most was, naturally, that of Britain, with its independent upper house to act as a check on the elected assembly.[91] But the British system also had many other features to commend itself to his reason: "the influence of ancient and venerable institutions, and the traditionary respect for rank and family", "the substantial power of wealth, and the control of numerous landlords over a grateful tenantry".[92] The United States possessed none of these countervailing "influences" which were thought to have the power to

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[89]*Ibid.* at 59.

[90]*Ibid.* at 59-60. When a neighbouring "race" is more wealthy, powerful and successful than one's own, and it is commonly accepted that the possession of such qualities is a mark of divine favour, "[t]he only recourse is to show this heathen success in a context of demonic parody, as a short-lived triumph that has all the marks of the real thing except permanence." N. Frye, *The Great Code: The Bible and Literature* (1982) at 140ff.

[91]The structure of Robinson's conception of a "balanced" constitution was distinctly hierarchical. He took as given the idea that "the legislature of this colony is subordinate to the imperial parliament" and viewed the elected Assembly as but "a branch of the legislature of this province", the other branch being the Legislative Council, which was appointed. See *M'Nab* v. *Bidwell* (1830), Draper 144 at 146-52 (U.C.K.B.). Though Robinson nowhere explicitly states that the Legislative Council was hierarchically superior to the Assembly (because it was more directly linked to the sovereign), this suggestion is difficult to resist. Thus, power was distributed vertically, not horizontally, and flowed from the top down instead of from the bottom up — all in marked contrast to the notion of popular sovereignty enshrined in the constitution of the United States.

[92]*Canada and the Canada Bill*, *supra*, note 2 at 122. Robinson appears to have viewed the division of society into ranks as so basic to the maintenance of social order that when he visited France in 1816 he was astonished to find that the post-revolutionary French actually comported themselves as if they were equals: "I was much struck by the graceful, easy manner of French men and women of all ranks. You see nowhere any mark of embarassment or awkwardness, nor is [the French peasant's] manner at all an imprudent one or an affected imitation of the higher classes." Robinson, *supra*, note 21 at 117-8.

curtail populist excesses. Neither did Upper Canada. Indeed, with respect to the latter place "it may almost be said that every farmer is an independent freeholder, and every male adult a voter".[93] But was not the possibility of becoming an independent freeholder precisely the promise that the colony had extended to the prospective British emigrant?

In fact a shift had occured in land granting policy *circa* 1825, the point at which it came to be believed that free gifts of land increased the scarcity of labour in the market and drove wages up. The new, more restrictive land granting strategy was the subject of a letter from the Colonial Secretary, Lord Goderich, to Lord Aylmer, the Governor-General of British North America, in 1831.

> It has been said that by a strict adherence to [a restrictive landgranting] system, by refusing Land to the poor man whose labour is his only wealth, a most useful class of settlers will be discouraged. I see no ground for such apprehension; whatever promotes the prosperity of the Colony will naturally attract settlers, both of the labouring and of all other classes. ... Has it, on the other hand, been sufficiently considered by those who make this objection, whether it would conduce to the real prosperity of the Province to encourage every man who can labour to do so only on his own account, to obtain and cultivate his allotment of land without giving or receiving assistance from others? Without some division of labour, without a class of persons willing to work for wages, how can society be prevented from falling into a state of almost primitive rudeness, and how are the comforts and refinements of civilized life to be procured?[94]

Perhaps this hidden agenda, this idea of creating "a division of labour" where none yet existed, was "the secret of creating real wealth" which the Americans had failed to discover. Whether or not this strategy for the creation of a labour pool was the "secret" Robinson alluded to, one thing is certain about his thought: the notion of divisions in a society attracted him, and any initiative which had as its aim the erasure of those divisions repulsed him. The entirety of Robinson's social and political thought, horizontal and vertical, may be accounted for by reference to the above proposition.

Taking the horizontal dimension first, it is worthy of note that Robinson entertained a scheme for the confederation of all the provinces of British North America as early as 1824.[95] Confederation perpetuates separateness. Union, on the other hand, abolishes separations. The reason Robinson so adamantly opposed Lord Durham's proposal for a (re)union of the Canadas

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[93]*Canada and the Canada Bill, ibid.* at 122.

[94]Cited in L.A. Johnson, "Land Policy, Population Growth and Social Structure in the Home District" in Johnson, *supra*, note 76, 32 at 49. See also, B.F. Gates, *Land Policies of Upper Canada* (1968).

[95]For Robinson's "plan" (written together with John Sewell) see J.B. Robinson & J. Sewell, *General Union of All the British Provinces of North America* (1824).

was that it violated the whole structure, irrespective of the content, of his thought. As he stated in *Canada and the Canada Bill*, referring to the Act of 1791 which introduced the split, "I believe it to be to that separation that Upper Canada mainly owes her rapid advancement."[96]

As for the vertical dimension, we have already remarked on Robinson's admiration for the class structure of Great Britain and his antipathy towards the levelling spirit displayed in the United States. The absence of an established aristocracy in Upper Canada was, accordingly, a source of concern to him since he assumed that no society could be complete without one. "To meet this situation, Robinson had to find a kind of aristocracy which, if resembling the English peers only slightly, might serve the same political and social functions as did their British counterparts"; and fortunately, at least with respect to meeting this situation, Robinson "firmly believed in a meritocracy, an aristocracy based on intellect and merit".[97] The man selected for its ranks (the seats on the Legislative and Executive Councils, and other such positions of responsibility) had to be "the most worthy, intelligent, loyal and opulent inhabitant ... a gentleman of high character, of large property, and of superior information".[98]

It was, perhaps, doubly fortunate that loyalty and being propertied had gone together since the very inception of the colony:

