SIR JOHN BEVERLEY ROBINSON: A COLONIAL JUDGE
AND THE DEVELOPMENT OF UPPER CANADIAN LAW

By

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THESIS ABSTRACT


This dissertation analyzes the judicial career of Sir John Beverley Robinson, Chief Justice of the Court of Queen's Bench (1829-1862) for Upper Canada. Robinson's tenure spanned much of the history of the colony before Confederation. During this time the formation of new corporate interests, steam technology, public works in transportation and urbanization affected the economy and the social relations in the colony. New developments had an impact on the law. This study examines four areas of Robinson's jurisprudence relating to this transitional era: the reception of English law into Upper Canada, the early development of corporate law, business law pertaining to the commercial development of the St. Lawrence and the initial stages of railway law. In addition, Robinson's jurisprudence is contrasted with contemporary American law. The central argument here is that Robinson's jurisprudence was different from that of American judges, and especially with regards to instrumentalism. The thesis argues that these differences can best be understood by relating Robinson's career to unique political, social, economic and other particularities within Upper Canada prior to Confederation.
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Completing this thesis would not have been possible without the encouragement, assistance and perseverance offered by my family, whose help I cannot ever adequately acknowledge. Lastly, to my son Gregory, I dedicate this work.
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INTRODUCTION

The writing the Life of a Judge would be an uninviting task unless coupled with political and historical incidents.
-D.B. Read Q.C., The Lives of The Judges of Upper Canada and Ontario, from 1791 to the Present Time (1888)

Sir John Beverley Robinson was the foremost Canadian judge before Confederation. Born in 1791 of an American loyalist father, Robinson parlayed his loyalist inheritance to great ends. Educated at John Strachan's elite school, he went from there to do his legal apprenticeship with solicitor-general D'Arcy Boulton. When the War of 1812 interrupted his law studies, Robinson was already a figure of such prominence in a small colonial society like Upper Canada's that when acting attorney-general John Macdonnell died in battle at Queenston Heights, Robinson was made acting attorney-general for Upper Canada. He was just twenty-one and had not yet been called to the bar! Politics then beckoned. Elected to the legislature in 1821, Robinson soon became the recognized leader of those forming the government or "Tory" party. Indeed such was his stature in the province that he was chosen to represent Upper Canada in England over a customs dispute with Lower Canada. There Robinson became one of only a
handful of Upper Canadian lawyers also called to the English bar.

Following this he assiduously cultivated influential English contacts in politics and at the Colonial Office to help secure his appointment as Chief Justice of the Court of King's Bench for Upper Canada in 1829.

When appointed, Robinson was the youngest and, significantly, the first native-born Canadian lawyer so honoured. He went on to preside as Chief Justice for thirty-three years until his retirement in 1862, and during his tenure he wrote the majority of that court's decisions.² The British government made him a Companion of the Bath in 1850 and a Baronet in 1854. On this latter occasion also the Canadian bar honoured him with a rare address of "warm congratulations" presented in open court through their chairman, the Treasurer of the Law Society of Upper Canada.³ On Robinson's death in 1863, after a solemn public funeral, the bar was even more effusive in its praise: "In full court, Sir John Robinson was always the pride and favorite of the bar" and sadly it had lost "the greatest man that Canada has ever produced."⁴

Despite Robinson's distinguished public life as a war hero, lawyer, politician, statesman and pre-eminent jurist in Upper Canada, the first biographical accounts about him were political diatribes or else incomplete. His political opponents never thought he was a great man. As a prominent leader of the tory persuasion in Upper Canada, Robinson often drew the ire of reformer William Lyon Mackenzie, who wrote disparaging columns on
him in *The Colonial Advocate* denouncing Robinson's privileged place in the "Family Compact." Mackenzie compared him to the infamous Judge Jeffreys of England.\(^5\) Later reform writers who favoured responsible government portrayed Robinson as a hide-bound reactionary, a "legal Nestor" and "fossilized tory" who opposed Canada's progression to a more independent nation apart from Britain.\(^6\) Robinson's contemporaries who shared his tory views willingly supported him, but with the exception of a laudatory summary of Robinson in Notman and Taylor's *Portraits of British Americans*,\(^7\) they remained strangely silent. So too for the Canadian bar; but perhaps to be fair there could not have been any contemporary written accounts about Robinson by lawyers, who might have had to appear before him in court. Yet one lawyer who did write a later account, D.B. Read (in his 1888 work *Lives of the Judges of Upper Canada*), presented only a brief summary of Robinson. Sadly he offered no complete explanation of Robinson's judicial decisions. As a lawyer who had practiced for seventeen years before Robinson, Read was ideally placed to have reported on Robinson as a judge.\(^8\) Instead, the bar's support was shown by the address already mentioned and by the placement of his portrait over the mantle in the Great Library at Osgoode Hall in 1857—where it remains revered to this day. Therefore, by important symbolic gestures, though not in print, Robinson had admirers.
In 1904, when imperial ties and preoccupation with the British Empire became noticeable in Ontario, Robinson's anglophile son Charles wrote the first major biographical account. Indeed, Robinson's own distinguished legal career as a British Canadian judge was a great example to Charles of Canada's strong and beneficial links to Britain. Although Charles tried to include many recollections about Robinson in a direct, sometimes plodding way, and admitted being "very sensible of the disadvantages which must, in some respects, attend their being written by a son," his account not unnaturally was biased. And again, perhaps because he was not a lawyer, none of Robinson's judicial decisions were included. Instead, this book is marked more for its useful collection of quotes and comments by Robinson at different stages of his political and legal career, which Charles gleaned when perusing his father's papers. Moreover this book was published when that early judge-historian William Renwick Riddell, the "father of English Canadian legal history," was just starting his own writing career on important legal events and figures in early Upper Canada. Yet, of the many books and articles Riddell published, none dealt in any detail with Robinson. Once again it was curious and unfortunate that Robinson escaped the attention of a near contemporary, who might have written on his judicial decisions with the added insight of a fellow judge.

Once Riddell died in 1945 little work was done on the study of Canadian legal history in general, and on Robinson in particular, until very
recently. The reasons are a matter of speculation; but certainly the long gap in time when both subjects were ignored by Canadian legal historians is one of two notable features about the present field of Canadian legal history.\textsuperscript{14} The second feature, related to Canadian legal historians correcting this oversight, is a current debate on the application of American legal concepts for Canada. Most Canadian legal historians acknowledge the importance of American ideas, but are not convinced that close adherence to them is in the best interest of Canadian legal history. Most feel the subject should be explained in Canadian terms.

Few wrote in the field of Canadian legal history and legal biography in particular, from the time of Riddell's work right up to the 1970's. Indeed when Richard Gosse wrote a revealing article in 1969 offering his "Random Thoughts of a Would-Be Judicial Biographer," he was amazed to note that virtually no other judicial biographies had been published since long before World War II, and he pointedly remarked that "this literary form has become virtually extinct in Canada."\textsuperscript{15} By giving his own speculations why, Gosse helped alert Canadian historians at long last to their neglect of this field of study.

Both the influence of American legal ideas and the perceived need to develop a Canadian legal history first came together in the pioneering work of Canadian legal historian R.C.B. Risk. "The study of Canadian legal history should be respectable and flourishing, but it is not. It has been
greatly neglected, and most of the little work that has been done has
reflected limited interests," added Risk also in his seminal 1973 article
entitled "A Prospectus for Canadian Legal History." The result is," said
Risk, "that we know almost nothing about our legal past. We have not even
accumulated and organized most of the major facts, let alone thought about
them." However, after emphasizing again this sad observation, which Risk
attributed to an intellectual gulf between the study of law and history, Risk
offered eight themes for a new Canadian legal history:

1. The function of law in the creation and expression of a
distinctive Canadian identity.
2. The influence of England, the United States, and France on
Canadian law.
3. The role of law in the economy, including the market, business
organizations and the allocation of losses caused by economic
activity.
4. The role of law in the community, including changes like
workmen's compensation, and medical plans.
5. The influence of law on an individual, including the regulation
of economic life and the family.
6. The use of law to regulate the physical environment over
natural resources, urban planning and control of use.
7. The control of violence.
8. The structures, procedures and functions of legal institutions,
including the constitution, the legislatures, the courts,
administrative agencies and the legal profession.

As an example of what could be done by using Canadian themes, Risk
provided a preliminary study on law and economic change in mid-
nineteenth-century Upper Canada in four areas: the market, business
organizations, the allocation of natural resources and transportation. Yet
these areas also reflected—though Risk curiously did not acknowledge them in his article—some ideas by American legal historians Morton Horwitz and J. Willard Hurst on American law and economic change. This continued in Risk’s more detailed studies on Upper Canada that soon followed.¹⁹ Germane also to this thesis was Risk’s attention to the important role that Robinson had on the economy and judicial history of Upper Canada. Being the first legal historian to examine Robinson’s judicial decisions in some detail, Risk concluded that Robinson “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.”²⁰ Over a century later Robinson was finally receiving some consideration for his jurisprudence, omitted in the earlier accounts.

As mentioned, some American ideas by Horwitz and Hurst especially influenced Risk, (as he acknowledged in a later article²¹), for Hurst was the leading American legal historian relating the development of American law to political, economic and social interests.²² And, given the bleak state of Canadian legal history at the time Risk began writing, perhaps it was not surprising that he would look to America for ideas and insights.

Hurst’s integrated perspective was developed in a number of major studies on American law spanning several decades. Beginning for example with his The Growth of American Law: The Law Makers (1950) Hurst gave
an overview of the growth of American legal institutions like the legislature, courts and bar between 1790 and 1940. Hurst touched on their social as well as formal aspects. His perspective and vision expanded in *Law and the Conditions of Freedom in The Nineteenth Century United States* (1956), where he explored the law's role in releasing an individual's creative energy so that Americans had scope to act freely on economic initiatives.\(^{23}\)

Hurst's *Law and Social Process in United States History* (1960) elaborated his idea of law as a working system, reaching its apogee in his massive study of law and the lumber industry in Wisconsin: *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836 -1915* (1964). In this work Hurst provided a functional treatment of law relative to the lumber industry. "Impatient and activist, the nineteenth-century Wisconsin community," said Hurst in an important phrase, "was ready and quick to use law as an instrument for practical ends."\(^{24}\) Many sources such as court cases, papers and statutes were examined, and the result was perhaps the most complete case study of an industry and law yet produced.

A legal scholar of such genius could not fail to influence others besides Risk. Hurst's broad generalizations and stimulating analysis, especially his ideas on how the American legal system promoted economic growth and how law interacted with the surrounding society did have an influence on works like Leonard Levy's *The Law of the Commonwealth and Chief Justice Shaw* (1957).\(^{25}\) Levy focused on law developed by Chief
Justice Shaw of Massachusetts (1831-1860) in areas like railways, labour, slavery and the police power. Lawrence Friedman, who wrote *The History of American Law* (1973), was the first American legal historian to present a socio-legal sweep of American law in a legal history text and he was also influenced by Hurst.\textsuperscript{26} Hurst’s other influence was on his contemporary Morton Horwitz, who developed further some of Hurst’s ideas relating American law to the economy.

Horwitz’s *The Transformation of American Law, 1780-1860* (1977)\textsuperscript{27} examined the relationship of American law to the economy between the American Revolution and the Civil War. Presenting, like Hurst, an integrated perspective, Horwitz believed that a fundamental transformation took place in American common law during these decades. Up to the Revolution, said Horwitz, Americans inherited an eighteenth-century English common law which was based on established principles of reason, customary usage and existing natural law. This eighteenth-century law was perceived as universal and operated according to elements of natural justice, such that a judge never made law but instead applied it using its established precedents to the case at hand. However, felt Horwitz, this universal and unitary conception of the common law began to break down after the American Revolution. The reasons were complex, but in the main, said Horwitz, it was due to changes in political theory.
After the Revolution, argued Horwitz, American common law, no longer bound to follow English precedent, made a different accommodation and followed instead the new written constitution as the embodiment of the will of the American people. This constitution as the new source of law was not discovered but was made by Americans and listed clear principles that Americans wanted both respected and followed. And as the new constitution embodied the will of the people, it was asserted over the common law, requiring American judges also to both respect and follow it. As a result, said Horwitz, judges began to realize that they too, like the people, could make law. Along with this, judges believed they were provided a mandate to render decisions according to the wants and usages of the American people, for law was an instrument of the people's will.

Given this change, Horwitz went on to show that around the time between the American Revolution and the Civil War, New York and especially New England were rapidly industrializing, with competition among businessmen emerging as the dominant aspect of commerce. There was new pressure from industries for American law to promote competition in the best interests of the community. As well, businessmen wanted free alienation of land to encourage economic development. Linked here too, said Horwitz, was an influential bar which had risen quickly in power and prestige through servicing marine insurance litigation. Lawyers—Alexander Hamilton being perhaps the most famous—became allied with businessmen,
creating a close connection between law, commerce and politics. Anxious to follow the will of the people, American judges, concluded Horwitz, believed, or were lead by lawyers and businessmen to believe, that the people's will was to increase the productivity of commerce without delay. Law was an instrument of policy designed to foster and promote American capitalism, and it was this judicial style Horwitz labelled "instrumentalism."

Horwitz then focused specifically on American private law in such areas as tort, contract, property and commercial instruments to show how judges made this new law to increase the productivity of capital. As examples Horwitz noted that the older Blackstonian idea of "quiet enjoyment" of one's property was sacrificed because it held back economic growth, as American judges felt the benefits of competition and rivalry were more important. Judges, he said, changed contract law by moving away from equity and fairness to a "will theory" where the only consideration was the agreement between the parties. In riparian law (having to do with a river bank) "reasonable use" of a stream's water replaced the former anti-commercial "prior use" doctrine. Judges held too that the old English law of waste was inapplicable in America as a restraint on the improvement of land, while the old English common law rule allowing dower on unimproved land was also rejected by judges as clogging estates. All these examples and more concluded Horwitz rapidly transformed America's economy, and it was judicial policy-making that mainly brought this about.
As suggested earlier, this American integrated perspective on law and economic change was very enticing to Canadian scholars, given the bleak state of Canadian legal history in the 1970's. And at about this same time David Flaherty, then teaching American legal history in Canada, wrote an important article championing the applicability of this work to Canada.\textsuperscript{28} Calling a comparative context "most exciting," Flaherty, who already knew about the brilliant work being done by American legal historians, summarized some of their results in his article, and he added that "recent American experience should thus serve as an incentive to those interested in Canadian legal history." So he asked rhetorically: "Hypotheses and models exist; only a small cadre of enthusiasts is required. Are there signs that the millennium is at hand?" With this, Canadian legal historians did respond and did take note of these American writers, but also of criticisms of their themes. If Canadian legal history was to develop on its own, it had first to weigh both the advantages and disadvantages of applying these comparative ideas to Canada. Indeed, the feeling was that it was important to be careful not to assume that approaches that were useful or applicable in America would or could be appropriate to Canada. Canadian legal historians wanted more than what Flaherty was suggesting.

Meanwhile, both Hurst and Horwitz had their critics, even in America. Harry Scheiber in particular, writing a review of Hurst's work in the 1970 \textit{American Historical Review},\textsuperscript{29} provided a penetrating critique of
Hurst by asking whether it was correct for Hurst to argue that "nineteenth-century Americans were mainly concerned with legal process for material reasons." There were, said Scheiber, class cleavages, sectional divisions and conflicting ideologies about rising economic productivity; a single Volksgeist was not possible. He questioned too whether Hurst's Wisconsin model accurately described "one, but only one, type of historic American legal process" to the exclusion of some other states that undertook major internal improvements in the early canal era. In other states, said Scheiber, especially ones like Ohio which undertook major internal transportation improvements, government aid was needed to mobilize capital and help with construction, something that was not prevalent in Hurst's Wisconsin, where the government's main focus was to allocate resources and bring order to the marketplace. He also noted that Hurst gave insufficient weight to the impact of ideological and partisan disputes, especially on the part of Jacksonian Democrats, over economic regulation of banks and corporations. Finally, he stated that the American South was not or could not be like Wisconsin.

As for Horwitz, Scheiber was likewise critical. Noting that Horwitz overlooked a whole range of sources like legislation, statutes, and the "interplay of national law and federal structure, on the one hand, and law in the states, on the other" that Hurst in contrast would have included, Scheiber again felt that Horwitz's Northeastern focus was a "serious
limitation." He felt little was presented about those who were harmed by big business or opposed to it, and suggested that "instrumentalism" may not have been "so monolithic a style as Horwitz suggests."³⁰

Moreover, some others also aware of these American writers tried to see if Horwitz's ideas might apply to England. R.B. Ferguson, for example, tested the applicability of the Horwitz thesis to England on the assumption that "England as much as America was transformed by industrial capitalism" in the nineteenth-century; but after a detailed examination of English case law he did not see any "instrumental" style in that country.³¹ In another study, even the key English case on damages of Hadley v. Baxendale (1854), often interpreted as a prime example of judicial invention in this growing industrial era was, said Danzig, to be understood not under the rubric of American "instrumentalism" but under "the industrial and legal world out of which it came and for which it was designed" in Britain.²² Thus it was no wonder that Canadian legal historians after Risk—and despite Flaherty—felt hesitant about applying Hurst and Horwitz to a separate country like Canada, where obviously different conditions, politics, history and development exist.

The first Canadian critical of using an American orientation for Canadian legal history was Graham Parker, who cautioned against too ready an application of "Hurst and his Madison circle" to Canada. Writing also in the 1970's, when Canadian legal historians were first having Hurst
brought to their attention by Flaherty and Risk, Parker observed that Canadian legal history was unfortunately the foster-child of the law school curriculum, and someone attempting to overcome this had to be "masochistic." Parker noted, however, that despite this it was now time for Canadian legal scholars to start moving. Yet even at this early stage he saw a disturbing tendency among Canadian legal historians to use Hurst—though curiously, Risk was not mentioned. As a result Parker examined Hurst closely and criticized his "difficult, turgid style" and wondered whether Hurst was even an historian. Hurst was, said Parker who echoed Scheiber, "too much the middle class, middle west man" who was fascinated "with a variation on Turner's frontier concept" which ignored other areas of the country, particularly the eastern seaboard. Also, said Parker, Hurst was too much a pragmatist and was "overly harsh on the courts," and "makes very broad generalizations from the perspective of nineteenth-century Wisconsin" that might not apply to other areas, let alone another country. Finally, said Parker, Hurst "tells me more than I will ever want to know about Wisconsin lumber and if it is meant to be history it is boring, repetitive, and lacking in cohesive narrative." He concluded: "Hurst's researches are avant-garde and must be treated as such." If anything, Parker was consistent. Writing a later essay on "Canadian Legal Culture" in 1986, he again noted:35

I strongly resist the blandishments of the Hurstian and critical schools, who would convert legal history into political science,
social theory or the extraction of macro-theoretical conclusions from the microscopic examination of data relating to some particular industry or phenomenon in national experience. I do not deny that much can be gained from the methodology of the critical or Hurstian schools. I simply do not believe that Canadian legal history is yet at a stage where such approaches are useful. By analogy, I would argue that it is not productive for Canadian legal scholars to be preoccupied with endless examinations of legal-political theory when they do not have a very clear concept of Canadian law as distinct from English or American models. We need to do some basic work in Canadian legal history and historiography before we can take off on flights of ideological fancy about the nature of law. If this seems insular and chronically nationalistic, so be it.

Canadian legal historians were now responding to this challenge. The "Osgoode Society" was incorporated in 1979 with objectives to study and promote interest in legal history in Ontario and Canada generally. This was an important step said its editor-in-chief Peter Oliver, for "the result of the failure of legal history to develop as a significant discipline is that some of the most important and substantial areas of the Canadian experience remain unilluminated by this historical scholarship."36 In addition, the prestigious Osgoode Hall Law Journal devoted an issue to "examining the past efforts and future prospects of Canadian legal history"37 while the Ottawa Law Review also added "legal history" to its survey on Canadian law.38

However, the influence of American ideas was still a troubling issue, and other Canadian legal historians concerned over writing their own legal history were also critical of Horwitz. "Canadians seem to have an almost
bottomless capacity for intellectual colonialism," noted Bell in a critical article commenting on the appearance of David Flaherty's (ed) first Osgoode Society volume of papers entitled Essays in the History of Canadian Law. Reviewing this seminal work, Bell criticized Flaherty's agenda (perhaps not surprisingly) as "explicitly American in its orientation," noting that "it is obvious that many of the Osgoode essayists (including R.C.B.Risk and his students) would find Horwitzian instrumentalism in Nineteenth-century Ontario, if only they could." This Horwitzian instrumentalism, felt Bell, was "too facile a model to use in analyzing the social and economic consequences of the work of Canada's intensely colonial courts." As a result he concluded, "It would be unfortunate indeed if this country's emerging legal historians were to join this trend by embarking on a breathless and unreflecting rush to an American model for Canadian legal history."

What Bell was concerned with specifically was that Flaherty's lead article on writing Canadian legal history advocated a comparative perspective. Although Flaherty cautioned that "successful comparative history is a very difficult enterprise; it requires substantial knowledge of at least two countries or two jurisdictions within a nation for successful execution," Flaherty nevertheless proceeded to promote his earlier idea that Canadian legal scholars should take up this challenge. "Three of Hurst's publications are particularly applicable to forming suitable approaches to
the writing of Canadian legal history," he noted and, after explaining Hurst’s ideas, added that "the applicability of such...to Canada...should be tested," and "legal historians of Canada searching for insightful models should start with Hurst, even if some problems of transfer exist."\(^\text{43}\)

Horwitz too was favoured by implication: "Morton Horwitz’s theory of the emergence of an instrumental conception of law in the early stages of industrialization in the United States" said Flaherty, "suffers significantly from the lack of such a perspective on what happened at similar stages in Canada or the United Kingdom." And, of particular interest again to this thesis was that Flaherty also offered some thoughts on Upper Canada as a case study using Hurst’s integrated perspective, and in doing so noted, like Risk, the dominant legal career of Robinson. However, rather than focus on Robinson as a Canadian judge per se, Flaherty suggested one study Robinson using American models. "It should be possible for someone to write about Robinson in the same way that Leonard Levy used Chief Justice Shaw to prepare a distinguished study of Massachusetts law between 1830 and 1860," he noted, while "Robinson’s innumerable decisions over the years in various areas of law can also be subjected to the kind of detailed analysis that Horwitz employed in The Transformation of American Law."\(^\text{44}\)

To be fair, Flaherty did note a desire for Canadians to develop their own legal history using their own terms, but it was his assumption that American models should be tested first that so upset Bell. And, as was
becoming increasingly evident, Robinson was a pivotal figure in the
developing controversy. At long last, more scholars were beginning to
appreciate just how important he was to politics, law and the economy of
Upper Canada. Thus Flaherty’s attention to Robinson, combined with
Risk’s earlier observations, did result in Canadian legal historians and
others focusing on him, but not always in the comparative way Flaherty
wished. These more recent studies have considered Robinson’s political
influence, important loyalist connections, and his relationship to the
economy of Upper Canada.

The literature on loyalists is voluminous.45 There are therefore
accounts of the loyalists that apply to the life of Robinson. The Virginian
loyalists specifically were examined by Adele Hast, who differentiated this
group from others like the emigres from New York and New England.46
This work provides a useful study for understanding Robinson’s family
background in America. The main accounts of Robinson, however, deal with
his loyalist ideas and how they influenced politics in Upper Canada, while
at the same time making Upper Canada distinct from America. These
aspects about Robinson have been examined by Saunders, Wise, Cook and
Baskerville.47

Patrick Brode, a lawyer who published the first modern political
biography of Robinson in 1984,48 went far to cover his life in ways not
possible by Robinson’s son Charles. Brode’s book also stresses the
importance of loyalism to Robinson's career, and it adds to those studies
done by Wise and Cook on the intellectual content of this concept. Robinson
was, said Brode, the very "bone and sinew" of the Family Compact, and his
commitment to the Crown, an established church, hierarchical society and
anti-democratic views helped establish these features as parts of Upper
Canada's political culture imparted by loyalism. The book is notable for
Brode's summation—like Risk's—that Robinson did not have a significant
creative role respecting law, that he viewed the legislature as the chief
lawmaking body, with judicial activity restricted to statutory interpretation.
His "indelible imprint," said Brode, was to strengthen the view that
Parliament and the legislature were supreme.49

Finally David Howes, an anthropologist interested in cultural
matters, was the first Canadian to compare Robinson's loyalist views with
those ideas of Hurst. In a 1985 article in the McGill Law Journal50 Howes'
purpose was to show that Robinson's legal ideas differed from those ideas of
American judges in Hurst's Wisconsin. His argument was that Robinson
personified the mentality of an archetype loyalist and that "only by turning
Hurst's model on its head, by viewing Upper Canada as the converse of
Wisconsin" could one begin to understand Upper Canadian laws. Howes
believed that as a loyalist, Robinson could not fit into Hurst's instrumental
conception of law, for loyalism instilled in him different attitudes to society
and law. According to Howes, Robinson believed events were dictated by
Providence, and he had an organic, not a competitive view of society. He did not regard law as an instrument of policy, but had a "covenantal" view of British laws.\textsuperscript{51}

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 covenant (fealty to Crown and British institutions brings national survival under imperial aegis)...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.

This perspective said Howes, gave Robinson an intellect "crystallized in opposition to the frontier" and made him devote much energy to "boundary strengthening technologies" like the Welland Canal Company and promoting British emigration to Upper Canada "to counterbalance the American presence on both sides of the border." Given this understanding, Howes concluded that to interpret Robinson as an American judge would be to omit many important cultural differences. One cannot overlook these he said, and therefore he helps confirm those criticisms by Scheiber and Parker of Hurst: one cannot make broad generalizations from the perspective of nineteenth-century Wisconsin and expect them to apply in all respects to other areas--and especially to another country.\textsuperscript{52}

For the Upper Canadian economy, new studies have expanded Risk's theme on the role of law in the economy. One emphasis has been
complementing Canadian economic studies on the staple theory that have hitherto overlooked both law and Robinson. In this regard Risk's influential articles on the Upper Canadian economy showed how law gave extensive powers to private ordering of economic activity. Highlighting legal aspects of financing, credit, security, business corporations, contracts and negotiable instruments for business needs, Risk confirmed in particular Douglas McCalla's observations that Canadian economists and historians had neglected this area. McCalla, writing extensively on this subject already, argued that Upper Canada's growth and development was not just dependent on staple exports like fish, furs, timber and wheat, and that other factors like British capital, commercial credit, risk, entrepreneurship and security arrangements among others had to be studied to avoid oversimplification. And in this respect law too had to be included. "Additional work is needed" said McCalla and Peter George in an important theoretical article on nineteenth-century Canadian economic history, "on the legal institutions which helped to shape the framework within which business was conducted." As a result this writer's own articles, influenced when studying law with Risk, tried to show how the legal system in Upper Canada played an important role as part of the business infrastructure contributing to increased economic efficiency, and how some judicial decisions by Robinson helped shape, as McCalla desired, the legal
framework within which businessmen conducted themselves in the staple economy of Upper Canada.

While these studies on Robinson's loyalist background and judicial decisions added new understanding to political and economic life in Upper Canada, Canadian legal historians were at last beginning to realize that the field was on the verge of important new developments. However, Flaherty's influential call for a comparative approach, particularly for Robinson, still was not answered. Were Hurst and Horwitz again worth following, or could there be particular Canadian studies following Risk's lead? As the most recent accounts reveal, this issue is still not resolved.

Like Risk earlier, Barry Wright attempted to prescribe the most recent goals for a new Canadian legal history in a significant 1984 article in the Osgoode Hall Law Journal. Although Wright acknowledged the important American ideas of Hurst and Horwitz—especially their "progressive" interdisciplinary approach relating law to external forces and social context, he, like Parker and Bell, cautioned against their total application to Canada. These ideas could be used said Wright, but not uncritically, for "Canadian scholars must be sensitive to their own jurisdictional particularities. Full attention must be paid to our unique conditions if our legal history is to be both progressive and Canadian."

Wright went on to discuss the legal system and economic development specifically, and he suggested that the different reception of English law to
Canada, the different manifestations of loyalism, the staple nature of the economy and the lack in Canada of anything like the American constitution meant that Upper Canada was quite different than the New England area Horwitz studied. "Horwitz's work is an obvious example to follow in this area" noted Wright. But he went on to suggest that "there exist constitutional, structural and conceptual problems with Horwitz's thesis, as well as basic economic structural differences between the United States and Canada." In Wright's view the application of Horwitz's instrumentalism thesis to Canada could run into "serious difficulties" which, said Wright, "highlights the dangers of over-dependence on theoretical perspectives geared to different situations." 59

Furthermore, like Risk, Flaherty and Brode before him, Wright offered his own thoughts on Robinson's legal career. Calling him also "the legal arm of the Family Compact," Wright suggested that one should look beyond his judicial decisions to see the key influence Robinson had as Chief Justice and by reputation on Lieutenant-Governors and the British Colonial Office. "British officials regarded Robinson as the great Tory figurehead," said Wright, "one whose knowledge of colonial affairs was invaluable." This perspective, said Wright, should not be forgotten in future studies on Robinson.

Finally, notwithstanding Wright's article, Flaherty's desire for a comparative approach to Canadian legal history was also answered. In this
regard Flaherty’s presence in Canada teaching law and encouraging this perspective at last bore results; and in an important article G. Blaine Baker supported some of Flaherty’s yearnings when he researched in detail a reconstruction of Upper Canadian legal thought in the nineteenth-century.\textsuperscript{60} Acknowledging his task to be a “daunting enterprise,” Baker painstakingly examined legal books in lawyer’s libraries and ventured the suggestion that before a distinct break at the turn of this century, (due mainly to a wave of Anglo-Canadian imperialism), there was “a well-developed and subtle legal supra-nationalism, or at least pan-Americanism, at work” in Upper Canada. Baker revealed that many Upper Canadian lawyers and judges had a considerable number of continental and American legal works in their offices. As a result, surmised Baker, “The legal pantheism facilitated by this nineteenth-century literature promoted a more cosmopolitan, flexible, and thoughtful legal tradition than that which has prevailed in twentieth-century Ontario.”\textsuperscript{61}

This was a revealing observation, and was encouraging to Bernard Hibbitts who wrote the most recent account of Robinson’s legal thought.\textsuperscript{62} According to Hibbitts, legal historians like Risk, Brode and Howes obscured much about Robinson through their focus on a "Tory touch" thesis. In their view, he said, "in reaching for a distinctively Canadian explanation of Robinson’s thought" they had presented Robinson as a conservative judge who opposed economic growth. What has emerged from their studies said
Hibbitts, "is a caricature of a man 'mindlessly aping' English practice and precedent in a colonial backwater cut off from the intellectual current of the nineteenth century legal world." The purpose of Hibbitts' account was to "help right the enterprise" and suggest Robinson's legal thought could be better understood "in the context of contemporary North American legal culture."

To accomplish this Hibbitts chose selected areas of law involving English precedent, property, commerce and transportation to suggest that Robinson was very "instrumental" in helping commerce. Robinson, he said, "relied heavily" on American writers like Story, and "indisputably similar geographical, economic and even social circumstances encouraged this broadening of judicial horizons" said Hibbitts. As a result Hibbitts offers the view that Robinson could be closely compared to contemporary American judges like Kent, Story and Shaw who, conversely, may not have been so "instrumentalist" themselves.

After offering a brief picture of these American judges, Hibbitts stated that "the extensive similarities that seem to exist between the legal approach of Robinson on the one hand, and that of Kent, Story and Shaw on the other cannot be explained using the 'Tory touch' paradigm of Canadian legal history." Instead, said Hibbitts, there should be "a more sympathetically comparative approach to the study of Canadian legal history which concedes the existence of differences between American and
Canadian legal cultures while being more sensitive to broad ideological and philosophical similarities between them." "Constitutional and cultural differences aside," he summarized, "there existed between Upper Canada and the United States a subtle yet significant legal continentalism...characterized by a shared concern with law as an instrument of gradual economic development and supported by a common ideological heritage and professional literature." Thus he concludes, "this continentalism not only helps to explain the similarities apparent in the attitudes of leading Canadian and American jurists, but it also suggests the usefulness of a comparative approach to the study of this period in Canadian legal history. The legal thought of Sir John Beverley Robinson, Canada’s greatest nineteenth century jurist, provides but a starting point in this enterprise."63

Hibbits’ account shows some advantages of a comparative approach; but as Flaherty mentioned earlier, such a perspective is extremely difficult to present, for it requires substantial knowledge of law in two countries. It can lend itself to criticism if one country’s legal evolution and particularities are not perfectly understood or fairly interpreted. In this case, one can question whether Hibbits presented a more accurate account of Robinson than Risk, Brode or Howes, or whether he only offered a new viewpoint these other writers overlooked. However one thing is certain: any future comparative study must (unlike Hibbits) deal with those criticisms shown
by Scheiber, Parker, Bell and Wright on the ability to fully generalize from the studies by Hurst and Horwitz, especially when another country is involved. And such a comparative study cannot simply denigrate differences in each country. Why must, as Hibbitts stated, a comparative approach just "concede" the existence of differences between American and Canadian legal cultures? Why must "constitutional and cultural distinctions" be put aside? Granted the border was porous, and ideas flooded into what was a very North American society in Upper Canada, yet as Howes argued this cannot deny some cultural and legal differences. If so, then Robinson might be a good starting place not to point out some similarities, but instead some contrasts between law in each country. This focus in the end might offer a better comparison when real and important Canadian particularities are not conceded or put aside, but are emphasized and explained.

To summarize, the consensus seems to be that Canadian legal history should be seen in relation to social, economic, and political forces that constitute its own environment. It should be sensitive above all to unique Canadian factors—but not be immune to comparative American insights. The ideal can be the one Flaherty himself suggested, of "Canadian writing that reflects peculiar Canadian problems and issues while remaining comprehensive, comparative, and in touch with the concerns of other historians of the Western legal tradition."64 Clearly, then, the time has
come for a detailed examination and analysis of Robinson’s judicial decisions with the above concerns in mind.

This dissertation will pursue this objective. It will describe and analyze in detail many judicial decisions propounded by Robinson during his long and significant tenure as Chief Justice for Upper Canada. In doing so it will adopt the perspective encouraged by Canadian legal historians of an interdisciplinary or "progressive" legal history, and relate Robinson’s cases to the distinctive society where he played so prominent a part. It will be attuned to Upper Canadian particularities, but venture comparisons to American law where appropriate. It will show that Robinson’s influence on the development of Upper Canadian law was significant and can only be understood if his particular background and his perception of his role as Chief Justice are considered. Robinson’s jurisprudence was strongly shaped by his loyalist background and pro-British sentiments, and these influenced ways in which he helped set Upper Canadian law on a path that was different from American law. While it can be said that Robinson revealed some attributes of instrumentalism, it was not exactly the same as that in Horwitz’s Massachusetts. Different circumstances in Upper Canada made both its content and application somewhat distinctive. It may be that any limitations pertaining to this thesis might occur when such comparisons need be made with American law. Given the caution by Flaherty, it is
hoped that such comparisons be condoned as observations rather than specific conclusions.

Chapter One reviews Robinson's early legal and political career and is intended to show how Robinson achieved the singular honour of becoming the first Canadian-born Chief Justice. While much can be attributed to Robinson's driving ambition, it argues that more might be ascribed to Upper Canadian loyalism and to an eighteenth-century context of privilege which the Robinson family enjoyed. Robinson came from a "worthy" loyalist family and he cultivated powerful friends in Canada and England who helped him to become the first Canadian-born lawyer to reach the top of the province's judicial pyramid. Here the crucial necessity of his obtaining imperial influence is stressed--something not necessary for any American judge--and the implications of this are explored, with some comparative observations about circumstances for judicial advancement in America.

By examining the early history of the Court of Queen's Bench for Upper Canada, Chapter Two ventures further comparisons between the Court of Queen's Bench and American courts in an effort to suggest some differences in judicial orientation for each court on law and the economy. The Court of Queen's Bench as an institution had important implications respecting the unique development of law in Upper Canada. This chapter attempts to link some of these implications to Robinson. It provides more
observations and ideas respecting Robinson's judicial character as the first Canadian-born Chief Justice of this Court.

Chapters Three to Six discuss in detail selected areas of Robinson's judicial decisions. Chapter Three examines Robinson's jurisprudence on the important aspect of receiving English common law to Upper Canada. Upper Canada was unique among all other British North American colonies for having a specific reception statute relative to English law, and under Robinson this had other implications for a particular Upper Canadian development of law different from American. Chapter Four concentrates on Robinson's jurisprudence involving company law. It also examines the consequences of this corporate development on a rapidly changing society. Here the paramount role of the legislature in Upper Canada is shown to be an important concern, and Robinson's particular relationship to it is presented. Again, some comparative remarks are made about the development of corporate law in Upper Canada under Robinson and also in America. It suggests some differences over instrumentalism occurred in this area.

Chapter Five examines the particular business workings of the St. Lawrence commercial system, where the centrality of staple exports is well known. It reveals that Robinson played a significant role in defining the long distance trading infrastructure of Upper Canada, something that contributed to increased economic efficiency. It suggests that Robinson was
instrumental in helping commerce along the St. Lawrence, but it was not exactly an expression of Horwitzian instrumentalism. Circumstances were different in Upper Canada respecting trade. Chapter Six examines Robinson’s jurisprudence towards the early formulation of Upper Canadian railway law. It offers some comparisons between Robinson and his contemporary, Chief Justice Shaw of Massachusetts. Like the earlier chapter on company law, it points out the paramount role of the legislature and again explores Robinson’s relationship to it.

The final chapter of this dissertation summarizes the importance of Robinson’s judicial career to the development of Upper Canadian law as something apart from American law. During Robinson’s long tenure as Chief Justice, Upper Canada was being transformed by new capitalist instruments, transportation technology, industrialization and urbanization. His career provides a useful vantage point from which to view the dynamics of the birth of corporate capitalism in Upper Canada during this transitional era; many of his legal decisions were critical for the success of these new corporate interests. Yet, even though America was also being transformed in this period, many local particularities shaped some important differences between Robinson and American judges. Only by stressing and understanding these differences can a more accurate comparison be made between how law developed in Upper Canada under Robinson and how law developed in the United States.
ENDNOTES

1. For Robinson’s family tree, see genealogical record of the Robinson family, Public Archives of Canada (PAC) Robinson Papers, MG 24, B9 reel M.204. See also Julia Jarvis, Three Centuries of Robinsons: The Story of a Family (Don Mills Ont., 1967).

2. The King’s, later Queen’s Bench Reports, are the chief focus of this thesis and consist of the following volumes: Taylor’s King Bench Reports, 1823-1827, 1 vol.; Draper’s King Bench Reports, 1828-1831, 1 vol.; Upper Canada Queen’s Bench Reports (Old Series), 1831-1844, 6 vols. (U.C.Q.B. (O.S.)); Upper Canada Queen’s Bench Reports, 1844-1881, 46 vols., (U.C.Q.B.). Other reports examined include Upper Canada Jurist, 1844-1848, 2 vols.; Upper Canada Chambers Reports, 1846-1852, 2 vols.; Grant, Error and Appeal Reports, 1846-1866, 3 vols.; Upper Canada Common Pleas Reports, 1850-1882, 32 vols.; and Grant, Upper Canada Chancery Reports, 1849-1882, 29 vols. Robinson’s Benchbooks, Ontario Archives (OA) Record Group 22, Series 390 Boxes 20-37 were also examined.