> In 1783 Governor Haldimand had set up a scale of grants for the loyalist refugees which allowed heads of families to receive 100 acres plus an additional 50 acres for every member of their families. Similarly men who had served under arms were to receive grants which scaled upward from privates who received 50 acres to senior officers who received up to 1,000 acres depending on rank. All these "official" grants, however, were soon increased. In 1787 Lord Dorchester ordered that an additional 200 acres be given to heads of families who had already improved their lands. The local land boards apparently took this to mean that all who had borne arms would be entitled to receive grants of 300 acres or more, according to their rank, and that other Loyalists should receive an initial grant of 200 acres. Finally, in 1788, grants of lands to officers had been raised to a maximum of 5,000 acres depending on rank.[99]

The meritorious, in other words, were a rank of people set apart from the lot of the common immigrant — the recipients of the "non-official" grants — from the outset. But what was the cumulative effect of this land granting strategy on the structure of Loyalist experience?

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[96]*Canada and the Canada Bill, supra*, note 2 at 101. For the tale of Upper Canada's "decline" see J.M.S. Careless, *The Union of the Canadas: The Growth of Canadian Institutions, 1841-1857* (1967).

[97]T. Cook, "John Beverley Robinson and the Conservative Blueprint for the Upper Canadian Community" in Johnson, *supra*, note 76, 338 at 343.

[98]*Canada and the Canada Bill, supra*, note 2 at 144-5.

[99]Johnson, *supra*, note 94 at 33-4.

To begin with, the "march of history" would have presented itself to them as a progression from contract to property since it was by virtue of their adherence to the convenant with the mother country that they found themselves granted estates. What we have called Hurst's "law for the conservation of energy" holds true, therefore, with respect to the interpretation of the legal history of Upper Canada. It is in perfect accordance with that "law" or "immanent superior order(ing) of reality" that Hurst discerned a transformation in the opposite direction (property into contract) taking place in nineteenth-century Wisconsin.

Secondly, there are few more transparent instances of the idea that property relations are but reified social relations than the case of Haldimand's land granting strategies.[100] The separation of men according to their rank in the army (or their service to the empire) was projected onto the ground and "realized" there in the form of scaled estates. The separations of rank and of official/non-official grants set up distances between people, distances which were compounded by the practice, beginning in 1791 of setting aside two sevenths of the land in each township for the establishment of Crown and Clergy reserves. This spacing was mirrored and

> confirmed by the internal arrangements of a church. Special seats were reserved for the members of the government and the military. In Anglican churches worthy guests might be seated in the chancel. In several Presbyterian and Anglican churches, high box pews (with tables) were owned by the wealthy while precarious galleries and benches were left for those of lower estate.[101]

These land granting and church seating practices gave the social life of the Loyalist its tone as well as its shape. If put to music, the tone of Loyalist social life would sound like a funeral march with its long, drawn-out beats as opposed to a Highland fling with its quick invigorating cadences. "More spacing means more solemnity", more formality, more seriousness.[102] And the Loyalists took themselves very seriously. As has often been remarked, "[t]he Loyalist vision of Upper Canada ... at times substituted manners for substance, tragic posturing for agonized conviction, and hierarchy for brotherhood."[103] Robinson, for example, "disliked foolish levity, and any want

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[100]For the notion of property relations being reified social relations see M. Taussig, "The Genesis of Capitalism Amongst a South American Peasantry: Devil's Labour and the Baptism of Money" (1977) 19 Comp. Stud. in Soc. & Hist. 130.

[101]W.E. DeVilliers-Westfall, "The Dominion of the Lord: An Introduction to the Cultural History of Protestant Ontario in the Victorian Era" (1976) 83 Queen's Q. 47 at 58. Of course, not all Loyalists were Anglicans and Presbyterians.

[102]M. Douglas, *Implicit Meanings: Essays in Anthropology* (1975) at 214.

[103]Duffy, *supra*, note 50 at 31.

of decorum in Courts of Justice".[104] In the final analysis, then, Robinson's "blueprint for Upper Canada" with all the emphasis it places on techniques of separation reads like a reprint — a reprint of his experience of the distances inscribed at the core of the social life of the Loyalist.

However, the structure of Robinson's experience of the world was not representative. For those Upper Canadians whose estates lay all jumbled together in outlying districts, or whose lot was to remain forever cast in the labour pool; for those who tended to be more "enthusiastic" than staid in their religion (the Methodists, Baptists, Dissenters, etc.); and for those who were not Tory but other, distance was a fact to be overcome, not emphasized. They "agitated" for responsible government and they called for the abolition of the Crown and Clergy reserves. Their day came in 1841, when the Canadas were reunited and the system of government overhauled. The "separation" had been erased, but the structure of Robinson's thought persisted unaltered, or so it will be argued in the next section.

IV. Law in the Bush Garden

Given Robinson's background, the reason "the law" appealed to him probably had to do with the way that, throughout the history of western civilization, laws were conceived of as establishing boundaries and setting limits to action. (Of course, the law may also be used to facilitate human action, as the Americans had discovered, but this was quite an innovation.) The Greek word for law, *nomos*, was originally identified with the boundary line or hedge which separated one household from another, and from the public realm. Without this wall-like law separating the realm of necessity (the economic life of the household) from the realm of action (the political life of the city) there could be no political community. We find it difficult now to appreciate the full significance of this distinction, as Hannah Arendt has shown in *The Human Condition*. But to the ancients the idea of an "economic analysis of law"[105] would have seemed preposterous, just as "the

[104]Robinson, *supra*, note 21 at 319. The ascendancy of manners over substance was also manifest in Robinson's attitude towards the forms of action. As Risk has observed, *supra*, note 14 at 94: "Empty requirements of form were preserved; precendent and abstract logic overcame the merits of individual claims; and strict and critical interpretations overcame apparent intention." In a sense, the forms were all that Robinson had to work with. They provided solace against the "huge, unthinking, menacing and formidable physical setting" that constituted the backdrop of his experience. See N. Frye, *The Bush Garden: Essays on the Canadian Imagination* (1971) at 225, and the second verse of "Lines on an April visit to Windermere", *supra*, note 21 and accompanying text.