3. “Presiding as your Lordship has done, for more than a quarter of a century, over the Judiciary of Upper Canada, your name has been associated with most that is worthy of being rescued from oblivion in our brief, legal history; and your influence and example have largely contributed to uphold the character and conduct of the Courts in their relations and intercourse with the Bar.” “Address to the Chief Justice of Upper Canada” (1855) 12 U.C.Q.B. 553.


6. John Charles Dent, The Canadian Portrait Gallery (Toronto, 1881), IV, 122; J.C.Dent, The Last Forty Years: The Union of 1841 to Confederation (Toronto, 1881) 12; William Smith speaking of Robinson noted, "Here we have to do with a die-hard Tory, with all the virtues and defects of the species" William Smith, Political Leaders of Upper Canada (Freeport New York, 1931 repr.1968), 58. For a more detailed discussion of the whig interpretation of Canadian history refer to chapter 2, "The Rise of Liberty" in Carl Berger's The Writing of Canadian History, (Toronto, 1986), 32.

7. W.Notman, Fennings Taylor, Portraits of British Americans vol.3 (Montreal, 1868)1. This account noted at 22: "From the time when his connection with political affairs closed, he ceased to be the property of a party. Then, and to the end of his life, he belonged to the province, and consequently his pure character and ripe benevolence exerted their natural influence."

8. Read wrote that "It would be idle to attempt to give even a synopsis of the judicial decisions come to by him during the thirty-three years he was Chief Justice of the Queen's Bench." D.B.Read Q.C., The Lives of the Judges of Upper Canada and Ontario, from 1791 to the Present Time (Toronto, 1888), 136.


11. The main sources of Robinson's papers which remain are PAC Robinson Papers MG 24, B9; and OA Ms 4. Robinson's benchbooks are in OA Record Group 22, Series 390 Boxes 20-37.


17. Said Risk, ibid at 227: "The neglect and the need are obvious, but the reasons for the neglect are not. The study of legal history requires knowledge of legal doctrine, structures and procedures. Lawyers have had this knowledge, and I have a vested interest in believing that lawyers can be scholars, but perhaps their interest and opportunity have been limited by a traditional preoccupation with courts and conflict, and the late entry of lawyers and legal education into the universities. Perhaps historians have been interested, but frustrated by lack of knowledge, or perhaps they have not even been interested. Their interest, also, may have been restricted by the lack of lawyers in their universities."

18. Ibid., 230-238.


22. In a later article Hurst summarized that "...ideally legal history should tell not only what went on in the law's formal processes, but what were the full actual effects that law and the life envisioning the law had on each other." James Willard Hurst, "Legal Elements in United States History" in Donald Fleming, Bernard Bailyn (eds) Law in American History (Boston, 1971) 91.


26. Lawrence M. Friedman, *A History of American Law* 2nd. ed. (New York, 1973, 1985). Referring to the development of American law after the Revolution, Friedman noted at 114: "For this period, people came to see law, more and more, as a utilization tool: a way to protect property and the established order of course, but beyond that, to further the interests of the middle-class mass, to foster growth, to release and harness the energy latent in the commons."  


30. Harry N. Scheiber, "Back to The Legal Mind? Doctrinal Analysis and The History of Law", *Reviews in American History*, 5 (1977) 458. See also the review by A.E. Keir Nash in *American Political Science Review* 73 (1979) 244 who notes at 245: "Two points remain less than well proven. One is whether in fact only a few prospered while the bulk of the citizenry paid the costs of development, or whether a few got more than their fair share but many others, though getting less, still got more than they would have without industrialization. The other is whether the judges and their lawyer allies were quite so deliberately engaged in plotting the upshot as Horwitz frequently seems to imply. Judicial motivation, too often, seems to be deduced from the distributive consequences of case law, rather than induced from direct evidence of an alliance."


32. *Hadley v. Baxendale* 9 Ex. 341 (1854) limited damages for breach of contract. Said Baron Alderson, at 354: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." See Richard Danzig, "Hadley v. Baxendale: A Study in the Industrialization of the Law", *Journal of Legal Studies*, 4 (1975), 249.

34. Ibid., 327-330.


41. Bell, supra, note 39 at 318.


43. Ibid., 6-7.

44. Ibid., 30.

45. An excellent source that reviews the major recent writers on loyalism is Elwood Jones, "The Loyalists and Canadian History", Journal of Canadian Studies/Revue d'études canadiennes, 20 (1985) 149.


49. Ibid., 273.


51. Ibid., 384.

52. See Howes’ Appendix, *ibid.*, 414 where he contrasts the main features of American Republican and Upper Canadian loyalist, legal and political culture.


55. "Overall, Upper Canada's was a complex, balanced economy, where local exchanges played key roles; it was not an acutely export-dependent economy, in the sense that local economic activity necessarily slowed when wheat export markets sagged. Doubtless wheat had a strategic role, but capital and credit and the many locally produced, exchanged, and consumed goods and services played highly significant roles in maintaining and propelling the economy. To single out one commodity, uniquely, as has so often been done in analyzing this economy, is to oversimplify and miss many of the relevant factors in the survival and growth of such a new economy." McCalla, ibid., "The Internal Economy of Upper Canada: New Evidence on Agricultural Marketing Before 1850" at 415.


59. Ibid., 368. See also Barry Wright, "An Introduction to Canadian Law in History", in W.Wesley Pue, Barry Wright (eds.) Canadian Perspectives on Law and Society: Issues in Law and History (Ottawa, 1988).


61. Ibid., 285.


63. Ibid., 528-529.

64. Flaherty, supra note 42 at 3.
CHAPTER ONE

"THE IDEAL END OF A CAREER AT THE BAR" THE RISE OF
JOHN BEVERLEY ROBINSON TO CHIEF JUSTICE

Now is the Time for you to lay a Foundation for future
Eminence in your Profession

-Rev. John Stewart to Robinson, student-at-law (1809)

Introduction

In 1829 the British government appointed John Beverley Robinson, colonial lawyer, politician and Upper Canada’s attorney-general since 1818, to the prestigious position of Chief Justice of the Court of King’s Bench for Upper Canada. The appointment was auspicious. Robinson became not only the youngest Chief Justice in the British Empire, but also the first native-born Canadian lawyer so honoured. All six previous Chief Justices of this court, established in 1794 by Lieutenant-Governor Simcoe and William Osgoode, the first Chief Justice, had been English barristers or lawyers
from other British colonies or pre-Revolutionary America. Moreover, when a previous Upper Canadian lawyer had been elevated to this court, a puisne \(^3\) position was then usual. In breaking these precedents the British government granted Robinson a distinctive reward for his work in the colony. Indeed it could perhaps only have been some special colonial lawyer who had crucial imperial influence who could make the British government break its usually rigid judicial appointment patterns.

If so, then Robinson's early efforts to further his position and to become the first Canadian-born Chief Justice may warrant an initial review. In addition there was much about Robinson's exceptional legal practice to suggest that it had implications that helped shape his later judicial life when he took to the bench in 1829. While much of Robinson's achievement in becoming Chief Justice can be attributed to his great ambition, more might be ascribed to the way in which he used the advantages of Upper Canadian loyalism. There was also an eighteenth-century context of privilege which his family enjoyed. Robinson came from a "worthy" loyalist family, and he cultivated powerful friends in Canada and England who helped him immensely to achieve this ideal end to his legal practice at the colonial bar.
Upper Canada and John Beverley Robinson

A major factor for explaining Robinson’s great success as a colonial lawyer, as an influential tory politician and in his eventually becoming Chief Justice related to the settlement of loyalists in Upper Canada after the American Revolution. Ever since Richard Cartwright left Revolutionary Albany, happy "to quit a Place where Discord reigned and all the miseries of Anarchy had long prevailed," the influx of loyalists who moved into the area up-river from Quebec meant new considerations for the British administration there. Surveying this up-river area for settlement, supplying loyalists with needed mill machinery, setting up new administrative districts and providing them with courts and judges were some of these considerations. Indeed so persistent and influential were loyalist demands for additional government concessions—chief among them English laws—that the British government created the new province of Upper Canada in 1791 to accommodate them.

Among historians who have examined the meaning of loyalism to Upper Canada, S.F. Wise in particular has shown that loyalist beliefs like supporting the Crown, deference to established order and authority, distrust of democracy, adherence to the Anglican Church and a real wish to make Upper Canada the "envy of the American states" were some of the most important social and political implications resulting from this movement of
loyalists into what became Upper Canada.  Although Upper Canada also had a large American population—some of whom coalesced with others like William Lyon Mackenzie to start a "Reform" party—settlers with a loyalist background soon became entrenched in key government posts in the new province close to the Lieutenant-Governor. These prominent loyalists joined other English administrators in the colony through marriage ties, social intercourse, land speculation schemes and business ventures to create what Mackenzie called a "Family Compact" of privilege and office holding.

Robinson's father Christopher, a Virginian loyalist who fought with Simcoe's Queen's Rangers as an ensign in the American Revolution, was a personal example to Robinson of how far an ambitious, well-connected loyalist could rise in this new province. After the Revolution Simcoe's Queen's Rangers disbanded in New Brunswick, but when Simcoe was appointed the first Lieutenant-Governor of Upper Canada he in turn appointed his former ensign to the position of Surveyor General of Woods and Forests for that province. Given this position and much land to go along with it, Robinson's father was rejuvenated. He was licenced to practice law in 1794, was elected to the House of Assembly in 1796, and in 1797 helped form the Law Society of Upper Canada and became one of its first benchers. Only his sudden death in 1798 prevented greater achievement.
Robinson was only seven when his father died. The family had recently moved to York, the provincial capital. Though new to the town, Christopher’s widow and young sons were not without some influence and connections; and the tightly-knit loyalist community soon ensured that this unfortunate but “worthy” loyalist family would be well looked after. Robinson’s mother soon re-married Elisha Beman, a prosperous merchant from the fast developing Newmarket region north of York. Beman brought Robinson’s two brothers Peter and William into his business, and he assisted their later efforts to develop a fur-trading, farming, milling and provisioning establishment for settlers in that area. In fact the area north of Toronto became a recognized center for the Robinson family’s direct involvement with commerce in the province. Later in life Robinson also purchased much land there along with large amounts in neighbouring Peel County. A modern study by Kenneth Kelly has shown that these areas grew and became dependent upon essential communication links like Yonge Street and the railway to market its furs, wheat and lumber at York. This aspect of holding much land in these regions leads to the suggestion that Robinson, when he later became Chief Justice, would be inclined to favour transportation and commerce because he and his brothers had a large personal stake in this region’s development. At the very least he was well aware of business practices and risks.
Robinson was favoured in a different way than his two brothers. Rev. John Stuart, another Virginian loyalist, the Anglican bishop of London's emissary in Upper Canada and close family friend, offered to support Robinson's education at John Strachan's elite Cornwall grammar school. This school had been set up in 1803 by Rev. Stuart and other prominent loyalists and merchants like Richard Cartwright and Robert Hamilton to provide the best possible education for their sons. Yet in bringing the Rev. John Strachan over from Scotland to head this new school, these fathers unwittingly did more. Once attending, young Robinson soon developed a close friendship with Strachan, who became a powerful ally assisting with his future legal and political career. Admittedly it is hard to present a psychological account of this clever, ambitious, and very lucky young Robinson. However, it seems probable that Robinson endeavoured to please the teacher who had replaced the departed father. Strachan, as well as providing his pupils with a sound moral education, also saw it as his duty to mould and form their character, to be loyal to Great Britain in general, and to him in particular. Strachan's sermons, where he fondly spoke of the British as "God's peculiar people," indicated his loyalty.

But more than this, these boys from leading loyalist and merchant families sent to Strachan from all over the province also developed a close esprit de corps and a strong sense of duty to the Crown and to public service when they graduated. As an example, Robinson's classmate John
Macaulay of Kingston was a most significant associate. Both Strachan and Robinson helped him establish a newspaper at Kingston after their graduation. By 1820 this paper called the Chronicle was regarded, said Wise, as the chief organ of tory opinion in Upper Canada. It strongly advocated canal building and navigation improvements for the St. Lawrence (which said Wise, were probably written by Strachan and Robinson) as well as stressing important tory ideas on the need for established order, public morality, and loyalty to the government. Of as much interest were Robinson's own early ideas on privilege and public duty, which he expressed in a letter to Macaulay suggesting he consider running for political office for the tories against Bidwell and the reformers. In it, said Robinson, "We must buckle on our armour to meet them...& let me tell you, Classmate, you ought to have made it your calculation to be ready to join us in the fight. You are of the regularly bred, and You owe the State some service." All these were significant ideas and articulated eagerly in one so young.

Robinson chose the legal profession after graduating in 1807. Like many contemplating law, he likely saw law as a prerequisite for his own political prospects and necessary if one wished to serve the state in a major capacity. Any lawyer can also appreciate that the choice of an articling position is crucial for their later progress at the bar or in politics. Here Robinson was no exception. The many contacts he made at Strachan's elite boarding school paid off, and he secured a prestigious articling position with
solicitor-general D'Arcy Boulton. Once there, Robinson was encouraged by his benefactor Rev. Stuart to excel above all others: "There is no medium in the Profession you have chosen," wrote Stuart to Robinson as he began his articles, "you must either rise to Eminence and Respectability, or sink to the level of a pettifogging attorney, in some obscure part of this Country." Indeed the impact of this admonition and advice on young Robinson may have been even more significant, in view of the fact that he was no doubt grateful to Rev. Stuart for being allowed the opportunity denied his brothers to receive such a privileged education. He probably realized that his future prospects in life might depend on his own initiatives.

In other respects this particular articling position was auspicious. Boulton was then aggressively trying to raise his own station in life and to secure for himself a judgeship on the Court of King’s Bench. To draw the attention of imperial authorities, so crucial for this appointment, he undertook the rare tactic of writing a book. What Robinson may have learned from Boulton’s efforts was another example of relentless ambition which, coupled with Stuart’s letter cited above, may have instructed him about more than just leading a moral and worthy life. Being somebody important was a greater thing to pursue, and there were no great rewards in becoming a pettifogging attorney in some obscure part of Upper Canada.
Articling with Boulton also provided Robinson a useful re-entry from distant Cornwall back to the close-knit "official" society at York, where he could utilize Strachan's education to work for him. As well Boulton had a small brick cottage at York that Robinson was later to purchase and greatly enlarge for a matrimonial residence he called "Beverley House." This became a center of York's social life and a useful place for impressing people who could help his career. Thus it was perhaps no wonder that Robinson remembered all these many benefits and opportunities later in life when he reminisced to his biographer son:

I was fortunate also in the next step I took. If I have any merit in getting on harmoniously with my brethren at the Bar and on the Bench, I owe it in a certain degree to having been at an early period of life, when I commenced my legal studies, under the care of the late Judge Boulton, who was then Solicitor-General of the Province.

During his time under articles at York, Robinson's developing skill in making important contacts also allowed him to secure the prestigious position of clerk assistant to the House of Assembly. Furthermore his articling period allowed him to cultivate friendships with two other men who would also prove invaluable to his career: William Dummer Powell, then a puisne judge on the Court of King's Bench, and one of York's leading businessmen, William Allan.

Robinson seems to have gained Powell as an influential early ally when he began courting his daughter Anne. This budding relationship, (before it ended tragically with Anne's death), probably helped Robinson to
secure the aforementioned clerkship. Powell’s support was also involved in
Robinson becoming acting attorney-general during the War of 1812—even
though he had not yet been called to the bar.36

Robinson developed a lasting friendship with Allan when he was
Robinson’s commanding officer in the York militia during the War of
1812.37 Allan was one of the most important merchants then operating in
York,38 and he may also have influenced Robinson’s thinking about the
economy of Upper Canada. William Allan, noted M.L. Magill, "belonged to
the school which regarded the St. Lawrence as the key to the prosperity of
Canada." He was later to be a director of the Welland Canal Company and
Commissioner of the Canada Company. He headed the subscription
committee to incorporate the Bank of Upper Canada, and served as its first
president, built a substantial commercial wharf on York’s waterfront,
became the first Governor of the British America Fire and Life Assurance
Company, and became an active railway promoter.39 Through all these
offices he exerted a tremendous influence on Upper Canadian business
practices because of his distinct views about these positions. He was in
essence on the "secure" side of risk.

Adam Shortt noted that Allan was influential in taking action to close
the "Pretended" Bank of Upper Canada at Kingston. Allan, Shortt felt,
believed that the government-controlled Bank of Upper Canada at York was
more secure and that this early Kingston bank was inadequately capitalized
and badly managed. The close association by Allan and others of the Family Compact, including Robinson, in the Welland Canal Company is well known. In a more recent examination, Peter Baskerville noted that Allan’s conservative economic views were tied into securing York’s commercial supremacy in Upper Canada. Allan, said Baskerville, took his responsibilities seriously, kept business ventures on the secure side (i.e. under control by York’s business elite) and had a strong dislike for reckless promoters or speculators who might disrupt the provincial economy. And, as this thesis will suggest, some of Allan’s conservative thinking about business may have influenced Robinson’s own conservative approach to business ventures when he later took to the bench.

Robinson’s articling period with Boulton ended when Boulton travelled to England to curry further favour at the Colonial Office for his much desired judgeship. As a result, Robinson was able to use his growing influence on this close knit loyalist society at York to transfer his articles to the acting attorney-general John Macdonnell, who also became aide-de-camp to General Brock after the War of 1812 broke out.

Like his father before him, Robinson along with many former classmates from Strachan’s school joined the loyalist side to fight the Americans. He saw action under Brock and Macdonnell at the battle of Queenston Heights. When Macdonnell was killed in action there, the important office of attorney-general became unexpectedly vacant. However,
mainly through the influence which Robinson had with Powell, Robinson was appointed in Macdonnell’s stead as acting attorney-general, even though he was only twenty-one and, because the war had disrupted meetings of the Law Society of Upper Canada, had not yet been called to the bar. This appointment was without precedent, yet it graphically reflected the trust felt by those in the wartime administration of the province towards Robinson’s bright legal promise and capabilities. As well, Robinson was placed in an unexpectedly envious position for one so young. He could use the office to enhance his future legal or political career.

Robinson soon had the opportunity to do so. Nowhere were Robinson’s nascent legal talents more challenged than they were at an event, later known as the Ancaster "Bloody Assize" of 1814.\textsuperscript{44} A judicial proceeding set up by the government at Ancaster to try men mostly from the London district for treason in the war, Robinson, as acting attorney-general, had the important job of prosecuting these suspected traitors. It was an extremely onerous task, made more difficult by Robinson’s need to adhere to old English practice and procedures regarding the very political and serious crime of treason.\textsuperscript{45} "I have to look into every step of the proceedings in every department," wrote Robinson, "for if anybody commit an error, the effect as it regards the prosecution may be fatal."\textsuperscript{46} For someone not yet called to the bar the task of setting up, prosecuting and
dealing with the three King's Bench judges hearing this momentous legal action was unprecedented.47

Robinson was finally called to the Upper Canadian bar at the war's end by a special act of the legislature, making legal any irregularities wartime interruptions may have had for law students.48 As a result he had achieved much. He had received experience, distinction and recognition early on that many another lawyer would need a lifetime of practice to acquire. Another aspect about his later judicial life perhaps arose from this great event. As this thesis will develop, Robinson's conservative judicial approach of "going by the book" and stressing strict adherence to form and precedent may have been relat. i to his earlier efforts to successfully prosecute those charged at this Ancaster assize. With three King's Bench judges noting his every action, Robinson probably realized that precedent had to be strictly followed. It might have been something drilled into him so forcefully that he could never later escape from it.

The war's end led to other important developments for Robinson's career. When D'Arcy Boulton returned from England to Upper Canada49 and regained his former office as attorney-general, Robinson was made solicitor-general in 1815. This was an important office for someone just called to the bar, but for the "veteran" Robinson it did not have the same meaning. Boulton's English trip to curry favour for his judgeship may have acted as a further example and catalyst in persuading Robinson of the
necessity now to do likewise. It was then, his son Charles noted, that Robinson also became concerned over what he felt were the "disadvantages of a rule which was said then to prevail in the Colonial Office, to appoint no one to be Attorney-General, or Chief Justice, of a colony who was not a member of the English Bar."50 Here the evidence is retrospective, but it does suggest that Robinson felt some insecurity over his office and some anxiety for his future prospects. He was determined, like Boulton, to do something about it. He secured some valuable introductions from Lieutenant-Governor Drummond and from his ally Strachan to influential Englishmen to "view favourably...his visiting England for the purpose of being called to the Bar."51 He then negotiated with the government to secure a paid leave of absence and like Boulton went to England.

On this first journey he was not successful, perhaps because he became too smitten by Emma Walker, niece of William Merry the Under-Secretary for War, whom Robinson married there. He was also drawn to the charms of England's Lake District, Scotland's Melrose Abbey by moonlight, Walter Scott's Abbotsford and other delights of "this England."52 Despite these distractions, he cultivated further contacts in high government circles who, like his friends in Upper Canada, could be useful to his future legal or political career. Thus when Robinson returned to Upper Canada in 1817 to his office as solicitor-general, he established his prestigious English bride at "Beverley House." He settled down to push for future prospects where his
new English connections might assist in ways again not generally available to most other Upper Canadian lawyers.

Robinson did not have long to wait. Boulton was finally appointed a puisne judge of the Court of King’s Bench in 1818, and Robinson got back his “old” post as attorney-general. As one of the few Upper Canadian lawyers to have observed the English legal system first hand and to have found it too frivolous and disrespectful to judges for his liking, Robinson as attorney-general was determined to help the legal profession in Upper Canada operate in a more dignified manner. To this end he was elected Treasurer for the Law Society of Upper Canada in 1818. Under his aegis in this office he formed the “Juvenile Advocate Society” for law students to promote their sense of pride and purpose. G. Blaine Baker has written an interesting article on this Society. He suggests that Robinson’s aim included the use of Upper Canadian lawyers for a local aristocracy (in the absence of a landed one not possible in the province) and as a buttress against what Robinson felt was growing American republicanism. During Robinson’s second stint as Treasurer (1821-22) he introduced to the legislature an act to incorporate the Law Society of Upper Canada for, among other things, the ability to hold land as a corporate body. During his third and last term as Treasurer (1828-29) he sold some of his park lot lands in York to the Law Society. On this land the Law Society built what would become the magnificent building known as "Osgoode Hall" for its permanent home.
Thus Robinson became a direct builder of the legal establishment in the province, a role most lawyers appreciated, and this was perhaps one of the reasons his portrait was placed in an honoured position over the mantle in the great library in Osgoode Hall.

Robinson's work as attorney-general and as Treasurer of the Law Society, combined with his legal practice, which Read claimed was then the largest of his day,\(^7\) drew him deeper into politics. Indeed when reform newspapers and individuals like Robert Gourlay began raising criticisms of the British administration of the province,\(^8\) it was becoming important to those in the administration and to those coalescing towards a "Tory" party to have Robinson represent their views as a sitting member in the assembly. Hitherto as attorney-general it had been Robinson's duties—ever since they were established by John White, the province's first attorney-general\(^9\)—to conduct civil and criminal cases, to advise the administration on questions of law, and to draw and settle grants and proclamations. It was not then usual or necessary that the attorney-general be elected to perform these duties. Yet Robinson was a rising tory star and he had gained the respect of those in the administration. They wanted him to run for public office. Brode in his biography felt that Robinson himself may have then entered politics to push his earlier ideas regarding transportation improvements and to get Upper Canada moving against what he continued to feel was growing American republicanism in the province.\(^6\) Robinson's
newspaper articles on the need to improve the St. Lawrence which had previously appeared in Macaulay's Kingston paper may have indicated this concern. In any case Robinson was elected to the assembly in 1821 for the town of York. He had been astute enough to donate a new bell to St. James Church on the day before polling. He remained in elected office as attorney-general until 1829 when he was appointed Chief Justice.

This review of Robinson's early life will not focus in detail on his political career, but some references to it might be useful for several reasons. D.B. Read, who appeared as counsel before Robinson for some seventeen years, suggested in his biography of Robinson that "it will not be irrelevant to refer to Mr. Robinson's parliamentary career, as in some measure affording a key to his subsequent judicial life." Here Read noted several points. The first was Robinson's strong tory views. Said Read:

If I might venture an opinion I would say that there was no more devoted a King's man in his Majesty's dominions. I might add that a reverence for established authority was one of the distinguishing traits of his life. Mr. Robinson was a Tory of the old school. Church and State had a charm for him which, to men of the present day, seems a relic of feudalism.

A second point noted by Read was Robinson's inclination when he later became Chief Justice to interpret favourably laws and statutes he had a personal part in framing. Robinson drafted or helped introduce to the assembly many acts in commercial matters and for improving navigation of the St. Lawrence. The important legislative act setting up the Bank of
Upper Canada\(^65\) was, said Brode, drafted by Robinson,\(^66\) along with an act to establish a uniform currency throughout the province.\(^67\) Other significant transportation acts with which he was involved were those to establish the Burlington Bay, the Welland and Desjardins' Canals,\(^68\) the Rideau Canal Act involving imperial concerns to build this waterway,\(^69\) and the first corporate acts establishing a bridge, harbour, and turnpike company.\(^70\) Furthermore, the important Nichol's report on improving navigation on the St. Lawrence was tabled at this time,\(^71\) and Robinson, after introducing the first-ever borrowing act to the assembly for improving militia pensions,\(^72\) helped create a precedent for further borrowing acts.

As Brode explained:\(^73\)

> If money for the pension funds could be raised in such a simple manner, it was obvious that public works could also be financed by issuing government notes. The prosperity created by the canal projects would undoubtedly be the source for future revenues to repay the debentures. The Debenture Bill of 1821 was the first step in the government's plan to mortgage the province's future with the security of an efficient navigation system. Many years later, after Upper Canada had borrowed extravagantly to finance the canal projects, John Robinson faced the cold reality of the province's limited ability to support such projects, ruefully admitting that he had "the glory of laying the foundation of our public debt."

As a result when Robinson later took to the bench, "in commercial law he was," concluded Read, "ever for a liberal interpretation of the laws affecting banking and commerce, regarding these matters as the utmost importance to the advancement of the Province."\(^74\) In other words Robinson had the unique opportunity to be the judge who interpreted many of the acts he
himself had a part in making, and so he would be sure that laws affecting
banking and commerce were protected from the bench.

Robinson's legal expertise, government connections and growing
influence over the public debt in the province allowed him another
opportunity to travel to England once again in 1822. The Constitution Act of
1791 which set up the two provinces had left Upper Canada without a
seaport, and a working agreement between Upper and Lower Canada over
sharing customs revenues at Quebec was implemented. This agreement
expired in 1819 and, because the province was deprived of these much
needed revenues to finance new public works, Robinson was sent to England
to seek imperial assistance to help settle the continuing dispute with Lower
Canada.

When Robinson returned to England he found the Colonial Office had
more on its agenda than just this issue. In fact both receiver-general John
Caldwell and solicitor-general Charles Marshall of Lower Canad were
already at the Colonial Office conferring with Edward Ellice on a possible
union for the two provinces. Ellice, a member of the British Parliament
who had extensive fur trading and other commercial interests in Canada, was a key figure in these discussions which had their origins, noted Brode,
"in the plans of Montreal merchants and their agents to subvert the Lower
Canadian Assembly and re-assert their own dominance in Lower
Canada." Robinson was caught somewhat off guard by their discussion,
and it lay outside the terms of reference given him. However, he was opposed to it. In a letter to the Right Honourable Earl Bathurst which Robinson had published, he stated that "It is the fear of perpetual strife, from the unavoidable inconvenience of having the parties of French and English, Catholic and Protestant, so nearly balanced, that disposes me most to doubt the policy of uniting the provinces of Canada at this period." Robinson went on to attribute the French Canadians' reluctance to make improvements to the St. Lawrence mainly because of their "ancient laws and usages" and "peculiar system of civil jurisprudence." "It is certainly to be lamented, that the civil as well as the criminal code of England had not been prescribed to them after the conquest," wrote Robinson, for he felt that Upper Canada's use of English laws was responsible for that province's great advances.

Instead of a union of the two provinces, Robinson, along with Chief Justice Sewell of Lower Canada, proposed a general legislative union of all the British provinces in North America into "one grand confederacy." However, the proposed Union Bill stalled more because it was introduced late in the parliamentary session and because Sir James MacIntosh felt that Canadians should be consulted before such an important constitutional change was made for them. Due to this delay only a Trade Act Bill drafted by Robinson for the customs dispute passed at this time. Thoughts of Canadian union were of course to continue, but of more relevance to
Robinson was the fact that he had another chance to cultivate friendships with men like George Hillier, secretary to Lieutenant-Governor Maitland, with Wilmot Horton, Under Secretary of State for War and the Colonies and with other influential English officials, and this greatly increased his growing reputation as an important British Canadian politician. Robinson was also called to the English bar during this second sojourn to England, fulfilling an unstated but necessary prerequisite as mentioned to any future judicial appointment for him in the province. Finally, although the Union Bill was defeated, and only Robinson's Trade Bill passed, he could consider himself privileged to have been probably the only Upper Canadian lawyer to have drafted and to have passed a Bill directly by the British Parliament. This action gave him much insight into the English parliamentary system and once again made him unique among lawyers in the colony. Probably no other lawyer had his experience and influence in dealing with the Colonial Office, and this gave him immense prestige.

When Robinson returned from England, he was warmly welcomed for his accomplishments. He was indeed the rising star of the Tory party. And, because of the increased stature this important overseas assignment provided him, his law practice was thriving. It should be noted that it was still possible then for him as the province's attorney-general to "augment his emoluments" by accepting private retainers where there would be no conflict with the Crown. In addition and unlike most other lawyers in the
colony, Robinson began building up a large part of his law practice by acting as an agent and trusted advisor to influential English lawyers and politicians with important legal and financial concerns in the colony.\textsuperscript{87} Law students recognized this uniqueness and the great prestige associated with Robinson’s trans-Atlantic law practice and vied to serve under him. John Solomon Cartwright of Kingston became Robinson’s student in 1820 and, as Shortt revealed, the close association of these two men of distinguished loyalist fathers was such that Robinson supported Cartwright’s growing political power at Kingston, and he helped set him up as the trusted president of the Midland District Bank begun in that town in 1832.\textsuperscript{88}

But of more importance perhaps was Robinson’s relationship with William Henry Draper. George Metcalf, who has written about Draper extensively,\textsuperscript{89} noted that Robinson became so impressed by a legal brief Draper had prepared for him at the Cobourg assizes in 1829 that he immediately gave Draper a position in his law office at York. Yet Robinson may have had more in mind than just obtaining someone with bright legal acumen. Both Metcalf and C.B.Sissons (who examined Egerton Ryerson’s papers) noted that Draper was chosen by Robinson to be his successor in business when Robinson shortly thereafter took to the bench.\textsuperscript{90} Accordingly, it is possible to suggest some further implications. Metcalf noted that in 1836 Robinson appealed, as he had done earlier with Macaulay, to Draper’s sense of "duty" to do more and to enter politics.
There, said Metcalf, Draper’s own political career was marked by the same earlier concerns of Robinson his benefactor: maintaining the British connection, and above all becoming the leading parliamentary spokesman who worked for supporting and restoring the commercial viability and unity of the St. Lawrence. Although Draper differed with Robinson over Union in 1841, taking the view that it was necessary to restore the old commercial unity of the St. Lawrence\(^9\) and accepted Sydenham’s request to introduce the Union Bill and pilot it through the Assembly,\(^9\) he did nevertheless continue to make commercial development a key plank for a "conservative" party that by the 1850's was beginning to form.\(^9\)

The action by Robinson to have Draper succeed him in business and later perhaps in politics may not have been the only indication that he was positioning himself in earnest for a long awaited move to the bench. As attorney-general and one with a distinguished legal practice, he had accomplished much, and as Romney noted for this office and for that of solicitor-general, "for most of the first half of the nineteenth century they were seen as a sort of property, entailing not only a privileged venderhood of services to the government and the public but also the promise of promotion when a suitable vacancy arose."\(^9\) Robinson was at last in a strong position to capitalize on the expected vacancy left by the retirement of the sixty-six year old current Chief Justice Campbell.\(^9\) As Read noted about Campbell, "It was a saying of the wags of the day that he at that age was so appointed
to keep the place warm for the Attorney-General, whom it was well understood would succeed him in the office when he should have arrived at a judicial age. Robinson was then only thirty-eight, yet as has been continually stressed, he had accomplished more in these years than many another Upper Canadian lawyer might ever hope to achieve.

A more immediate catalyst sparking Robinson to accept judicial office in 1829 involved a personal dispute between himself and Judge John Walpole Willis, whom the British government appointed a puisne judge of King’s Bench in 1827. Willis, it seems, had come to Upper Canada armed with the expectation that he would become the first Chief Justice of a proposed new Court of Equity in the colony. He had already established himself in England as a leading barrister in this area. However, once in Upper Canada there were, as John Weaver noted, many problems establishing this court so that Willis also began to consider the alternate possibility of replacing the old and ailing Campbell as Chief Justice of King’s Bench. Recognizing each other as potential rivals, Willis and Robinson reached an impasse when, in a case before Willis where Robinson was prosecuting the reform editor Francis Collins for libel, Willis upbraided Robinson in open court for his alleged irregularity in not prosecuting the seconds in a long-ago duel, and for not prosecuting those men involved in destroying Mackenzie’s printing press in 1826.
Robinson was indignant over this judicial admonishment and, when it was coupled with Willis's actions in questioning the legal status of the Court of King's Bench itself, he mustered sufficient influence with Lieutenant-Governor Maitland to have Willis removed from the bench. Among the issues that Robinson raised, noted Read, was the failure by Willis to be amenable to the sensitivities of a colonial court,\textsuperscript{102} and the incident seems to have effected Robinson greatly. Apparently he faced the possibility that despite his legal stature in the colony, despite his efforts to be called to the English bar and despite the contacts he had cultivated at the Colonial Office, the English government might still appoint an English lawyer for Chief Justice on the expected departure of Campbell. Robinson noted this point succinctly to his biographer son Charles:\textsuperscript{103}

> On this last occasion I had some scruple about standing longer in the way of promotion, which is naturally looked for among members of the Bar, and I was apprehensive that, by the appointment of some person from England not older than myself, I might be shut out from the judicial office when circumstances might lead me to desire it.

Furthermore his legal practice and family situation were such that the station, salary and prestige associated with being the first Canadian-born Chief Justice were now very appealing to him.\textsuperscript{104} This singular honour would be the fruition of all his many benefactors' greatest hopes and dreams. Robinson's considerable reputation and crucial imperial influence was enough to ensure his success. On the retirement of Chief Justice
Campbell, Robinson, the leading member of the Upper Canadian bar and strong tory loyalist, received the recognition he had worked so assiduously to secure. In 1829 he was appointed Chief Justice of the Court of King's Bench.

Conclusion

In becoming the first Canadian-born Chief Justice, Robinson achieved the ideal end of a distinguished colonial legal career at the bar. He received this honour through a combination of loyalist inheritance, privilege, ambition, connections and opportunity. Born to a worthy loyalist family in a small close-knit colonial society and, on the early death of his father, fostered by its loyalist and English officeholding elite during formative times, Robinson took heed of the exhortations given him by his early benefactors and rose to great eminence and respectability. His privileged schooling under Strachan allowed him to secure this influential Churchman to help further his career. This schooling also helped Robinson make important contacts with Judge Powell. Powell helped him to obtain the privileged opportunity to article with both Crown law officers. Robinson had a necessary loyalist background, driving ambition, brilliance and much personal charisma; these were assets that made him go on to become the leading tory parliamentarian in the colony. Due to his political eminence, he
had the rare legal cachet to have drafted a Bill for the English Parliament. He was also one of the few Upper Canadian lawyers who had the personal determination as well as a rare second opportunity to be called to the English bar. His distinguished legal and political career in Upper Canada brought him the critical attention and the help from influential English patrons. Indeed, Robinson's legal practice and life were like no other lawyer's in the province. No other lawyer had his drive, connections, opportunity or ability. Robinson's legal practice and outlook were most importantly trans-Atlantic, and he had the added prestige of being a trusted confidant of influential imperial officials. In summary he had the notoriety of being perhaps the foremost British Canadian in the colony. The strength of all of these things combined provided him the opportunity to break rigid colonial appointment patterns and to become the first Canadian-born Chief Justice.

In contrast with contemporary American judges, who obviously had no need or desire to be called to the English bar or to cultivate powerful English patrons, Robinson had to do so in order to achieve his success and become Chief Justice. As a result, although Robinson was a native-born Canadian, he was particularly conscious of the problems and reality of implementing English law in the province once he became Chief Justice. Indeed his unique judicial background and his own reactions to English law
raised considerations for him, unlike for any American judge. This linkage between England and Upper Canada meant that the law Robinson propounded could not be the same as that developing in America.
ENDNOTES


3. Puisne (later born, or younger). A puisne judge meant a judge of Queen's Bench other than the Chief Justice.


J.F. Pringle, *Lunenburg or The Old Eastern District Its Settlement and Early Progress* (Cornwall, 1890).


12. Many aspects of the "Family Compact" such as its relationship to landholding and business will be examined post. For general works, see Alison Ewart, Julia Jarvis, "The Personnel of the Family Compact, 1791-1841", CHR, 7 (1926) 209; Robert E. Saunders, "What Was the Family Compact?", *Ontario History*, 49 (1957), 165; David W.L. Earl (ed.) *The Family Compact: Aristocracy or Oligarchy* (Toronto, 1967). The "Family Compact" has been subject to a number of interpretations, but perhaps the best is that of Craig: "The members of the Compact were simply the leading members of the administration: executive councilors, senior officials, and certain members of the judiciary. They were in complete control of the day to day operation of the machinery of government...the Compact saw to it that like-minded men received the lesser appointments throughout the province. As a result, little local "family compacts" emerged among sheriffs, magistrates, militia officers, customs-collectors and others. In one sense, there was nothing new in this situation. There
had always been a small core of executive officers and judicial advisors around the
governor or administrator who had largely held the reins of power. Such a group
was inevitable in the old colonial system of government and in a society where rela-
tively few men had the training and education needed for the leading government
offices." Gerald M. Craig, Upper Canada: The Formative Years 1784-1841 (Toronto,
1963) 107. For an example of the "local family compacts" spoken of by Craig, see
Elva M. Richards, "The Joneses of Brockville and the Family Compact", Ontario
History 60 (1968) 169.

13. An Act to Authorize the Governor or Lieutenant Governor to License
Practitioners in the Law (1794) 34 Geo. III c.4 (U.C.). Sixteen men received licenses
under this statute.

14. An Act for the Better Regulating the Practice of Law (1797) 37 Geo. III c.13
Canadian Bar Review 26 (1948) 437; C.H.A. Armstrong Q.C., The Honourable Society
of Osgoode Hall (Toronto, 1952); W.R. Riddell, The Legal Profession of Upper Canada
in its Early Periods (Toronto, 1916).