[105]R.A. Posner, *Economic Analysis of Law*, 2d ed. (1977).

very term 'political economy' would have been a contradiction in terms: whatever was 'economic', related to the life of the individual and the survival of the species, was a non-political, household affair by definition".[106] The law as wall both dictated and sustained that definition.

Though we cannot impute any knowledge of classical civilization beyond that contained in Virgil and Horace to the Chief Justice (who carried their works with him on his circuits)[107] our understanding of his views on "the law *and* action" may nevertheless be enhanced by comparison with ancient Greek conceptions.

> The fences inclosing private property and insuring the limitations of each household, the territorial boundaries which protect and make possible the physical identity of a people, and the laws which protect and make possible its political existence, are of such great importance to the stability of human affairs precisely because no such limiting and protecting principles rise out of the activities going on in the realm of human affairs itself. The limitations of the law are never entirely reliable safeguards against action from within the body politic, just as the boundaries of the territory are never entirely reliable safeguards against action from without. The boundlessness of action is only the other side of its tremendous capacity for establishing relationships, that is, its specific productivity; this is why the old virtue of moderation, of keeping within bounds, is indeed one of the political virtues par excellence, just as the political temptation par excellence is indeed *hubris*.[108]

The idea of moderation, of "keeping within bounds", is crucial to the interpretation of Robinson's thought. As we have seen repeatedly, "the boundlessness of action" perplexed the Chief Justice, especially action stemming from south of the border. Robinson was all too aware of how the expanse of the North American continent had created a "new man" in the republic:

> In a boundless field, or rather in a boundless wood, no individual among them seemed to have a defined and settled position in society; there could be no castes, or anything approaching to castes, such as the competition and necessities of the crowded countries of Europe tend, more or less, to create. All seemed to depend on individual ingenuity and exertion.[109]

This exertion knew no limits in the United States, as we saw in the context of the mill-dam cases. But for Robinson, whose "blueprint for society" was distinctly stratified, the vision of a boundless, undifferentiated wood was something of a nightmare. Accordingly, and as befits the son of a surveyor general of the woods and reserves, in his mind's eye he pictured the Canadian

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[106]Arendt, *supra*, note 49 at 29.

[107]Robinson, *supra*, note 21 at 405.

[108] Arendt, *supra*, note 49 at 191. See also F.M. Cornford, *From Religion to Philosophy: A Study in the Origins of Western Speculation* (1957) at 30.

[109]*Canada and the Canada Bill*, *supra*, note 2 at 57.

wood as already surveyed, laid out in numbered lots and allocated to its rightful owners. Any action which failed to heed the boundary lines of this hypostatized survey he viewed as a transgression.

The task of clearing the land and cultivating it was a backbreaking one in Upper Canada. It called for just as much exertion as in the United States, but this exertion was wasted if one failed to keep one's activity within the bounds of the survey lines and one's position in the "division of labour" (which, practically speaking, were one and the same). In *Doe dem. Henderson* v. *Seymour*, for example, the plaintiff had purchased some Clergy Reserve land from a government agent and obtained receipts for partial payment in 1846. It was on the strength of these receipts that the plaintiff threatened to bring an action in ejectment against the defendants and their families, who had been living on the land as squatters since 1840. The defendants had made many valuable improvements, and the injustice of depriving them of these was brought to the attention of the government. In 1849, an order in council was made providing that on defendants making the required payments, which they did, plaintiff's purchase money should be returned to him and the sale to him cancelled. The plaintiff brought his action in ejectment on the plea of prior purchase in 1850, and succeeded. As Robinson, the last of the moralists, stated:

> It has ... the appearance of being a perversion of sound principle, and detrimental to morality, to afford to wilful trespassers [the squatters] the privilege of a pre-emption right by reason of their illegal occupation ... [even though] the opposite policy of favouring these intruders has been generally, I believe, the policy of the government in this province for a long time, if not from the first.[110]

The Crown could not, at its pleasure, change a wrongful occupant into a rightful occupant, to the prejudice of its own vendee.

This decision is consistent with the structure of Robinson's thought, though it would have caused tremendous hardship for the defendants. The squatters had acted as if they owned the land, that is, outside their proper sphere or station in life as labourers. The plaintiff could assert a superior title to the land (incomplete as it was) such that to condone the squatters' intrusion on the Clergy Reserve lots would have entailed sanctioning a transgression of boundaries.

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[110](1851), 9 U.C.Q.B. 47 at 53. See also, *Doe Sheriff* v. *McGillivray* (1841), 6 U.C.Q.B. (O.S.) 189, *Doe Fitzgerald* v. *Finn* (1844), 1 U.C.Q.B. 70, and *Doe dem. Charles* v. *Cotton* (1852), 8 U.C.Q.B. 313. It would seem that what finally took the morality out of property in Canada, as in the United States, was the rise of the liberal conception of property rights. See E.V. Mensch, "The Colonial Origins of Liberal Property Rights" (1982) 31 Buffalo L. Rev. 635; and C.B. Macpherson, "Liberal Democracy and Property" in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (1978) 199.