15. R.E. Saunders, "Christopher Robinson", in the Dictionary of Canadian Biography
(DCB) (Toronto, 1979) 4, 677.


17. Wendy Cameron, "Peter Robinson", DCB, 7, 752.


19. The Robinson Papers, Ontario Archives (OA) Ms 4 contain much correspondence
between Robinson and Judge Gowan of Barrie and John Lally, Treasurer of Simcoe
County regarding Robinson's lands there. See Letter, Jas. Gowan, Barrie to John
Beverley Robinson reporting on lands in Nottawasaga, Collingwood and St. Vincent
Townships, March 23, 1847; Letter, James R. Gowan, Barrie to John Beverley
Robinson concerning lands around Georgian Bay; Letter, John Lally, Barrie, to Chief
Justice John Beverley Robinson sending a schedule of lands in the County of Simcoe
owned by Robinson, Nov. 16, 1850; Memorandum of Lots in York, Ontario and Peel,
belonging to John Beverley Robinson, on which taxes were paid up to 1853, with
treasurer's receipt, April 1, 1853, Reel 5. Letter, Edward Lally to Sir John Beverley
Robinson concerning the taxes on his lands in Simcoe County, August 3, 1858, Reel
6.

20. See David Gagan, Hopeful Travellers: Families, Land, and Social Change in Mid-
Victorian Peel County, Canada West. (Toronto, 1981). Gagan, who has written several
accounts of social aspects in early Peel County, noted there were hundreds of acres
here owned by speculators. He notes that Robinson was a principal absentee
landowner with 1000 acres. See also his article "Property and 'Interest': Some Preliminary Evidence of Land Speculation by the 'Family Compact' in Upper Canada, 1820-1840", *Ontario History* 70 (1978) 63.


22. Later in life Robinson acknowledged: "To you I am indebted for whatever success has attended, or may attend since thro' life, and that to you I owe ultimately which is of more importance than any occasion of office, those moral principles which your precepts and example inculcated, and which, I trust will secure to me the continuance of your friendship." Letter, Robinson to Strachan, 1850 PAC Robinson Papers, MG 24 B9 Reel M-203. See also, J.L.H. Henderson, *John Strachan 1778-1867* (Toronto, 1969); David Flint, *John Strachan Pastor and Politician* (Toronto, 1971); A.N. Bethune, *Memoir of the Right Reverend John Strachan, D.D., LL.D., First Bishop of Toronto* (Toronto, 1870); George W. Spragge (ed.) *The John Strachan Letter Book: 1812-1834* (Toronto, 1946).


30. D'Arcy Boulton, Sketch of His Majesty's Province of Upper Canada (London, 1805). This work is also highly laudatory of the British government. See also John Lownsbrough, "D'Arcy Boulton", DCB 7, 78.


34. When a clerk, Robinson noted an 1809 contest for the speakership between early reformers and Tories to be "nearly equally divided between Blackguards and Gentlemen." Quoted in Gerald Craig, Upper Canada: The Formative Years, 1784-1841 (Toronto, 1963) 64.

35. Patrick Brode, "Anne Powell" DCB, 7, 603.


46. Quoted in Riddell, supra note 44 at 109.


48. An Act to Afford Relief to Barristers and Attorneys, and to Provide for the Admission of Law Students Within this Province, and for Other Purposes Therein Mentioned. (1815) 55 Geo. III c.3 (U.C.)

49. Boulton in fact never made it to Britain. His ship was captured by French privateers and he spent the duration of the war in France.

50. C.W. Robinson, supra note 33 at 57. See also William H. Angus, "Judicial Selection in Canada—The Historical Perspective", Canadian Legal Studies 1 (1967) 220.

51. Letter Gordon Drummond to Lt. Gen. Sir George Murray, K.G.C.B. May 1, 1815 (Copy) OA Robinson Papers MS 4 Reel 3; In a letter dated 26 August 1815 from Strachan to The Hon. Chief Justice Sewell of Lower Canada, Strachan advised Sewell that Robinson was in England to study law, and asked Sewell if he would introduce him "to some of your professional Friends in London." in George W. Spragge (ed.) The John Strachan Letter Book: 1812-1834 (Toronto, 1946) 4.

52. Robinson's diary on this trip to England, including travels to the Continent, is in PAC Robinson Papers MG 24 B9 Reel M-204.

53. Robinson visited Westminster and was appalled, said his son Charles, by lawyers walking through court with a "lady on each arm," their rude treatment of witnesses and making caricatures of judges. C.W. Robinson, supra note 33 at 81-97.


57. Read, supra, note 2 at 126.


61. Ibid., 59.


63. D.B. Read, supra note 2 at 126.

64. Ibid., 126.

65. An Act to Incorporate Sundry Persons Under the Style and Title of The President, Directors and Company of the Bank of Upper Canada (1819), 59 Geo. III c. 24 (U.C.)

66. Brode, supra note 60 at 66.

67. An Act to Establish an Uniform Currency Throughout the Province (1821) 2 Geo. IV c.13 (U.C.)
68. An Act to Provide for Constructing a Navigable Canal Between Burlington Bay and Lake Ontario (1823) 4 Geo. IV c. 8 (U.C.); An Act to Incorporate Certain Persons Therein Mentioned under the Style and Title of "The Welland Canal Company" (1824) 4 Geo. IV c. 17 (U.C.). Note as well Robinson was a director of this company. See Hugh G.J. Aitken The Welland Canal Company: A Study in Canadian Enterprise (Cambridge, Massachusetts, 1954); An Act to Incorporate Certain Persons Therein Mentioned, under the Style and Title of "Desjardins Canal Company" (1826) 7 Geo. IV c. 18 (U.C.).

69. An Act to Confer upon His Majesty Certain Powers and Authorities, Necessary to the Making, Maintaining, and Using the Canal Intended to be Completed under His Majesty's Direction, for Connecting the Waters of Lake Ontario with the River Ottawa, and for other Purposes Therein Mentioned. (1827) 8 Geo. IV c.1 (U.C.).

70. An Act to Incorporate Certain Persons Therein Mentioned, under the Style and Title of "The Cataraqui Bridge Company" (1827) 8 Geo. IV c. 12 (U.C.); An Act to Provide for the Construction of a Harbor at the Mouth of Kettle Creek, in the London District (1827) 8 Geo. IV c. 18 (U.C.); An Act to Incorporate Certain Persons, for the Purpose of Making a Turnpike Road in the County of Halton, under the name of the "Dundas and Waterloo Turnpike Company" (1829) 10 Geo. IV c. 15 (U.C.).

71. See E.A.Cruikshank, "Public Life and Services of Robert Nichol, a Member of the Legislative Assembly and Quartermaster-General of the Militia of Upper Canada", OHSPR 19 (1922) 6.

72. An Act to Authorize the Governor, Lieutenant Governor or Person Administering the Government of this Province, to Borrow a sum of Money upon the Securities therein mentioned, to be applied in Discharging the Arrearages due to Militia Pensioners (1821) 2 Geo. IV c. 5 (U.C.).

73. Brode, supra note 60 at 66.

74. Read, supra note 2 at 136.


77. Dorothy E.T.Long, "The Elusive Mr. Ellice", CHR 23 (1942), 42.


80. Ibid., 5-10, 21-25. See generally Alexandre Gerin-Lajoie, "Introduction de la Coutume de Paris au Canada", La Revue du Barreau de la Province de Quebec, 1 (1941) 61.


86. This was established in Upper Canada with John White the first attorney general. See W.R. Riddell, "The First Attorney-General of Upper Canada-John White (1792-1800)", OHSPR, 23 (1926) 413; W.R. Riddell, "Thomas Scott, the Second Attorney-General of Upper Canada" OHSPR 20 (1923) 126; W.R. Riddell, "Robert Isaac Dey Gray-The First Solicitor-General of Upper Canada 1797-1804", The Canadian Law Times 41 (1921) 424, 508. See also list of deeds and other papers in the office of J.B. Robinson, October 27, 1827 OA Robinson Papers Ms 4 reel 4.
87. See Letter of Attorney, John Bellamy of John Street, Bedford Row, County of Middlesex, England, to John B. Robinson, to act as his agent in the collection of the debt of Hugh Richardson, York, U.C. January 13, 1827 OA Robinson Papers, Ms 4 reel 4; Copy of Letter London April 29, 1844 from the Duke of Wellington to Robinson on how to dispose of his shares in the Welland Canal Company, OA Robinson Papers Ms 4 reel 5.


91. Metcalf in Careless, ibid., 36-37; in CHR ibid., 301-311.


95. For Chief Justice Campbell, see R.J.Morgan, Robert L.Fraser, "Sir William Campbell" DCB, 7 113; A concise memoir of the principal events of the life of Sir
William Campbell, Knight, January 3, 1834, OA Robinson Papers Ms 4 reel 4. Note as well Campbell's home still stands in Toronto at Queen and University Avenue.


100. This was the famous Jarvis-Ridout duel. See W.R. Riddell, The Duel in Upper Canada (no place of publication or date) 8-10; and W.R. Riddell, "The Solicitor-General Tried for Murder" in Riddell, Upper Canada Sketches: Incidents in the Early Times of the Province (Toronto, 1922), 24.


102. Read, supra note 2 at 116-117.

103. C.W. Robinson, Life of Sir John Beverley Robinson (Toronto, 1904) 199.

104. In correspondence with Lieutenant-Governor Arthur, Robinson wrote that he had declined to be Chief Justice in 1825 because of his youth, his large family and busy law practice, "and felt no disposition to lay myself on the shelf at so early a period of life, with an income too little for my wants,--and much less than I was then making." This changed by 1829, and especially when the salary of Chief Justice had been raised considerably. Then said Robinson, "I was somewhat nearer the period when one may be supposed to prefer the quiet of the Bench to the bustle of the Bar and the sacrifice to be made in the exchange would now be less considerable." Robinson to Arthur, September 28, 1841, in Charles R. Sanderson (ed) The Arthur Papers vol.3, 461.
CHAPTER TWO

"THE CHIEF ORNAMENT OF THE COURT:"

ROBINSON AND THE COURT OF QUEEN'S BENCH

In the year 1790, the wisdom of the British government was eminently evinced in dividing the province of Quebec into two separate governments, and granting to each a constitution on the most liberal, as well as disinterested principles; a constitution perhaps unequalled in the historic page for freedom, and a just regard to the happiness of the subject, with all the advantages enjoyed by the British colonies in America, previous to the revolution, and with many that are additional.

-D'Arcy Boulton, Sketch of His Majesty's Province of Upper Canada (1805)

Introduction

The era between Robinson's appointment as Chief Justice in 1829 until his later death in 1863 witnessed many political changes. Mackenzie's Rebellion of 1837 was significant. So too was the reform party's movement for responsible government. The union of Upper Canada with Lower Canada in 1841 was another major milestone. The clergy reserves were at last secularized. New proposals even for a union of all the British North American colonies were put forward to debate. Yet, while Robinson had left the rigours of political life for the "quiet" of the bench, he still remained an
influential figure in many of these events. Although he was forced to resign as President of the Executive Council in 1831, as a consequence of reform party demands for an independent judiciary,\(^2\) he continued on for another twelve years as Speaker of the Legislative Council until the union of Upper and Lower Canada. This position allowed him many years of persuasive influence on the Lieutenant-Governor and other prominent government administrators. As well, even though becoming Chief Justice, Robinson continued to speak out publicly on some matters of political concern to him—his opposition to the union of Upper and Lower Canada being the most prominent example.\(^3\)

While many historians specializing in this colonial era noticed Robinson’s continued influence on political life in the province almost to Confederation, the influence he had as Chief Justice on the economy, law, and the province’s judiciary has been noticed in far less detail. The recent work by Risk, Howes, George and Sworden, and Hibbits has made some progress in this area. But as Douglas McCalla and Peter George have pointed out, a great deal of work remains to be done, particularly on the institutions which helped shape the legal framework within which business was conducted.\(^4\)

Probably the most important legal institution affecting businessmen and providing law for them was the Court of Queen’s Bench itself. This court too has attracted little attention from Canadian legal and economic
historians, and one should not view Robinson in isolation from it. Indeed
this court had its own unique history and was affected by, and affected
Robinson as Chief Justice in return. Furthermore, it had a different
political relationship to the colonial government than either the Supreme or
State Courts had with their respective governments in America. Upper
Canada in comparison lacked a written constitution, a Bill of Rights, and a
federal form of government among other things. As will be shown, the
English common law and Parliamentary tradition of the Court of Queen's
Bench deferring to the supremacy of the colonial legislature was
entrenched, and this had significant implications in the province's judicial
life. As a result there were many relevant differences between this court
and those in America.

The important judicial role that Robinson assumed once he became
Chief Justice of this court in 1829 also requires review before his legal
decisions are discussed. Would being colonial-born make a difference? What
would the prestigious position of Chief Justice of the Court of Queen's
Bench allow Robinson to do about the type of law in the province, and what
were its restrictions? An examination of some of these questions may
provide additional background to selected areas of Robinson's jurisprudence
and help fill a long-overlooked gap in this area of the province's history.
The Early History of the Court of Queen’s Bench
for Upper Canada

The beginnings of this court can be traced in part to the arrival of many loyalists to Canada after the American Revolution. Indeed one might even go back as far as the English conquest of Quebec in 1760 to see a continuous demand for English laws in Canada, and the arrival of loyalists into the area that became Upper Canada only intensified this. After the English conquest of Quebec, Governor Murray set up the first English courts in Canada. However, English sensitivity to French civil law traditions like the Coutume de Paris and code marchand meant that English common law (as opposed to English criminal law) was never entirely introduced, and a kind of uneasy compromise existed in Quebec with both French and English civil law systems being allowed to operate together. But this legal duality was far from satisfactory to the English traders who followed Wolfe into Quebec and who soon began to take over the French fur trade. As a result, they petitioned the English government for more familiar English commercial laws; but the seigneurs especially resisted, and at this early stage in time the English merchants were unsuccessful. The English government instead, trying to reach a more effectual provision for the administration of this French province, brought out the Quebec Act in 1774 which tried to overcome the duality of laws by stating,
among other things, that "in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same."¹⁰

This decision by the English government to continue in existence French laws on property and civil rights did not result in clarifying anything legally, as English merchants in Quebec continued to grapple with the unfamiliarity and uncertainties of the meaning of this Act's directive. Hilda Neatby, whose early study The Administration of Justice Under the Quebec Act¹¹ is still unsurpassed, wrote that both English and French laws continued to operate in "a sort of noisy chaos." Justice she noted, was usually slow, uncertain, complicated and corrupt, and Englishmen appointed to hear legal disputes were confused themselves on the meaning and content of the laws of Canada. "Lawyers, having spent their energies in maintaining the justice of their clients claims," said Neatby, "were accustomed while waiting for the verdict to amuse themselves by tossing up coins or drawing straws on the outcome of the case." Even the learned Chief Justice Smith who came to Quebec with Governor Carleton in 1786 could not restore confidence among English businessmen in the bench.¹² Neatby's conclusions summarize this situation:¹³

Briefly, then, it may be said that the defects of the administration of justice during the period of the Quebec Act resulted from the application of an unknown law, by untrained men, in a factious community where primitive affairs were mingled with the intricate transactions of merchants acting as a link between the vast fur-trading wilderness to the west and
the commercial center of the world across the ocean. The inevitable result was that the rule of law often broke under the strain and was replaced by the arbitrary authority of individuals.

After the American Revolution in 1776, a large influx of American loyalists settled in Quebec, and this other group of loyal Englishmen soon pressured the English government for English-only laws. Of particular concern for this background review were those American loyalists who settled in the area up-river from Quebec. These loyalists were also subject to the laws of Canada as this area was still then part of Quebec; and subject also to quasi-military laws dispensed by their former commanding officers in the Revolution. "There are traditions of Magistrates' Courts being held, and of justice, rough and ready," recalled Judge Pringle in an early work on this area, "somewhat in the drumhead court-martial style, being dealt out to offenders; of a culprit's feet being fastened between two rails of the justice's fence, in default of the legitimate engine of punishment, 'the stocks'; or of a party convicted and sentenced to hard labour, working out his punishment by hoeing the convicting magistrate's corn or potatoes." However, as these new loyalists settled in, and the problems of re-establishing new homes receded, they put even more pressure than English traders had done on the British administration at Quebec for English-only laws. In particular Sir John Johnson, who was put in charge of settling loyalists in this area, went to England in 1785 to present a petition from himself and other former loyalist military officers complaining against
unfamiliar French laws and wanting English land tenure and English laws only for this newly settled region.\textsuperscript{17}

In response Governor Carleton of Quebec, now Lord Dorchester, sent William Dummer Powell (then probably the leading commercial lawyer in Montreal) and John Collins, the deputy surveyor-general, to investigate these up-river loyalist complaints first hand. Their report dated August 18, 1787 recommended new administrative districts for this area and improved court facilities to avoid the considerable delays, expense and inconvenience of residents there having to travel to court at Montreal. Shortly afterwards on July 24, 1788 Dorchester created four new districts for this area called Lunenburg, Mecklenburg, Nassau and Hesse. Each had a new Court of Common Pleas with unlimited civil, but no criminal jurisdiction. Each district's court also was to have three new judges who were to be appointed from leading men in the region, and it is significant to note that Richard Cartwright, a prominent Kingston loyalist, was appointed a judge of the Mecklenburg (Midland) District. As will be shown, he became the most vocal opponent of the later Court of King's Bench which abolished these courts in 1794.

However important loyalist demands were in getting these new courts established, it should also be noted that a particular demand over the staffing and jurisdiction of these new courts came from the merchants at Detroit. This town was then the leading commercial centre, especially in
fur trade, for the whole region west of Montreal. The area had been settled since the time of the earlier French regime, and it was the one area west of Montreal already accustomed to the laws of Canada. Moreover, in order partly to overcome the delays and expense of having to litigate disputes at Montreal, most Detroit merchants had entered into a General Arbitration Bond to help settle commercial disputes amongst themselves. Riddell, who examined this area in some important (but often overlooked) early works, noted that most of the merchants there, including two of the proposed new judges, signed a petition to Dorchester dated September 12, 1788 specifically requesting only a legally trained judge for their new district of Hesse. They wanted someone who had "professional abilities and character" who was not himself a businessman so as to avoid any potential bias and conflict of interest. They urged Dorchester to ensure this by giving such person "a salary depending neither on perquisites nor the voluntary contribution of individuals." Dorchester was accordingly careful to note their particular demands, and he appointed a committee of his Executive Council to study them. When the committee agreed that this new post should be filled by a lawyer, "possessing knowledge of the custom of Merchants," and that an increased salary was warranted, Dorchester secured William Dummer Powell to be the sole judge for this Detroit (Hesse) District. In getting a lawyer who was bilingual, a member of the Quebec and English bars, and who had probably the largest commercial practice
then in Quebec, the Detroit merchant’s demands were answered.20

The four district Courts of Common Pleas were the first civil courts operating in what would soon become Upper Canada. Staffed except for the District of Hesse by laymen, what is important to note was that these judges first administered not English but only the laws of Canada in a very decentralized way. Naturally this was done with more skill by Powell than all the others who had no legal training. William Canniff, an early observer noted, for example, that shopkeeper Judge Richard Duncan of the District of Lunenburgh "dealt out law, dry goods and groceries alternately."21 Accordingly, many of these laymen judges conferred with Dorchester's Executive Committee on how they should make themselves familiar with the laws of Canada, but, said Neatby, "they were left to find their own way out of the difficulty."22 Indeed, it may have been that no person in the province knew authoritatively just what comprised the "laws of Canada."