McKinnon v. *Burrows* is another case in which the exclusive structure of Robinson's thought came to the fore. This case concerned the proper measure of damages for breach of a covenant for title made by a vendor in a deed. At issue was whether the jury ought to have allowed damages for improvements made by the plaintiff subsequent to the covenant, or limit his damages to the purchase money plus interest. If one assumes in accordance with the prevailing functionalist interpretation of Ontarian legal history that "the facilitation and encouragement of private initiative" was the major value of the day, and "the protection of useful, private effort" was one of the minor values which overlapped it, then the proper measure of damages ought to have included room for improvements.[111] But Robinson, after having found little or nothing in the books on this score, rested his decision on the analogy of executory contracts for the sale of goods. According to that case law, "the value supposed to be in the contemplation of the parties at the time of the agreement should be the measure of the damages", and if mere English authority were not enough: "In the civil law the principle which thus restricts the damages to the price paid, without suffering them to be enhanced by subsequent events or acts not within the contemplation of the parties is recognized, subject to some modifications in peculiar cases, and is explained at large in Pothier on Obligations, pages 91, 97."[112]

The whole structure of Robinson's reasoning is analogical in this case, and his polyjurality barred him from making a "realistic" assessment of the demands of the situation. But to say of this case that: "[t]he result seems to express a belief that individuals should take responsibility for their own economic fates ... [and that] it seems to be a denial of protection for useful, productive effort, and contrary to results in other kinds of cases"[113] is misleading and more illustrative of the poverty of empiricism than of any deficiency in Robinson's reasoning. The problem here appears to stem from the functionalist premise that the law must serve a purpose, which entails importing into the interpretation of this judgment the alien (to Robinson) suggestion that the law ought to protect useful, productive effort. It may be that in other kinds of cases this content (or purpose or "belief"), can be

[111]Risk, *supra*, note 14 at 103. Much of the discussion which follows will appear to be critical of the work of R.C.B. Risk; but, of course, were it not for his pioneering efforts Canadian legal history would hardly exist — as it does today — as a separate field of study. It should also be noted that Risk's more recent work indicates that he has largely abandoned the Hurstian, functionalist perspective. See, *e.g.*, R.C.B. Risk, "Sir William R. Meredith, C.J.O.: The Search for Authority" (1983) 7 Dal. L.J. 713; and R.C.B. Risk, "Lawyers, Courts and the Rise of the Regulatory State" (1984) 9 Dal. L.J. 31.

[112](1833), 3 U.C.Q.B. (O.S.) 590 at 592-3.

[113]R.C.B. Risk, "The Last Golden Age: Property and the Allocation of Loss in Ontario in the Nineteenth Century" (1977) 27 U.T.L.J. 199 at 210.

attributed to Robinson's thought, but not so here *because the form of his thought would not allow it.* Content is always determined by form, and in this case it must be recalled that a third party with a superior title hovered in the background. The plaintiff had expended energy but not within boundaries that he could claim as his own: his action had been "immoderate".

Had *McKinnon* v. *Burrows* taken place in Wisconsin the result would have been different, which is to say, the reverse of what it was. But *McKinnon* took place in Upper Canada, and it was decided in accordance with the legal system of that province. The legal system of Ontario crystallized in oppositon to the legal system of Wisconsin, as the Conversion Table (Appendix) demonstrates. Far from being inconsistent, then, Robinson was being ruthlessly logical.

While Robinson's ruthless logic may have proved refractory to functional analysis, his thought is rendered transparent when the techniques of structural analysis are applied to the interpretation of his judgments. As we have seen, the inductive-empirical generalizations so characteristic of Canadian legal historiography to date fail to hold across more than a handful of cases. This is because they tend to be inspired replications — but not transformations — of American motifs. The structuralist, by way of contrast, takes the patterns to be discerned in the American case law, *inverts them,* and then tests these converted propositions against the facts. The application of this transcendental-deductive approach to the interpretation of the facts of Canadian legal history yields connections which have the merit of being intrinsic to the phenomena under study.

The same approach may be taken to the interpretation of statutes. In early nineteenth-century America, a number of states gave expression to the policy of promoting improvements by enacting statutes which permitted the purchaser to recover the normally higher value of his estate at the time of eviction (as opposed to sale). After 1810, the states and the courts reversed themselves in this regard, but as if so as not to leave the developer at a loss, they began to enact "good faith possession" statutes almost immediately. "These statutes enabled a *bona fide* purchaser of land to recover the value of his improvements from one who, with superior title, ousted him from his possession."[114]

No such statutes existed in Upper Canada. As the common law dictated, anyone who improved another's land by mistake as to title simply lost the value of the improvements upon being ousted. The sole exception to this rule was a statute, enacted in 1818, by means of which the legislature sought

[114]Horwitz, *supra,* note 23 at 61.

to impose a uniform standard for the determination of the side lines of the lots in each concession.

Aware of the fact that this new mode of settling boundaries might disturb some persons in their possessions, the legislature "made the equitable provision, that when the boundary thus ascertained should vary from that which had been assumed, in consequence of an erroneous previous survey, the person who would lose land by the correction of the error must be indemnified for any improvements he may have made before he shall be dispossessed".[115] Significantly, the American laws all have to do with "establishing relationships", whereas the Ontarian law concerns "inclosing private property" (Arendt). The former facilitated action by "making more definite the framework of venture and expectation" (Hurst) whereas the latter was designed primarily to rectify boundaries between households and only incidentally did it touch on compensation.

Killichan v. *Robertson* is a further case pertinent to the discussion of the (supposed) value of protecting useful, productive effort. In this case, the intruder at one end of a lot of Crown land which had never been granted to anyone brought an action in trespass against an intruder at the other end for planting and harvesting a crop. Here, then, was a plaintiff who "claims the right of excluding others from doing the same wrong that he had done".[116] It was impossible to ground plaintiff's right anywhere, and the jury found for the defendant accordingly. The defendant's effort, therefore, did receive protection, but only by default. The "real" problem which this case raised, however, was that of how to found an exclusive right on the basis of an invasion of the property of a third party (the Crown). And there could be no foundation for such a right, no ground for such a claim, given the form of Robinson's thought. The same point may be made with respect to the Chief Justice's timber licence decisions. Throughout this line of cases, as R.C.B. Risk has observed, "[t]he established and apparently unquestionable limits of the forms of action restricted responses and perceptions; for example, a licensee, could not assert a claim in trespass, the usual remedy for

[115]*Dennison* v. *Chew* (1835), 5 U.C.Q.B. (O.S.) 161 at 164. Note how the unlawful intruder or "trespasser" in this case gets redefined as a lawful excluder by virtue of the right of entry up to the newly-established limits which the *Act* conferred. See also *Doe dem. Moule* v. *Campbell* (1850), 8 U.C.Q.B. 19.

[116](1842), 6 U.C.Q.B. (O.S.) 468 at 469. This case, *Chestnut* v. *Day* (1843), 6 U.C.Q.B. (O.S.) 637, and *Henderson* v. *McLean* (1858), 16 U.C.Q.B. 630 form an indissociable trinity irrespective of their separation in time.

interference with an interest in land, because the licence did not give a right to exclusive possession."[117]

If no evidence can be gleaned from Robinson's judgments to suggest that he sought to promote improvements or protect productive effort, did the Chief Justice, then, discourage these things? Again, the question is ill-phrased because it goes only to the content — as opposed to the form — of his thought. The form of Robinson's thought remained static while the content varied in accordance with the nature of the cases that arose out of the human encounter with nature in nineteenth-century Ontario. For example, in *Dean* v. *McCarty*, the Chief Justice avowed that: "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."[118] It is difficult to imagine any more forceful statement of the intrinsic value of economic development. But at the same time, there were few more staunch nineteenth-century adherents to the doctrine of the English law of waste than Chief Justice Robinson. According to this law, "any fundamental alteration by a tenant of the condition of the land constituted waste for which he was liable".[119]

Robinson was called upon to adjudicate one such reversioner's claim against a tenant for life for cutting timber in *Weller* v. *Burnham*. The defendant attempted to justify his action by pleading that he had felled the trees "*to and for the purpose of clearing said lands*, and improving and cultivating the same ... according to the custom of good husbandry, and the custom of the country in Upper Canada, and [had] thereby increased and enhanced the value of the said land".[120] The plea fell on deaf ears. As the

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[117]*Supra*, note 113 at 216. See *Monahan* v. *Foley* (1947), 4 U.C.Q.B. 129; *McLaren* v. *Rice* (1848), 5 U.C.Q.B. 151; *Perry* v. *Buck* (1854), 12 U.C.Q.B. 451. It is not fortuitous that in all of the cases (except *McKinnon*) discussed in the main text the reservation of land to the Crown constituted a barrier to "progress" or "rewarding, useful, productive effort" in functionalist terms.

> The principle of reservation, crown ownership and leasehold tenure which characterized Ontario resource policy stood in bold contrast to their nineteenth-century American counterparts. Americans placed a premium upon the rapid transfer of the public domain, either by outright sale or pre-emption, into unrestricted private ownership and the retention of property rights by the state for the welfare of the community became an increasingly unAmerican notion with the passage of time. The public lands were public only insofar as they were waiting to become private.

H. Nelles, *The Politics of Development: Forests, Mines and Hydro-Electric Power in Ontario 1849-1941* (1974) at 39. In structuralist terms, the "negative community" of the Crown *presented* itself by means of these reservations. The state as absentee landlord is, perhaps, the dominant motif in accord with which Robinson decided these cases involving the allocation of losses.

[118]*Supra*, note 48 at 450.

[119]Horwitz, *supra*, note 23 at 54.

[120](1853), 11 U.C.Q.B. 90 at 90-1.

Chief Justice stated: "[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 ... I cannot say I have any doubt that in substance, as well as in form, this plea is bad."[121]

It is instructive to note by way of contrast that had this plea been made before an American judge it would have been found good. Given that America was a "new unsettled country", and "the nature of the soil and the manner of improvement" were different than in England — it followed ineluctably that "in this country, such conversions in [land use] as are compatible with good husbandry, would not be deemed waste".[122] Evidently, the migration of the law (or myth) of waste from England to America had reached the "limiting situation" described by Lévi-Strauss in the following passage:

> When a mythical schema is transmitted from one population to another, and there exists differences of language, social organization or way of life which makes the myth difficult to communicate, it begins to become impoverished and confused. But one can find a limiting situation in which instead of being finally obliterated by losing all its outlines, the myth is inverted and regains part of its precision.[123]

The law of waste retained all of its precision in the process of migrating from England to Upper Canada, however, at least in the mind of Sir John Beverley Robinson. It is astonishing that this transposition took place without the least displacement given the vast differences in actual social organization and way of life of the British and Canadian people. But ideally there were no differences between the two, not according to Robinson's "blueprint" in any event. Thus the reception of the English law of waste intact may be accounted for by reference to another myth, the mythical conception of Canada as the New Albion.

The graded scale of Loyalist and retired army officer estates was as crucial to the foundation of a *British* North America as the idea of creating a "division of labour" was to securing the amenities of British civilization. The law of waste fitted neatly into this schema because it both recognized and maintained a graded scale of interests and uses with respect to the disposition of a particular estate. Thus, the hierarchical structure of the well-balanced society that Robinson envisioned could be "realized" in the context of a single plot of land by virtue of the power conferred on owners of the fee simple to create limited interests in their holdings. The relationship

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[121]*Ibid.* at 91.