Yet some of these judges felt they were developing Canadian law to suit litigants in their courts. Riddell, who reviewed the operation of Powell’s court in some detail, noted that Powell was enjoying great success at Detroit, and because French civil law also included equitable jurisdiction, it was in some respects in advance of the English common law in meeting a litigant's needs.23 Wylie, who examined the Midland District court of Richard Cartwright for this same period, noted that Cartwright was trying to rely on his long experience in North America and his mercantile
background in New York state to provide fast, simplified, low cost and efficient justice. His main goal, said Wylie, was to try to simplify legal technicalities and tailor his judgements to the needs of those in his District.24 As a result these early judges—a combination of shopkeepers, loyalists and one learned lawyer—had an initial chance to develop “the laws of Canada” for this area. They had the opportunity to make such laws more North American in orientation, for there was yet no official obligation that any laws be English only. However, this nascent possibility proved short-lived.

Loyalist demands for an alteration of the Quebec Act still continued, especially for English-only land tenure laws in this new area where a majority of loyalists were establishing farms. And, despite receiving a localized court system, the English merchants trading along the St. Lawrence kept up their own demands for a declaration that only the commercial laws of England should govern matters of trade and commerce. As Neatby has shown, both loyalists and English merchants were committed enough to English laws that they enlisted the help of powerful English MPs to further their demands. They had their concerns raised in discussions leading up to the Constitution Act of 1791 which separated Upper Canada from Quebec.25 Lord Grenville, secretary of state for the colonies, wrote to Dorchester on the wisdom of including a section on the applicability of English commercial laws in this proposed new act.
Dorchester's reply omitted any recommendations on this point. According to E.A. Cruikshank, this had been due to the "complicated and professional nature of the subject." As a result no English commercial law clauses were included in this act, as Grenville explained to Dorchester:

After much enquiry and consideration, and after receiving the opinions of professional men upon the subject, it does not appear to me to be practicable to introduce into the proposed bill any considerable or material articles of Commercial Law... and the insertion of those of smaller importance would not be desirable. Unless therefore I should receive any further suggestions on that subject from Your Lordship, it is my present intention not to add to the bill any clause of that nature, although I cannot but confess that I have taken this resolution with considerable reluctance, and apprehension of the possible effect it may have on the British Commerce.

A. L. Burt also focused on Grenville's reply in his early study of this period, and noted that Grenville felt that complaints which merchants had over the uncertainty of Canadian laws "might be immediately removed by the local legislature." Grenville himself noted that any uncertainty "must ultimately be done away by an uniform and consistent administration of justice" which the English government would secure after the act had passed. As events were to show, both these important issues received quick attention in the new province of Upper Canada when the Constitution Act was passed in 1791.

The Constitution Act did more than just establish the new Province of Upper Canada. The English government also had definite plans for this new province as a result of its recent experience in the American
Revolution. It wanted to keep the new administration strong, to establish an aristocratic element, and to retain close political control through the Lieutenant-Governor.\textsuperscript{30} Not all these plans were to prove possible, but nevertheless as some Canadian constitutional writers noted, the "avowed object" of this act was clearly "to assimilate the constitution of Canada to that of Great Britain, as nearly as the differences arising from the manners of the people, and from the present situation of the Province would admit."\textsuperscript{31} This avowed object had no greater supporter than Simcoe, the new province's first Lieutenant-Governor. Simcoe, said Mealing in his account of Simcoe's hopes and "enthusiasms," thought of himself as coming to Upper Canada more to found than to govern the new province, for what he proposed in the first instance was "meticulous, instantaneous and uncompromising assimilation to British models."\textsuperscript{32} This was stated by Simcoe himself in an often quoted passage in a dispatch sent by him to the Duke of Portland:\textsuperscript{33}

> It appears proper that I should state to your Grace, that incontrovertibly, on my receiving the administration of the Government of this Province, under the Canada Act, I did conceive, and stated to His Majesty's Ministers, that I considered the Act as the Magna Charta of the Colony, and that it was my duty to render the Province as nearly as may be "a perfect Image and Transcript of the British Government and Constitution".

Given his plans, Simcoe's first step when he assumed his new duties was to replace the laws of Canada administered by the Courts of Common Pleas and to introduce instead needed English laws to compliment and
strengthen his political agenda. It should also be noted that the Constitution Act did not abolish the laws of Canada, but allowed them to remain in force until they were varied or repealed by the new Upper Canadian legislature. Simcoe did so at the first session of the new Provincial Parliament which met at Newark in 1792. There, said W.P.M. Kennedy, "all available pomp of circumstance was pressed into service, and in a clearing in the Canadian woods an attempt was made to reproduce with solemn seriousness and due decorum the glory of Westminster." At this "new" Westminster, the Upper Canadian legislature's very first actions were to repeal section 33 of the Quebec Act relating to the carry-over of the laws of Canada and to proclaim a Reception Act which stated that in future "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same." Not surprisingly, the second act passed by this new legislature established that judicial institution so beloved by Englishmen—trials by jury. So the laws of Canada, with all the implications of how they might have been otherwise developed, were officially ended in Upper Canada.

However, just as important as English law to Simcoe was having a new court to administer it, for the Courts of Common Pleas with their laymen judges were not sufficient for his purposes. The court system too had to be assimilated to one that was like England's. Fortunately Simcoe had a capable ally in William Osgoode, who was appointed the first Chief
Justice of the province over the already long-serving Powell. The appointment probably reflected Osgoode’s close connections with the Colonial Office.\textsuperscript{38} The result of their joint collaboration was the extremely important Judicature or King’s Bench Act of 1794, which abolished the Courts of Common Pleas.\textsuperscript{39} By this act a new Supreme Court of Judicature for the whole province was established, and called "his Majesty’s court of King’s Bench, for the Province of Upper Canada." It would be "a court of record of original jurisdiction, and shall possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction." The one limit to its jurisdiction was that it was a court of law only and had no equity powers. It was to be headed by a Chief Justice and two puisne (associate) judges, and it was to sit "in the city, town, or place where the governor or lieutenant governor shall usually reside." Appeal provisions were also provided.\textsuperscript{40} It was intended to resemble an English court as closely as possible; its practice as well as the quantum of costs allowed were to be governed "by the established practice of the Court of King’s Bench in England."\textsuperscript{41} Moreover, after a short period of time, the legislature passed another act providing for the publication of its decisions and the appointment of the first law reporter.\textsuperscript{42}

Simcoe and Osgoode’s deliberate attempt to restructure the province’s early court system continued with Osgoode’s desire to get only trained lawyers to practice before this court.\textsuperscript{43} Because there were then only two--
Walter Roe in Hesse\textsuperscript{44} and the province's first attorney-general John White\textsuperscript{45}--the legislature passed another act authorizing the Lieutenant-Governor to license sixteen practitioners in the law.\textsuperscript{46} It was these men (Robinson's father among them) who met at Newark in 1797 to form themselves into a society "to be called the Law Society of Upper Canada" which, said the preamble to this act, was formed "as well for the establishing of order amongst themselves, as for the purpose of securing to the province and the profession a learned and honourable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said province."\textsuperscript{47}

However, the imposition of this grand visionary scheme of a British court system to Upper Canada did not come about without some protest, notably from Judge Richard Cartwright of the Court of Common Pleas at Kingston. Cartwright felt that these first Courts of Common Pleas were operating with few delays and little expense, and were well adapted to the nature of the country. Instead, he feared, Simcoe and Osgoode were upsetting this by introducing "the intricate practice of Westminster Hall" to a new country where such could not apply. Cartwright's speech against the Judicature Bill in the Legislative Council is pertinent here:\textsuperscript{48}

There is no maxim more incontestable in politics than that a government should be formed for a country, and not a country strained and distorted for the accommodation of a preconceived or speculative scheme of government...In England, where the system now proposed to us has long obtained the "laws delay" has been frequently and pathetically declaimed on as one of the
great evils of life; yet, in point of size, England is hardly equal
to the smallest of our districts; the territory is compact and
crowded with an immense population; the intercourse from the
centre to the extremities, and from one part to the other, is
easy and expeditious; professional men sworn in every quarter;
and the City of London, the great emporium of the commercial
world, where the Court is fixed, furnishes of itself at least
nineteen-twentieths of all the suits in the kingdom. But let us
look around and see if there be in our situation the smallest
analogy to this. With a thin population scattered over an
immense extent of country, interrupted by inland seas and
large tracts of uninhabited lands of from two to three hundred
miles in extent, without communication or intercourse for at
least five months in the year, with but a single lawyer within
the compass of more than seven hundred miles, and where
every part is equally barren of intricate or important subjects
of litigation; -- is there any similarity in the circumstances of
the two countries? Can the same judicial arrangements be at
all applicable to both? To persist in the attempts to make
them so will literally be bringing the mountain to Mahomet.

But this opposition, though important, was not apparently
representative of most others. Riddell, who examined this early controversy
closely, noted that the elected assembly passed the Judicature Bill
unanimously, largely influenced by much dissatisfaction with many of the
legal decisions made by these judges in the Court of Common Pleas,
decisions which might not have been given had there been trained judges on
the bench.49 One cannot forget the particular wishes of the Detroit mer-
chants to get only a trained lawyer as a judge for their court to avoid a
merchant judge’s potential bias and to restore faith in the law as a means of
resolving commercial disputes. It was significant that no words against the
Jadicature Bill came from the commercial merchants of Hesse District who
had Powell as their judge. It was also significant that Powell was not
chosen to be the first Chief Justice. Powell by all accounts had been doing a
fine job administering Canadian laws for these merchants, yet was passed
over to head this new court in favour of the Englishman Osgoode.\textsuperscript{50} It is
again only open to speculation how far Powell might still have integrated
Canadian laws for commerce had he been appointed the first Chief Justice.

Instead Osgoode was followed in succession by other English Chief
Justices Elmsley, Allcock and Scott,\textsuperscript{51} who all reinforced the English
nature of this court before Powell became Chief Justice in 1816. By the
time Robinson became Chief Justice of this Court in 1829, the earlier
Courts of Common Pleas, with their ability to administer Canadian laws
well, according to Cartwright, were distant memories. By loyalty, habit,
convenience and above all constitutional obligation, the laws of England
were then applied in Upper Canada by strong minded English Chief
Justices unfamiliar with, and less amenable to a North American
orientation for Canadian law than what Cartwright and Powell had earlier
expressed or worked for. However, as events would show, and as discussed
in the next section, no single act could clarify the situation and establish
English law in all regards. But the fact remained nevertheless that the
erlier laws of Canada had been formally replaced by only English laws.
This was the background and circumstances into which Robinson stepped
when he became Chief Justice in 1829. They were once again different from
anything then faced by American judges.
Queen's Bench In Comparison To American Courts

While the Court of Queen's Bench was established as a new superior court of justice for Upper Canada, it should also be seen in a broader imperial context, and specifically in comparison to American courts. The main object of the Constitution Act establishing Upper Canada was to create a colony like that of England. This was carried out with great enthusiasm by Simcoe, especially in his joint efforts with Osgoode to create this court. As a result this court contrasted in many ways with American courts.

Essentially the Court of Queen's Bench for Upper Canada was established by Simcoe within the context of the English colonial legislative system. J.E. Read in an excellent article in the Canadian Bar Review attempted to show many of the characteristics of, and important limitations on the Lieutenant-Governor, the colonial legislature and the colonial courts all of which operated overseas as part of this system. Of most importance was the central role of the English Crown to all, as Read explained.
The Crown was an integral part of the system and, fundamentally, the provinces were limited monarchies. The governors acted in the name of, on behalf of and subject to the instructions of the Crown. The Crown was a part of the legislature, notwithstanding the formal difference in the style of enactment between the prerogative and the statutory constitutions. The Crown was the fountain of justice; the courts were royal courts; process issued in the King’s name; and, in the field of public law, proceedings were in the name of the Crown. Revenues were the Crown’s revenues; royalties enured to the Crown; the Crown was the owner of the public domain and lord paramount of all lands; and private titles to land derived from Crown grants.

The Lieutenant-Governor had power under the Constitution Act to assent to all colonial bills before they became law as well as power to withhold royal assent or reserve a bill for the King’s pleasure. In addition, he carried with him important Crown and Colonial Office instructions respecting colonial bills, especially those involving banking. He was initially responsible to the Colonial Office for many government interests like the Indian department, immigration, ordnance, customs and excise, the post office and the militia, which were still controlled by Britain until some time before Confederation.

For the legislature, noted Read, there were also many limitations on its jurisdiction as part of this colonial system, including the important existence of a substantial body of imperial statute law that still applied to Upper Canada, including trade and navigation, shipping, admiralty jurisdiction, privy council appeals, copyright, bankruptcy, naturalization, and military and naval discipline.
As for the province’s courts, the English colonial system established that judges were appointed by the English Crown, were expected to show deference and respect to the King’s Lieutenant-Governor residing in the colony and, most importantly, to defer to the supremacy of Parliament. In effect they were dispensing not their own, but the King’s justice. They could not act independently of the Crown, and by Upper Canada’s very first act, they were bound to administer only English law in all matters of controversy relative to property and civil rights. The Court of King’s Bench for Upper Canada was really more a British court in Canada than a Canadian court alone.

In contrast the American Revolution had disrupted and ended all of these constitutional obligations and imperial “restraints.” The Revolution changed many things in America, but the nature of how law changed was most germane as a point of comparison. Among such changes was the exodus from that country to Canada of many “tory” lawyers and judges (for example Powell and Smith) whose place and influence were filled by patriot lawyers like John Adams, Patrick Henry, Charles Carroll, Alexander Hamilton, James Kent and James Otis. Many of these lawyers played key roles in events leading up to the Revolution and, as influential leaders of the bar after the Revolution, helped move America away from its former legal and political ties with Britain.

Perhaps the most important legal relationship that ended was the
former unitary conception of the common law. After the Revolution, there
was no longer a legal obligation for American lawyers and judges to follow
English precedents. Indeed how the English common law became
"Americanized" when Americans had the freedom to chose which parts of
the English common law they favoured and which could not apply is an
important theme in American legal history.60

Horwitz is perhaps the most significant writer on this topic, whose
book The Transformation of American Law, 1780-1860 discussed earlier
argued that an "instrumental" policy developed by American judges
favouring economic growth changed the eighteenth-century pre-commercial,
anti-developmental features of the English common law of pre-
Revolutionary America.61 As a large part of this "Americanization"
process, American legal scholarship met that country's need for a new,
American approach to law. Chancellor James Kent of New York (1763-
1847), for example, published his extremely influential Commentaries on
American Law (1826-37) which, said Howe, soon "displaced Blackstone in
the lawyer's saddle-bag."62 Kent believed that in the formative period
following political independence from Britain a new American law had come
into being. Though Kent still had great affinity for the English common
law, said Raack in an article on Kent's legal thought, Kent provided a new
purpose for American law.63
He was convinced that law was indispensable to the new American republic. Kent had high praise for the republican institutions that had been established by America's Independence and new Constitution. Therefore, Kent believed one of the most important tasks for the law was to help "preserve the best fruits" of the American Revolution — those exemplary political and legal structures for which so much had been sacrificed.

In comparison the absence of a Revolution and any experience with these many implications and developments meant that Upper Canada continued under the English colonial legislative system and retained for the most part the important unitary conception of the English common law. As well there developed no significant local legal scholarship advocating a Canadian orientation for law in Upper Canada. Although the Law Society of Upper Canada controlled a lawyer's preparation for the bar, there were few Canadian legal works to study. Indeed for the whole of British North America perhaps the only substantial pre-Confederation Canadian legal work was Beamish Murdoch's *An Epitome of the Laws of Nova Scotia* (1832-33), which was inspired by and written in the fashion of Kent's *Commentaries*, but apparently without any real study or effect outside of Nova Scotia.

In America the Revolution also ended the former monarchial system of government, and the country became a Republic. A federal form of government was established along with a written constitution, a Supreme Court for the whole country, and a Bill of Rights proclaimed in 1791. Among the many legal implications arising from these developments was
the pivotal fact that the supreme law in America became the constitution, and not, as under the English colonial system still in Upper Canada, the will of Parliament. This new federal form of government had other legal aspects that emerged in time, including the very important early idea that the Supreme Court in America had the power of judicial review over acts of Congress and could declare a law unconstitutional. This power was established by Chief Justice Marshall (1755-1835) in the seminal 1803 case of Marbury v. Madison. America's federal form of government meant also that State Courts and the Federal Supreme Court experienced developing jurisdictional problems over their respective state and national economic interests, which was reflected in seminal cases like McCulloch v. Maryland (1819) on the taxing power of the federal government over a state government, and Gibbons v. Ogden (1824) on the scope of federal power to regulate economic affairs for the whole country.

In comparison Upper Canada had no supreme written constitution and no Bill of Rights, and the Court of Queen's Bench never developed judicial review to the point where it ever declared any act of the Upper Canadian legislature unconstitutional. Instead as in England the constitutional system was one where Parliament was supreme. It was also part of the English legal system for this court to defer to the legislature on matters of public policy. Finally the absence of a federal form of government in Upper Canada meant that national versus state conflicts
over economic powers were never featured in any legal decisions made by the Court of Queen's Bench. In fact this court under Robinson never apparently had the occasion (or the inclination) to refer to any decision by a court in another British American colony. As a result the Court of Queen's Bench for Upper Canada was never as constitutionally-minded or as nationalistic as the Supreme Court in America. In contrast it was insular. As will be shown in later chapters, under Robinson the Court of Queen's Bench accepted without challenge the supremacy of acts of Parliament. There was no need or constitutional basis for this court to make similar major legal decisions like those taken by the Supreme Court in America.

Robinson's Judicial Character as Chief Justice

Robinson became Chief Justice of the Court of Queen's Bench in 1823 largely because he was the most ambitious, influential, well-connected and prominent colonial tory lawyer in the province. The Osgoode Hall portrait of Robinson, as analyzed by John Honsberger, is filled with symbollic references to the history of the colony, the man, and the significance of the Crown to both. As Honsberger reveals:79

In the portrait, the first Chief Justice of the Province to be born in Canada is sitting at a small table. He is wearing a gown trimmed in ermine. The table cloth is purple. It is embroidered with the royal coat-of-arms. Behind the table is a large stone column with a wide red banner looped or tied at the top and dramatically flung across the background as if blown
by strong winds. The ermine, the purple cloth and royal arms are obvious symbols of the British connection and tradition. The wind blown banner in the background could represent the turbulent forces within, and the encroaching republicanism from without, the new colony. As if in the eye of this storm, the Chief Justice sits calmly and serenely at his table.

Robinson's judicial trappings are in fact revealing clues to Robinson's judicial character, especially when Honsberger also noted that he could gather no evidence that any other judge in Upper Canada before or since ever wore anything like Robinson's black silk gown and ermine. Riddell also pointed out that all the judges of Queen's Bench hitherto had used the prosaic legal title of "Your Honour," but once Robinson became Chief Justice in 1829 he introduced the significant English form of court address to judges as "Your Lordship" or "My Lord." So by personal appearances and appellation Robinson when Chief Justice wanted to look and feel august and powerful, and perhaps as close to an English judge as Upper Canadian legal sensibilities would permit.

What, then, were some other possible implications about Robinson, a loyalist and former tory lawyer, as Chief Justice at this critical juncture in time? By noting his early background and by making some assumptions on the basis of his portrait, it would appear that Robinson took his judicial responsibilities very seriously. The English legal connections were very much in evidence. The office of Chief Justice allowed him the discretion and the power to adopt and use these important judicial trappings. A lawyer who appeared before him would certainly recognize the majesty of the
Crown’s royal justice prominently displayed. At the very least a lawyer would realize that the Court of Queen’s Bench with Robinson presiding over it was very much an English Court and not an American one. Perhaps only a trial lawyer who must present their case before a judge can appreciate the aura and ambience of such a courtroom situation. Robinson tried to set up his court to be dignified and convey royal bearings. Seen in this perspective, his actual courtroom where law would be argued was important to trial lawyers when they were preparing and presenting their cases. Trial lawyers know their judge. In such a setting, they no doubt knew that arguing American cases would not greatly assist their case. A knowledge of both Robinson and his court meant that arguing English law was the better alternative.