[122]Horwitz, *supra*, note 23 at 54-5.

[123]C. Lévi-Strauss, "The Story of Asdiwal" in E. Leach, ed., *The Structural Study of Myth and Totemism* (1967) 1 at 42.

between a tenant for life and the owner of the remaining non-possessory interest was thus a microcosm of the totality of social relationships which Robinson envisioned in his "blueprint" for the New Albion.

Returning to *Weller* v. *Burnham*, it is evident that a tenant who "laid waste" to an estate was simply wasting his energy so long as the beneficial interest remained vested in someone else. But while Robinson's decision in this case may be explained in a manner consistent with the structure of his thought as revealed in other sorts of cases, there remains the problem of accounting for his indignant tone of voice. Perhaps his stance was motivated by "real terror" at the idea of "the individual feel[ing] himself becoming an individual, pulling away from the group",[124] or, in other words, "realizing" himself as an autonomous being.

The thought of an individual no longer feeling himself bound by the covenant and beginning to assert himself as a monadic subject would have repulsed Robinson because of the threat such action posed to the structure of *the relationship* between tenant and landlord, and at a higher (but isomorphic) level of abstraction, between colonist and King. Both such relationships are constitutive of a dyadic subject, a subject conscious of his position in the "division of labour", of his interdependence rather than his independence. The dyadic subject was the ideal subject as far as Robinson was concerned.

There is one Robinson decision, however, which appears to contradict much of that which has been said thus far about the structure of his thought, namely, *Dean* v. *McCarty*. Apparently, McCarty set fire to some log-heaps while in the process of clearing his land. A "high-wind" sprang up and caused the fire to spread onto his neighbour's property where it destroyed some cord wood and rails. The jury found that the defendant had exercised due care under the circumstances and acquitted him of blame. Robinson upheld their decision. Therefore, he must have secretly condoned McCarty's "immoderate" behaviour because there is no other way the Chief Justice would

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[124]Frye, *supra*, note 104 at 226.

> [T]he historian examining ideas must necessarily come to grips with the structure of mind itself, [that is] with relationships of intellection, *affection*, and will. Here, ironically, the very term "intellectual history" is somewhat problematic, for it implies a preoccupation with the first of these qualities of mind, possibly at the expense of others. Yet thought, like conduct, is scarcely the product of intellect alone.

McKillop, *supra*, note 12 at 192 [emphasis added]. There is considerable authority for the proposition that the "dominant and pervasive value" expressed in the law about the use and transfer of land in mid-nineteenth century Ontario "was individual autonomy, and especially individual power and initiative". See Risk, *supra*, note 113 at 213. To the extent that Robinson recognized this thrust (and there is some doubt that he did) he most certainly repressed it.

have lent the Court's sanction to such an invasion of the boundaries of the other. However, the reasoning in this case is of much greater interest than the result, and calls for careful scrutiny.

Dean v. *McCarty* occurred at a time when what had formerly been recognized as nuisance cases importing a standard of strict liability were being reclassified as negligence cases which only required that the defendant act in accordance with a reasonable standard of care. Prior to this era, then, the allegation of carelessness did not constitute the core of the type of action brought in *Dean* v. *McCarty* (an action on the case for negligence). Indeed, the "averment of negligence seems to have been mere surplusage"[125] since proof of injury could be relied on "as supplying the presumption of negligence ... when there might in fact have been no negligence".[126] As these words of Robinson's attest, the Chief Justice took the allegation of carelessness seriously and as having to be proved independently of the fact of injury. An instrumentalist would interpret the act of making this distinction as the first glimmering of the modern doctrine of negligence, which permits the denial of recovery as a matter of law where there is no proof of negligence. Such a doctrine evidently enables a court to subsidize economic development by shifting the burden of loss onto the shoulders of inactive plaintiffs; all the defendant need do is prove that he acted diligently under the circumstances.

It is very tempting to interpret *Dean* v. *McCarty* instrumentally. For example, after identifying the issue as "whether the defendant had used all due care in setting fire to his clearing, and in guarding against accident", the Chief Justice stated: "in a country like this, it is of very great importance that the rights and liabilities of parties in this particular, should be known".[127] He was sensitive, in other words, to the specific character of defendant's act and the context or "necessitous circumstances" in which the act occurred. One suspects that had the English sources he (mis)read — as we shall see — not enabled him to absolve the defendant of fault, Robinson would have either declared that they had never been applied in Upper Canada (as in *Doe Anderson*) or gone the way of Chancellor Blake in *O'Keefe* v. *Taylor*. In *O'Keefe* it was said that "such circumstances" as the necessity, for example, of clearing the land to make it productive, "would not have been overlooked by English judges, had they existed in that country; to omit the consideration of them where they do exist, is not to administer English law upon English principles, but blindly to apply a rule without reference to the circumstances, upon the consideration of which alone its applicability can

[125]J.G. Fleming, *The Law of Torts*, 6th ed. (1983) at 320.
[126]*Supra*, note 48 at 451.
[127]*Ibid.* at 448.

be determined."[128] The instrumentality of this distinction between English principle and Canadian circumstances is self-evident, which makes it all the more puzzling why Robinson did not invoke it.

Instead the Chief Justice took the more difficult tack of reading into Baron Comyns's statement of the governing "principle" in his *Digest of English Law* a meaning that was in no way intended by the author. The almost mystical passage which Robinson unintentionally converted reads as follows: "So an action upon the case lies upon the general custom of the realm, against the master of a house, if a fire be kindled there and consume the house or goods of another. So, if a fire be kindled in a yard or close to burn stubble, and by negligence it burns corn, &c. in an adjoining close."[129] The phrase "by negligence" in the second proposition meant "by failure" to keep the fire inclosed, *not*, as Robinson imputed it to mean, a want of reasonable care. The shift in the wind in the *Dean* situation, therefore, also shifted the loss because "upon the question of negligence ... [or] of what was reasonable care under the circumstances" the jury had found in favour of the defendant.[130]

Robinson evidently felt uncomfortable and a bit uncertain about applying the emerging doctrine of negligence because he fell back in the end on the English case of "*Tuberville* v. *Stamp* [sic]" which held that a defendant could acquit himself only by showing that the escape of fire was due either to an act of God or a stranger.[131] Strictly speaking, Robinson did not have to reclassify the "high wind" as "an act of God" in order to absolve the defendant if the latter had in fact exercised due care. The fact that Robinson did so recategorize the event calls for some explanation. As will be recalled:

> It is not very long since this country was altogether a wilderness ... . Till the land is cleared, it can produce nothing, and the burning the wood upon the ground is a necessary part of the operation of clearing. To hold that what is so indispensable, not merely to individual interests, 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

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[128](1851), 2 Grant 95 at 101 (U.C. Ch. Ct)

[129]*Digest of the English Law*, vol. 1 (1822) at 411. Robinson was aware that the first proposition had been altered by act of Parliament: (U.K.), 6 Anne, c. 31; (U.K.), 14 Geo. 3, c. 78, ss 85-6.

[130]*Supra*, note 48 at 449-50. "By negligence" could no longer just mean "by failure" to Robinson because he was aware of how the common law doctrine of negligence had successively "revealed" (or, as some would say, "evolved") itself through the running-down and ship collision cases. See Horwitz, *supra*, note 23 at 85-99; M.J. Prichard, "Trespass, Case and the Rule in *Williams* v. *Holland*" [1964] Camb. L. J. 234; P.H. Winfield, "The Myth of Absolute Liability" (1926) 42 Law Q. Rev. 37.

[131](1697), 1 Ld. Raym. 264, 91 E.R. 13.

> could certainly prevent, would be to depart from a principle which, in other necessary business of mankind [such as taking horses into the highway or bringing a ship to anchor], is plainly settled, and always upheld.[132]

Was it the "public interest", then, that negatived the plaintiff's right to claim damages for the interference the fire had caused to his property? Not according to Robinson. The right was negatived by virtue of an "act of God". In other words, it was not private initiative but Divine Providence which had caused the invasion of boundaries and occasioned the loss.

It must be borne in mind that Robinson lived in an age — so aptly described by Carl Berger in *Science, God and Nature in Victorian Canada* — when "the finger of God" was visible everywhere, directing the most disparate events.[133] For example, the Chief Justice rationalized his repeated attacks of gout as afflictions inflicted by Providence "for our good".[134] He attributed his long and illustrious career on the Bench not to his prodigious skills, but to his God-given talents for which he would one day have to account. "And may God grant", he said upon stepping down from the Bench, "that we all may bear in mind the account which we must one day render of the time and talents committed to our charge."[135] There was very little room for any display of private initiative given the conception that "[e]ach man's life was a record of his transactions with God and of God's purposes with him — for those who had the faith-given discernment to read it."[136] Perhaps the only display of individual autonomy Robinson could recognize lay in seeking an advantage to oneself at the expense of one's neighbour.

By parity of reasoning, the defendant in *Dean* v. *McCarty* could not be held liable upon a "rigourous and indiscriminating application" of the maxim *sic utere tuo ut alienum non laedas.* According to this maxim, one must use one's own property so as not to injure that of another, but as the Chief Justice noted:

> This maxim is rather to be applied to those cases in which a man, not under the pressure of any necessity, deliberately, and in view of the consequences,

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[132]*Dean* v. *McCarty*, *supra*, note 48 at 450. See also *Phillips* v. *Redpath and M'Kay* (1830), Draper 68 (U.C.Q.B.) (on the public welfare) and *Ham* v. *McPherson* (1842), 6 U.C.Q.B. (O.S.) 360 (not all tempests were necessarily acts of God).

[133]C. Berger, *Science, God and Nature in Victorian Canada* (1983) at 31ff.

[134]Robinson, *supra*, note 21 at 236.

[135]*Ibid.* at 397.

[136]Wise, *supra*, note 58 at 40. The display of piety, on the other hand, was central to Robinson's existence: he began each day "by gathering his family for morning prayers". Brode, *supra*, note 39 at 110. As he proclaimed in public at the opening of Trinity College: "Nothing else we most fondly venerate — not the glorious flag of England, nor the great Charter of our liberties — has from its antiquity so strong a claim to our devotion as our Church." *Supra*, note 21 at 350.

> seeks an advantage to himself at the expense of a certain injury to his neighbour; as for instance, in the use he makes of a stream of water passing through his land, which he is at liberty to apply to his own purposes, but he must not so use it as to diminish the value of the stream to his neighbour, unless he had a prescriptive right.[137]

As in the case of naturally flowing waters, so in the case of fire. The plaintiff's action failed because the fire was "prescribed", so to speak, by God.

One of the most remarkable examples of Robinson's penchant for natural theology is the paragraph quoted at the very beginning of this essay. It is the first paragraph of *Canada and the Canada Bill.* In that treatise, Robinson attempted to demonstrate that the Revolutionary War of 1776, and the massive cession of British territory to the United States at its conclusion in 1783, were actually part of the military strategy of divinity. Had it not been for the divine interference which sparked the war that redefined the boundaries of empire at a time when the American people were relatively few in number, Great Britain might have lost all of her possessions in the New World. After all, had not "the almost boundless territory of the North American continent" impeded "the exercise of an actual superintendence"? Was it not "inevitable" that a people "left at liberty to consert schemes of independence" would do so?[138]

If only God in his wisdom could alter the political contours of North America, then, by parity of reasoning, only an act of God could sanction a transgression of boundaires. McCarty, the defendant, would one day have to account to God, but evidently not to the plaintiff, Dean.