Conclusion

The Court of Queen’s Bench for Upper Canada was different than either the Supreme or State Courts in America. It was created and set up by Simcoe and Osgoode, the first Chief Justice, as part of their deliberate attempt to align the constitution of Upper Canada as closely as possible with that of England. This court replaced the earlier Courts of Common Pleas that first administered the laws of Canada by a supreme court for the whole Province, whose duty and practice it was to decide all matters of
controversy relative to property and civil rights according to the laws of England. This court operated not under a federal form of government, but in the context of British colonialism. Moreover, it accepted the supremacy of Parliament.

This English-type court had in Robinson its first colonial Chief Justice who, nevertheless, attempted to be quite English. As Chief Justice, the office also allowed Robinson an unfettered opportunity to adopt court dress and nomenclature that was as close to England as Upper Canadian legal sensibilities would permit. In essence under Robinson the court was oriented towards English laws. The former tory lawyer from York, who styled himself "His Lordship Robinson" would guarantee it.
ENDNOTES

1. W. Notman, Fennings Taylor, Portraits of British Americans vol.3, (Montreal, 1865) 22.

2. See An Act to Render the Judges of the Court of King's Bench in this Province Independent of the Crown (1834) 4 Will. IV c.2 (U.C.). This was a change from judges holding office "during pleasure" to "good behaviour".


6. Alexandre Gérin-Lajoie, "Introduction de la Coutume de Paris au Canada", La Revue du Barreau de la Province de Quebec, 1 (1341) 61.


10. An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America (1774) 14 Geo. III c. 83 s.8 (Imp). (emphasis mine). The "laws of Canada" as this phrase will be used reflected a very unsettled body of laws, and no one administering justice under the Quebec Act could really tell what law would be applied to any case. In general, the "laws of Canada" collectively were the coutume de Paris, code marchand, French royal edicts applicable to New France, provincial enactments of the French and English regimes, what judges conceived to be the custom of the country, and what they thought was fair in the circumstances of each particular case. Neatby's work *post* remains the best account of how these laws worked in the province.


16. J.F. Pringle, *Lunenburgh or The Old Eastern District Its Settlement and Early Progress* (Cornwall, 1890) 47.
17. A.L. Burt, _The Old Province of Quebec_ (Minneapolis, 1933) 385.


20. Powell also brought with him as his Court clerk Walter Roe, the only other lawyer west of Montreal. See D.R. Farrell, "Walter Roe" DCB, 5, 721.


22. Neatby, supra note 11 at 290. See also R.V. Rogers, "The First Commission of the Peace for the District of Mecklenburg", OHSPR 8 (1907) 49.

23. Riddell, _Life of Powell_, supra note 18 at 74. See also Riddell, "The First Judge at Detroit and His Court: An Address by The Honourable William Renwick Riddell for the 25th Annual Meeting of the Michigan State Bar Association", Lansing, Michigan, June 10, 11 (no date); "The Prerogative Court in Upper Canada", OHSPR 23 (1926) 397.


27. Quoted in Cruikshank, ibid., 241.

28. Burt, supra note 17 at 491.


34. Constitution Act, *supra* note 29, s.33.


36. An Act to Repeal Certain Parts of an Act in the Fourteenth Year of This Majesty's Reign Entitled, "An Act Making More Effectual Provision for the Government of the Province of Quebec in North America" and to Introduce the English Law as the Rule of Decision in All Matters of Controversy, Relative to Property and Civil Rights (1792) 32 Geo. III c. 1 s.3 (U.C.).


39. An Act to Establish a Superior Court of Civil and Criminal Jurisdiction and to Regulate the Court of Appeal (1794) 34 Geo. III c.2 (U.C.).

40. Ibid., s. 33: "That the governor, lieutenant governor, or person administering the government of this province, or the chief justice of the province, together with any two or more members of the executive council of the province, shall compose a court of appeals, for hearing and determining all appeals from such judgments or sentences as may lawfully be brought before them." For accounts on this court see W.R. Riddell, "How The King's Bench Came to Toronto", *The Canadian Law Times* 40 (1920) 280; W.R. Riddell, "Privy Council Appeals in Early Canada," *CHR* 11 (1921) 33. For the establish of Courts generally in the Province see W.R. Riddell, "The Early Courts of The Province", *The Canadian Law Times* 35 (1915) 878, 964: Thomas Mulvey, "The
41. "In future the practice of this court, as well as the quantum of costs to be allowed in all procedures, are to be governed (where not otherwise provided for) by the established practice of the Court of King’s Bench in England." See "General Rules Published This Term" (1823) 1 Taylor U.C.K.B. (O.S.) 67. Judge Sherwood gave this some further elaboration in Ross et al. v. Balfour et al. (1839) 5 U.C.Q.B. (O.S.) 683 at 684: "The meaning of this rule, in our opinion, is that the general practice of this court shall be regulated by the practice of the Court of King’s Bench in England, unless otherwise regulated by acts of the legislature, or by rules of this court." See also here D’Arcy Boulton, Sketch of His Majesty’s Province of Upper Canada (London, 1805); W.R. Riddell, "The First and Futile Attempt to Create a King’s Counsel in Upper Canada", Canadian Law Times, 40 (1920) 92.

42. An Act Providing for the Publication of Reports of the Decisions of His Majesty’s Court of King’s Bench in this Province (1823) 4 Geo. IV c.3. See also W.R. Riddell, The First Law Reporter in Upper Canada and His Reports, An Address before the Canadian Bar Association at Toronto, June 1916. This first reporter was Thomas Taylor, an English barrister. Taylor’s Reports cover the period 1824-1828. He was succeeded by Draper 1829-1831 and he in turn was succeeded significantly by Robinson’s two lawyer sons Lukin and Christopher.


46. An Act to Authorize the Governor or Lieutenant Governor to License Practitioners in the Law (1794) 34 Geo. III c. 4 (U.C.). Six more were licenced in 1803: An Act to Authorize the Governor, Lieutenant Governor, or Person Administering the Government of This Province to License Practitioners in the Law (1803) 43 Geo. III c. 3 (U.C.). These lawyers were appointed “from their probity, education and condition in life” and earned the sobriquet of “Heaven-born.”


49. Riddell, Michigan Under British Rule, supra note 18 at 359, 473.

50. Technically by the time this Court was created Osgoode had gone to Lower Canada to be Chief Justice there. Riddell notes supra note 38 at 353 that when Osgoode left, Simcoe wanted him replaced "by an English lawyer" which was Elmsley who, noted Firth, wanted no tampering with English law, procedures and precedents when he became Chief Justice in 1796. See Edith G. Firth, "John Elmsley" DCB, 5, 304.


53. Read, ibid., 636.

54. Constitution Act, supra note 29 s.30.

55. The Colonial Office was worried over the security and stability of Colonial banks and wanted the Lieutenant-Governor to ensure important safeguards were included. See Adam Shortt, "The History of Canadian Currency, Banking and Exchange", Journal of the Canadian Bankers' Association, 7 (1900) 209, 311 and 8 (1900-1901) 1, 145, 227, 305; R. Craig McIvor, Canadian Monetary, Banking and Fiscal Development (Toronto, 1958) 48; Paul Knapland, "James Stephen on Canadian Banking Laws, 1821-46", CHR 31 (1950) 177.


57. Read, *supra* note 52 at 636.


65. D.C. Harvey, "Nova Scotia's Blackstone", *Canadian Bar Review* 11 (1933) 339. Harvey notes at 341: "What interest was shown in this notable undertaking by Upper and Lower Canada I have been unable to discover."

67. 1 Cranch 137 (U.S. 1803). This was the first Supreme Court decision to hold an act of Congress unconstitutional.

68. 4 Wheat. 316 (U.S. 1819). There Maryland taxed notes issued by the second Bank of America established by Congress. Chief Justice Marshall held it invalid as a tax on a federal instrumentality. Marshall was concerned that the national government have the supreme power and the means necessary to govern effectively.

69. 9 Wheat 1 (U.S. 1824) There a grant of monopoly given by the State of New York to operate steamboats between that state and New Jersey was held invalid as conflicting with the Congressional power to regulate commerce. This again established a broad scope of Congressional power to regulate economic affairs in the country. For other cases, see Benjamin M. Ziegler (ed.) The Supreme Court and American Economic Life (Evanston, Illinois, 1962).


71. W.R. Riddell, "His Honour' the Lieutenant-Governor and 'His Lordship' the Justice", OHSPR, 22 (1925) 255.
CHAPTER THREE

DEFINING THE LIMITS OF ENGLISH LAW IN UPPER CANADA

As a student and afterwards when called to the bar, I was struck with the danger and the many difficulties of applying the laws of an old country with its matured habits and conditions to a newly settled country unlike England in very many particulars, and without a population composed of men of various lands, and through judicial construction, had to some extent mitigated the difficulties and the evils consequent upon our general adoption of English law. A vast number of insurmountable difficulties cropped up and, even in my student days, I tried my 'prentice hand with communications to the public press pointing them out and suggesting amendments, and continued to work in that line after I was called to the bar and also private communications to leading public men but the motto in those days was stare super antiquias.

- Sir James Gowan, Judge, District of Simcoe to William Lecky, November 14, 1902 Now and Then 11 (1981) 18

Introduction

The overseas extension of English laws to British North America before Confederation was a matter of central concern to judges in every British colony. Each colony had its own particular historical beginning and as a result a distinctive relationship to English laws existed in each domain. This ranged from the position taken by the maritime colonies of Nova
Scotia, Prince Edward Island, New Brunswick and Newfoundland that English laws had been introduced through the commissions and instructions given by the Crown and Colonial Office to their royal governors, in Quebec by the English right of conquest, and in Rupert's Land by the Hudson's Bay Company charter and by Imperial Act.\(^1\) Indeed, the matter of clarification of the full effects and status of English laws applicable to Canada only ended with the later Colonial Laws Validity Act of 1865\(^2\) and the much later Statute of Westminster in 1931.\(^3\)

In comparison to these colonies, Upper Canada was unique in having a local Reception Act relative to English law.\(^4\) By that act the effective date for the reception of English law into Upper Canada was October 15, 1792. This significant statute was accorded priority to rank as the first Upper Canadian act and was introduced as the underlying basis of Simcoe's attempts to bring this province as close to England as possible.

Yet Upper Canada never was nor could ever be completely English; many more Americans than Englishmen and loyalists made up its growing population, and arguably it was also the closest English colony affected by American influences. The American Revolution, constitution, developing legal scholarship, federal form of government and Supreme Court helped forge a new common law in America, but these forces and institutions were never directly influential in Upper Canada. The colony's judiciary beginning with Chief Justice Osgoode were determined not to have the colony's laws
succumb to American influences. Certainly the Reception Act helped, as well as the fact that most of the other Chief Justices before Robinson were English barristers or had been called to the English bar, a fact which inculcated in them a decidedly English orientation. However by the time Robinson became Chief Justice in 1829 the formative enthusiasms of the government administrators to make the province like England were not as immediate and the aftermath of the patriotic anti-American War of 1812 had receded. In other words, the passage of time, coupled with the rise of an American-oriented reform party in the province, meant that many American influences were becoming increasingly evident, raising the question whether they would be strong enough to influence the province's law.

Robinson too was aware of the fact that Upper Canada shared with America some common new world experiences that had never existed in England, or, if they had, only in its far distant past, and that some knowledge of American law could be useful. Nevertheless such American law could not be cited by lawyers as a binding precedent in "his" Court of Queen's Bench. The reasons for this harkened back to his influential loyalist upbringing, his desire to reach the top of the colony's judicial hierarchy and to his important trans-Atlantic legal perspective, which together gave him a commitment in favour of English common law in the province. This attitude is admittedly hard to reconstruct, having to do with
his psychological nature, but Robinson it seems, never felt comfortable discussing or using American law. More the contrary, he was perhaps the most conscious of all the province's judges of the duty imposed by the colony's Reception Act to adhere to the principles of the English common law as he understood them. Doing so had been one of the factors leading to his success in becoming Chief Justice and Robinson may have felt there was nothing personal for him to gain by using American laws. Indeed, the more Robinson used English laws, the more prestige it gave him when he became Chief Justice. His knighthood and baronetcy were proof of this. It was not to his advantage to neglect English law and favour American. Moreover, English law was always something that Robinson favoured as a bulwark against growing American Republicanism, and this helped preserve, for his liking, a British flavour to the colony.

In comparison, the Upper Canadian legislature was more influenced by American laws and could, unlike Robinson, selectively adopt American laws and acts which it considered helpful. Many legislative acts were in fact borrowed copies of similar ones passed first in America, and mostly from the bordering state of New York. What this meant in a broader context was the existence of an important "particularity" in the province. This particularity consisted of a legislature, able to utilize American laws as needed, and the province's judiciary, bound on the one hand by the English colonial legislative system to defer to the legislature, but on the other by the
Reception Act to apply only English laws in its decisions. It was also relative to which legal body was best able to develop Upper Canadian laws to meet the growing needs of the province, whether the legislature or the Court of Queen's Bench. In turn this particularity was germane to those in the reform party. The reformers wanted the province to develop in one way, while the tories wanted it developed in another way. Being cognizant of the fact that the Court of Queen's Bench under Robinson was a tory stronghold, the reformers used the legislature when they were in power to foster their political agenda.

The focus of this chapter is Robinson's relationship to what we have labelled a "particularity," and on how he tried to develop Upper Canadian law in conjunction with it. As Chief Justice, Robinson was bound to uphold the supremacy of acts of the legislature, but this did not deny him some important influence, as the reformers realized, in determining the English character of the province's laws when the Reception Act applied. His judicial interpretations on the reception of English law into Upper Canada were perhaps Robinson's greatest opportunity to promote English law as he understood it, mainly because of the fact that his legal purview was almost unlimited. The province's Reception Act was never amended or superseded by any other related act.

Indeed, the reception of English law is the other part of this particularity in the province. It should be stressed that English law was not
a neat code, but something filled with peculiarities and problems. It was something that was changing, complicated, and offering contradictory precedents. Much of it was a muddle evolved out of an ancient and complex society whose complexity was not readily apparent in the province until it came time to see whether its legal concepts were compatible to new world situations. In short the body of English law was problematic, and colonial circumstances made rejection of it sometimes necessary.

Accordingly this chapter will examine Robinson's approach to some of the relevant issues which this Reception Act raised. Did the introduction of the laws of England to the province include all of English law, or just some? What was meant by the term "property and civil rights" in the Reception Act? Could a judge in Upper Canada even make new law? These were only a few of the main interpretive issues involving the Reception Act that were Robinson's preserve as Chief Justice. His judicial responses to them helped define in some subtle ways the shape of law in the province. His perspective on the complexity of English laws also helped direct Robinson to assume an important role towards establishing consistent and predictable legal decisions for businessmen relying on his court. Consequently, Robinson influenced the way business was conducted in the province.
The Applicability of English Law to Upper Canada

Given the fact that Upper Canada had a local Reception Act specifically passed for introducing English law into the province, judges of the Court of Queen's Bench had the important responsibility to interpret, in usual judicial fashion, problems and consequences arising from the applicability of this act. The first judicial elaboration on this reception issue was that of Judge Sherwood in two of his early cases. In Forsyth and Richardson v. Hall (1830)\(^6\) he was concerned, among other things, with interpreting the phrase "beyond the seas" contained in Upper Canada's Statute of Limitations with reference to how that term was defined by English law. During the course of his comparative examination of English law on point he gave his view on the general meaning of this Reception Act. Said Sherwood:\(^7\)

The first exertion of legislative power in this province wholly abolished the code of French laws and introduced those of England in their stead, not by enacting such parts of them separately as appeared best adapted to the local circumstances and political state of the province from time to time as occasion required, but by adopting them in a mass, subject to a few exceptions only. The consequence of this sweeping measure was to range in our statute books many English acts whose phraseology strongly marks their insular extraction, and if construed according to the strict letter would produce effects never contemplated by the adopters.

In the second case, he was concerned with deciding whether an old English apprenticeship act dating back to the reign of Elizabeth I applied to Upper
Canada, because a litigant's counsel was using it to support his case.

Again, during the course of his decision he noted: 8

By the first statute which was passed in our provincial parliament, when in session on the 15th of October 1792, it was declared, "that in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same." The intention and meaning of the legislature undoubtedly was that resort should be had to such of the laws of England as are applicable to the state of society in a British colony, which is very different in many respects from the state of society in England. Courts of justice are to decide on the applicability of the law to any particular case, when doubts arise on the subject; and, upon the same principle, they must decide upon the adaptability of any particular law of England to this province, in a general point of view.

After porcusing this particular English apprenticeship act at counsel's behest Sherwood felt that this early statute was only "a local act" and was, he said, "probably adapted to the state of society in England three hundred years ago, but it is not now, and never was adapted to the population of a colony, and was never in force here."

Robinson provided further elaboration on the general meaning of this Reception Act on which, as he said in Anderson v. Todd (1845-6), 9 "rests our right to the enjoyment of the laws of England" when he took to the bench. Indeed, in that particular case where the validity of devises of real and personal property in trust for "the Canadian Wesleyan New Connexion Body of Missionaries in Africa" was an issue, Robinson took a rare judicial step by giving the bar a long recitation of Canadian constitutional history so it might understand his approach to this act. Confessing that "a wide field
is opened for disputes by the term civil rights" contained in the Reception Act, Robinson used also the English legal writer Blackstone to further review the introduction of English law into Canada. He tried to establish an understanding for the bar that it was the Reception Act's overall intent to introduce not just English laws, but more importantly the principles that English laws were based upon as the rule of decision for settling disputes relative to property and civil rights. Moreover, as he mentioned also in another such case, the Reception Act introduced not just the principles of the common law of England, "but also the statute law, with the exceptions specified in the act, and with other exceptions, though not specified, of such laws as are clearly not applicable to the state of things existing in the colony." In other words, what he tried to convey to the bar was that it understand the subtle and important distinction that English common law and its important principles would be recognized by the Court of Queen's Bench as in force in Upper Canada unless both were found to be inapplicable; whereas the only English statutes that would be recognized would be those which were found to be obviously applicable to the colony.