Conclusion

I have demonstrated that certain parities exist in the legal, political and religious thought of one of Canada's most illustrious jurists. I do not claim that Robinson's legal or religious thought can be reduced to his political thought; I merely point to the congruence.[139] It was not fortuitous in other words that the Chief Justice was a High Church Anglican, a Tory, and a Loyalist. It would have been "immoderate" for him to have been anything else, for if there is one formula in terms of which the totality of Robinson's thought may be expressed it is that fragment (again) from Heraclitus which reads: "The people should fight for the law as for a wall".[140]

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[137]*Supra*, note 48 at 449. Compare Brode, *supra*, note 39 at 238-40.

[138]*Canada and the Canada Bill, supra*, note 2 at 14.

[139]See E.E. Evans-Pritchard, *Nuer Religion* (1956) at 320.

[140]Arendt, *supra*, note 49 at 63 n. 62.

I have also shown that the common law became increasingly uncommon in the course of its migrations. The differences which emerged in the process of transmission and reception were not random though. They reveal a definite pattern. The fact that it is possible to discern a system to the different ways in which the common law was received and enforced in the North Atlantic world implies that jurists exercise their "creative power" subject to certain constraints, namely, the constraints of the "system in place". Thus, as we have seen, new law is not invented, it is but inverted (or otherwise transposed) old law.

The American judges went about "creating new law" deliberately, or so they thought, by (basically) inverting all the terms of the English law of property. Robinson also "created new law" as in *Dean* v. *McCarty*, but not intentionally, since all he meant to do in that case was to reiterate the "principle" articulated in Comyns's *Digest*. Thus, in certain circumstances, even the act of repetition is capable of effecting a conversion.

I have used the term conversion throughout this essay the way both a logician and a theologian would to refer to an operation of the mind (or spirit). The Conversion Table (Appendix) illustrates the dynamics of the conversion process. It is a process by means of which one body of thought could be said to transpose itself into the terms of another corpus of ideas, and vice versa. What remains constant is not the terms, obviously, but the relation between them, a relation which may be characterized as one of complementary opposition.[141] It is in this sense that cultures (and the legal systems which they encompass) situate themselves apart, but can only be grasped in conjunction, as "equally significant, integrated systems of differences" from each other.

One would not expect to find *any* resemblances between the legal systems of Upper Canada and the United States on the basis of the foregoing account. But this is, and was, not the case.[142]

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[141]See the chapter entitled "Analogical Classification" in Needham, *supra*, note 56 at 41.

[142]For example, writing in 1857, Oliver Mowat remarked:

> In Canada we must find advantage and interest in examining [American] decisions and writings far beyond what is the case in England. Our local circumstances are more nearly like those of the people of the United States. The classes of cases that arise more frequently in the United States than in England, are also more frequently arising with us. ... Our legislature has also adopted, and sometimes with little alteration, many valuable American statutes. The interpretation of these by the Courts of the States in which they originated or by which they have been adopted in the same way as by our legislature, is obviously most worthy of our attention.

See O. Mowat, "Observations on the Use and Value of American Reports in Reference to Canadian Jurisprudence" (1857) 3 Upper Can. L.J. 3 at 5 and 7. "In structuralist terms any discourse at some level alludes to the absences it intrinsically sets in abeyance." Boon, *supra*, note 6 at 232. Compare Robinson in *Street* v. *Commercial Bank of the Midland District*, *supra*, note 37.

It is not my concern to provide an inventory of those similarities here. I allude to them only to point out how problematic they must (henceforth) appear. For if the comparative study of law (like that of myth) is to achieve respectability then we must follow Lévi-Strauss's lead in recognizing that

> resemblance has no reality in itself; it is only a particular instance of difference, that in which difference tends towards zero. But difference is never completely absent. It follows that critical analysis must take over from the making of empirical inventories to face the basic problem of those conditions in which a resemblance can have a wealth of meaning far surpassing what might be implied by a random coincidence, an effect of convergence or a common origin.[143]

[143]C. Lévi-Strauss, *The Naked Man: Introduction to a Science of Mythology*, vol. 4, trans. J. and D. Weightman (1981) at 38.

Appendix

Conversion Table: Contrastive Features of American Republican and Upper Canadian Loyalist Legal and Political Culture (*circa* 1830)*

United States	*Upper Canada*
Republican Democracy	Imperial Monarchy
Separation of powers	Unity of powers
Legislative power flows from the People up	Legislative power flows from the Imperial Crown down
Rapid transfer of property rights to private individuals	Retention of property rights by Province (*e.g.* Crown lands)
Creative expansionism	Defensive expansionism
Invasionary	Exclusionary
Egalitarian	Hierarchical
Monadic subject	Dyadic subject
Private initiative	Divine Providence
Release of individual creative human energy	Cultivation of industrious habits
Life, liberty and the pursuit of happiness	Peace, order and good government

* This table is presented with the caveat that
> when we advance a theory or description of "the system in place", we are obliged to recognize the relative character of our efforts and to acknowledge that what such a phrase solicits is not "the system" so much as that system which, in contrast to some ground, figures as less muted, subjacent, inhibited in its influences or restricted in its manifest expression than others that are, nonetheless, also in place.

R.F. McDonnell, "Symbolic Orientations and Systematic Turmoil: Centring on the Kaska Symbol of Dene" (1984) 4 Can. J. Anthropology 39 at 41.