Robinson provided the bar with more judicial guidance by reiterating that it should also be aware of the reasoning behind the common law principles of English law. In his decision in The King v. Justices of Newcastle (1830), for example, Robinson held that the Justices of the Peace for that District could not apply District funds to build a new court
house and gaol without the authority conferred by an act of the provincial legislature. Public moneys, said Robinson, were essentially involved, and he noted, "the general principle of the common law of England, which requires the authority of the legislature for erecting gaols, is in force here I have no doubt. It is a principle involving important consequences to the administration of justice in civil and criminal cases."\textsuperscript{13} "In every case of the kind, the question, whether a statute has force here or not," said Robinson to the bar in another such case, "must rest on reasons and principles to be considered in reference to such statute in particular."\textsuperscript{14}

Perhaps the best occasions offering Robinson the opportunity to instruct the bar on this reception question were those cases involving political principles affecting the rights and privileges of English subjects. Robinson could usually be assured that respected counsel would be retained and of heightened public awareness in such cases. And Robinson was no stranger to other important cases where public figures and politicians were involved, and where his views would be widely reported.\textsuperscript{15} For example, he decided cases concerning the political principle of whether an action for libel could lie against a British subject's privileged right to petition the Lieutenant-Governor,\textsuperscript{16} whether or not a sitting judge was exempt from imprisonment for debt,\textsuperscript{17} and whether an action for libel could lie against a solicitor's letter raising an important matter of public concern that was sent to a municipality.\textsuperscript{18}
Probably Robinson's most important and noteworthy case was that of *McNab v. Bidwell and Baldwin* (1830). That case involved a partisan political battle between McNab, a prominent High Tory, and the reformers Bidwell and Baldwin over whether the provincial House of Assembly had power to adjudge and commit a member for contempt; and if it did have that power, whether the person cited could bring actions of trespass and false imprisonment against the Speaker and other members. The case had much public interest for, as Robinson intimated in his judgment, the question of whether the Court of King's Bench might exercise some judicial control over the House increased partisan political sensitivities. Yet Robinson carefully avoided this sensitive legal and political issue in his judgment, but he brought to the bar's attention that reference must again be had to the principles involved in this courtroom drama over parliamentary privilege. As he noted, his decision could have been easier for him to make if such contempt powers had been given specifically to the assembly. And more was involved, he suggested, than just arguing by analogy from the power of the English Parliament to cite for contempt. As Robinson articulated, "the question is to be taken up on broader grounds:"

I do not say that because the British House of Commons has the power, therefore under our adoption of the law of England the same power is vested in the House of Assembly as a body perfectly similar; but I consider the question in this way: - the fact that the House of Commons assumes and exercises the right shews that it is felt to be necessary in order to enable
them to discharge their duties. I think the same necessity exists here, and from principle the same consequence in my opinion must follow such a necessity. It is plain that if upon this record this action could be sustained against one of these defendants no one could venture hereafter to fill the situation of Speaker, and if it could be sustained against the other certainly there would be an end of independent exercise of the will and judgement upon constitutional questions by the members of that body.

Other cases also provided Robinson with the opportunity to stress to the bar that it understand the principles behind an English act to see whether it applied to Upper Canada. Some of these cases involved landholding. The granting of land was another central concern for Robinson's court, for so many people (including Robinson) were involved either in land speculation or in establishing farms in the province.\textsuperscript{21} In such a milieu many problems arose, not just because speculation was rife, but also because of absentee owners, faulty records, squatters and bad surveys. One particular problem was the occasional practice of buying and selling disputed titles. An old English act dating back to the time of Henry VIII prohibited this practice in England, but there was nothing similar to this act in Upper Canada. Accordingly when this reception issue came before Robinson in \textit{Beaslev Qui Tam v.Cahill} (1845-6),\textsuperscript{22} he held that although this English statute was very old, it still applied to Upper Canada because of its principles. Buying up pretended or disputed titles, said Robinson, was "unfavourable to the peace of society" and in his view "prejudicial to the administration of justice."\textsuperscript{23}
Similarly in Regina v. Mercer (1859) the issue was not related to land, but instead to the buying and selling of a government office. The defendant had entered into a secret agreement to have the sheriff of Norfolk County resign, and he paid him an annuity in return for his office. Again there was a heightened sense of public awareness over this political case when John A. Macdonald, then attorney-general, acted for the prosecution. Once more the issue at bar was whether an old English act, dating back to the time of Edward VI that forbade the buying and selling of government offices in England, was in force also in Upper Canada. Defense counsel for Mercer argued that the issue did not fit under the rubric of "property and civil rights" as per the Reception Act. But Robinson felt his argument was not fully presented, and instead said that the English act was adopted in Upper Canada both as part of the criminal law of England that had also been introduced into the province and because, he stated, "the statute was made for restraining a great public evil, equally necessary and proper to be restrained in all countries, more especially as regards these offices which are connected with the administration of justice."

Even though Robinson took pains to alert the bar to understand how underlying principles behind an English act might explain its applicability to Upper Canada, his judicial tutoring was never entirely successful simply because lawyers, being lawyers, continued to use any English act if they perceived it helped their client’s case. Several examples are representative.
In the significant commercial case of Bank of Upper Canada v. Donald Bethune (1835), the defendant, a prominent and aggressive Kingston steamship entrepreneur, was indebted under promissory notes to the very important and government supported Bank of Upper Canada. Robinson was himself a former director of this bank, his close friend William Allan was its first President, and the bank was of the utmost importance to the province in financing much commercial activity. Bethune's counsel argued that the English Bubble Act of 1721, passed as a result of the collapse in England of the South Sea Company, was applicable to Upper Canada by another British statute. The Bank of Upper Canada, he argued, was an illegal association incapable of operating.

Robinson, in a very forceful judgment, said "the question is one of general importance," and that the British statute had since been repealed, and that clearly the Bank of Upper Canada did not come within the scope of the Bubble Act. Said Robinson:

The Bubble Acts are levelled at voluntary associations of individuals under false pretences of public good, presuming, according to their own devices, to draw in unwary persons; against dangerous and mischievous projects of persons presuming to act as if they were corporate bodies, pretending to create transferable stock without any legal authority, by act of parliament or by charter from the crown; and if there are any other projects of a like nature, tending manifestly to the prejudice, grievance, etc. of the public, the statutes are intended likewise to suppress them. Now the President, Directors and Company of the Bank of Upper Canada, if we must assume that there is but one such body, made use of no false pretenses -- they presumed nothing, pretended nothing, contrived nothing -- they drew in no one -- they did not proceed
according to their own devices -- they did not pretend merely to act as if they were a body corporate. They are a body corporate, created by a public act, to which the King has assented. This act was equivalent to an act of the British parliament, because the colonial legislature have power to pass it under the 31 Geo. 111 ch.31. The inducement to the statute was the public good moving the legislature. The association was contrived and the foundation was laid by the legislature.

In another case, Leith v. Willis (1836) defense counsel tried to convince Robinson that a British statute on selling "spirituous liquors" applied to Upper Canada; but Robinson noted that "The statute has 32 clauses, of which not one with any reason can be considered as applicable to this province." In Shea v. Choot (1845-6) where the applicability of another Elizabethan statute on Master-Servant was again an issue, Robinson said the act never applied and that "indeed it cannot possibly admit of doubt that its provisions are inapplicable to any state of things that ever existed here." Perhaps the most extreme example was the case of Stark v. Ford (1854) where the plaintiff, convicted for larceny by the mayor of Hamilton, sitting in the Recorder's Court for that city, challenged the authority of the verdict and the court itself by using the old English statute of Charles I which had abolished the Court of Star Chamber! Arguing that the Recorder's Court was similar, the plaintiff wanted also to impose the £500 penalty the act provided on this mayor-judge for doing something contrary to law. However this was, said Robinson, "not a very hopeful" attempt and succinctly remarked that "it is rather wonderful that any one
could seriously imagine that the first experiment of the kind could be successfully made, not in England itself, but in a colony.\textsuperscript{37}

As a result of these reception cases Robinson had the opportunity to adopt some important principles of English common law to the province. The Reception Act’s applicability was his court’s preserve and it allowed him much power and discretion over which English acts and laws were the best, as he perceived them, for the province. He did not think that all English laws were applicable to Upper Canada. He picked out what he wanted. In these particular instances, it was important for him to adopt and stress fundamental principles of English common law applicable to the province. As Chief Justice, this was part of his subtle but real power to influence the shape of law in the colony.

\textbf{Whither New Laws for the Province}

Whereas Simcoe and Osgoode had both tried in their respective areas to make Upper Canada the very "image and transcript" of England, the province was nevertheless a new land different in many respects from England.\textsuperscript{38} Upper Canada was only recently settled, with many immigrants still trying to re-establish themselves there, whereas England had been settled for centuries. The hopes of Simcoe for introducing many cherished English aristocratic features, such as an Established Church or landed


gentry, were proving impossible to set up. There was a large American population within its borders (unlike England) and a reform party that sometimes supported a competing American orientation to political life that challenged the views and efforts of the "Family Compact" to rule the province. As much as Robinson tried to uphold an English-only orientation for the province’s laws, there were some local new world situations raising legal issues that had no exact parallel—or precedent—from England. However some things bear noting. It should be stressed that any new world “frontier” situations were few in number. In such cases, Robinson always stated this fact for the record, and often tried to base his decision, if an exact English precedent was unavailable, on what he consistently perceived to be the important principles involved.39 Many questions, as might be expected, occurred over landholding. Robinson however, decided a small number of such cases in comparison to other legal areas, and possibly decided more of them when sitting as a member ex officio of the second Heir and Devisee Commission set up by the government specifically to deal with the colony’s many land problems.40 But another reason for Robinson’s limited judicial involvement was perhaps because many landholding remedies desired by litigants like an injunction or the specific performance of a contract were equitable and not legal ones. These remedies were only given in the new Court of Chancery finally set up in 1837.41 As well many litigants may have gone instead to the Court of Common Pleas (a court with
the same concurrent jurisdiction as Queen's Bench) that was set up in
1849. As well, even if Robinson did sometimes use American cases for
those few times when he could not discover an exact English precedent it
was never indiscriminate, and was usually preceded with caveats for the
record as to why he had acted in a particular way. Finally, one must be
cognizant of the idea suggested earlier, that the legislature was a more
active legal body than Robinson's court was in adopting American laws to
Canada. In short, for developing new laws in the province, Robinson's
conservative influence was important, but in making laws he was not alone.

Many new world situations raising legal issues different from those in
England concerned land. Landgranting probably ranked first as the most
important government concern in Upper Canada. Ever since the first
loyalists settled up-river from Quebec in what later became the province in
1791, everyone coming into the colony tried to get as much land as possible.
In this respect, said R.G. Riddell, "no policy in regard to land was ever
formulated by the British government in the period between 1783 and
1825." The practical result was, he noted, that it placed all land in the
colony virtually at the unfettered disposal of the Lieutenant-Governor. As
such the "Family Compact" was in the best position to benefit. Historians
like L.A. Johnson and David Gagan, who examined the early social history
relating to Peel County, revealed how much land these influential loyalists,
administrators, military officials and judges received in the areas east and
west of York, the provincial capital. If there was one thing that united these men it was, said Gagan, "the profits to be made from the vacant lands in York's frontier of economic development." 44 Johnson noted that by 1800 before most other immigrants arrived, 68.4% of land available in Pickering, 60% in Scarborough and 53.7% in York had already been alienated to these people. 45 Gagan also noted their holding similar amounts in Peel County to the west, with Robinson in particular owning one thousand acres there. 46 Furthermore, Robinson, along with his two brothers Peter and William, owned much land further north of York in Simcoe County. Indeed membership in this group had its privileges.

But also, said Johnson, "in the long run, Government land policy in Upper Canada was concerned with much more than mere distribution of lands. In effect, it became the medium through which policy makers attempted to shape not only the manner in which land was acquired and held, but also the very nature of society itself." 47 From Robinson's background and judicial perspective as a member of this Family Compact this meant the enshrinement in those landholding cases he decided of conservative English property law principles for the protection of private capital and property rights.

Hibbitts in his article on Robinson also noted that Robinson's interpretation of real property law cases reflected this conservative perspective, that "protection of private property rights was generally regard-
ed as central to continued colonial prosperity and political stability" so that
"procedurally, property rights were to be protected by adhering to English
precedent in a way that made property owners secure in their estates."48
When Robinson decided such real property cases his perspective was
perhaps based on his inclination, like others of his class, to protect the
privileged position that holding large amounts of land made possible in the
colony. Robinson and other leading members of the Family Compact were
not generally (or arguably) a commercial or industrial elite, but more a
landholding elite. Landholding made them powerful; Robinson as part of
this elite was careful to defend from the bench the privileges that land
granted them.

This perspective may help in understanding Robinson's cases in this
area. Several can be noted. First, perhaps Robinson aimed at judging real
property law to fix its principles and to make them known to the bar. With
so many people wanting so much land so quickly, many problems arose
involving improper surveys, poor legal descriptions, alienation of the clergy
reserves, squatters and Indian land rights, as well as the widespread
problems caused by speculation and absentee ownership. The government
tried to help in many ways49 and so too did Robinson who stressed in Doe
Fitzgerald et al. v. Finn (1844-45)50 that "I know no points in which it is
more important in this country, that the law should be consistently
administered, and its principles fixed and known, than in those which
regard the rights derived under grants of land from the crown."51 This
directive from the bench certainly would benefit those holding much land
feel more secure in their estates.

Second, the English law of waste, which prohibited a tenant from
making any fundamental alteration to the condition of land, was another
conservative principle of English property law that Robinson favoured in his
main case on this point.52 In this dispute a tenant for life had cut timber
on the owner's land, justifying this in order to clear the land. Robinson
rejected this defence because, he said, it changed "the character of the
estate wholly or in part." This would have helped protect private property,
especially for those holding land for speculation. These owners would not
appreciate tenants who used their own discretion to change land that was
not their own. Also of note was the fact that Robinson’s decision contrasted
with how this concept was being decided in some parts of America.

American judges in the industrializing Northeast were holding that the idea
of waste was inapplicable to America as a restraint on the improvement of
land. Many reasons, of course, existed why the two courts should hold
differently here. Perhaps it was because Robinson’s wealth came from a
landholding base and because the advent of industrialization was slower to
emerge in Upper Canada that Robinson favoured, and not like American
judges, overturned this settled English concept. Robinson saw the law of
waste never as a restraint on land, but a support for someone holding it.
Third, the English property law concept of dower, which allowed a widow one third of the lands which her deceased husband owned during his lifetime, was another conservative principle of property law Robinson adopted (again in contrast to its erosion under American judges) in the several cases he decided in this area. Perhaps the reason may have been personal. Robinson’s father died when Robinson was only seven and the family newly-arrived at York. Though unfortunate, Robinson’s widowed mother had important dower rights to her deceased husband’s large tracts in the colony. She was not long in being courted and wed. Thus when in a dower case counsel argued against the concept of dower still being applicable to Upper Canada, Robinson held that this was a policy matter that his court would not entertain, and he responded in a subtle way that gave a small clue to his personal feeling on the matter.\footnote{53}

It may be urged as a reason why we should not admit such evidence of marriage as was given in this case, that dower is an inconvenient incumbrance embarrassing to purchasers, and interfering with that free convertibility of real estate, which the circumstances of a new country require, and that it is, therefore, contrary to sound policy to facilitate in any manner its recovery; but reasons of that kind can have no weight with us on one side or the other, the only question being, whether the law justifies us in excluding the evidence .... and whatever may be thought of the justice or policy of allowing the widow’s dower out of lands which her husband had parted with, there can be no claim more just in itself and more in accordance with humane feeling, than that the mother of a family should be entitled to some support out of the estate left by her husband, and should not be wholly at the mercy of her offspring.
A fourth principle of English property law that Robinson had occasion to adopt was breach of covenant for good title. Specifically the question involved the proper measure of damages to award to someone who had bought land from a vendor, had improved it, and then had found his title defective. Robinson upheld the settled English property law principle that such a plaintiff could recover only his purchase price and interest, but nothing for his improvements. Once again it would be of comfort and assurance to those like Robinson who sold much land, that even if holders of much land found they had a defective title, the repercussions of a disputed sale would not be financially crippling for them.

Finally, another aspect of landholding might reflect his judicial bias in favour of gentlemen of property and large landholders. Because many of these people were speculators who were also absentee landowners, unknowing squatters occupying their outlying lands could create serious potential legal problems, especially if they were on the land for over twenty years. In these circumstances, squatters could claim a prescriptive or vested right to the land through the legal defence of adverse possession. In such instances Robinson tried to decide as forcefully as possible against this. He opposed the principle and the morality of affording wilful trespassers a pre-emption right by reason of what he felt was their illegal occupation of the land.
Although Robinson never decided a large number of real property cases, those in which he did seemed to reflect a bias towards protecting a large landholder's private property rights. This bias was in contrast to the development of real property law in America, or more particularly in New England where, as Horwitz argued, businessmen wanted free alienation of land to encourage economic development. Robinson's decisions may have had some correlation to a lack of, or at least slower development of industrialization in Upper Canada, where the province's ruling elite still derived the main source of their wealth primarily from land. If this is so, it raises the caution that Robinson did not think like American judges. Robinson, contrary to what Hibbits suggested, could well overlook American law—even if he found it convenient. His inclination to favour and promote English over American property law principles reflected the subtle but important power he had to interpret the reception of English law.

Yet in deciding some real property cases there were occasions when Robinson, like his brother judges in other British North American colonies, sometimes sought assistance from American precedents. However, these American cases were never looked upon as binding legal authority and were never looked at indiscriminately. They were used when these judges realized that similar types of cases occurred in America involving new circumstances for which it was difficult to find any direct precedent or parallel in an older settled country like England. The case of Doe dem Hill
v. Gander (1844-45)\textsuperscript{57} over the issue of adverse possession between owners of adjoining lots provides a good example of Robinson’s position about this.\textsuperscript{58}

I do not cite these dicta as decisions [i.e. American cases] binding upon us, but it is satisfactory to find these expositions of the principle in question by eminent judges, though of a foreign country, founded as we know they are in their judgement, upon the common law of England, and bearing upon questions which, from the nature of things, are much less frequently called up in England that in America, and upon which therefore it is not always easy to find adjudications in our books.

When he examined such American cases Robinson always stated for the record, as he did for example in the case above, that he was not at liberty to use them as binding precedents. Furthermore such instances in which he looked at American cases were never as numerous as this case might lead one to believe. Among Robinson’s cases in this thesis, there appears to have been only a limited number of times when Robinson turned to American sources.\textsuperscript{59} And, even if Robinson considered them persuasive, he noted that he still had to decide a case in his court according "to the decisions of English Courts of Justice"\textsuperscript{60} and if these were lacking he would "adhere to the judgements already given in this court upon the point."\textsuperscript{61}

Perhaps one effect of Robinson’s entrenchment of the principle of the limited applicability of American cases to Upper Canada was disclosed in a lecture by Oliver Mowat entitled "Observations on the Use and Value of American Reports in Reference to Canadian Jurisprudence" given to
Canadian law students in 1857. American reports, said Mowat in his lecture, were useful, but he noted that "an indiscriminate resort to American decisions is extremely undesirable, and will occasion much profitless labor, both to those who indulge in it, and to the Judges before whom such reports may be cited." As a learned counsel with much courtroom experience Mowat advised Canadian law students never to cite American reports on a point of practice; never to cite an American case until one had ascertained that English and Canadian authorities left in doubt the point to be examined; never to cite an American case unless first having read it; and finally to determine if there were any conflicting American cases on point. Moreover Mowat also noted that any American influences may have been more in the legislative than the judicial field. "Our Legislature has also adopted and sometimes with little alteration many valuable American statutes," said Mowat, "instances of such statutes are those abolishing the old law of primogeniture, regulating chattel mortgages, limited partnerships and the sale of Infant's estates by the Court of Chancery--and others." One should always remain cognizant of the fact that the Upper Canadian legislature may have been more "continentalist" than Robinson ever was.

Robinson was not the only Upper Canadian judge developing "new" law for the province, because the legislature established the Court of Chancery in 1837 and the concurrent Court of Common Pleas in 1849. The
Chancery Court began with the imperial appointment of Robert Symson Jameson, but there were many problems with this court, and it became apparent that Jameson faced counsel more competent than himself. Under the impetus of leading equity counsel and reformer William Hume Blake a re-organized Court of Chancery was established in 1849 with Blake appointed to it. Blake henceforth had his own distinguished judicial career, and his Court of Equity decided matters and granted legal remedies different from Robinson's Court of Queen's Bench. But there were occasional instances when the same issue (e.g., land squatters and the law of waste) showed a different sensitivity to the matter. Indeed it was Blake, a leading reformer, who was not a loyalist and who was the first law professor at King's College, who seemed more inclined than Robinson to make new law for some new world Canadian circumstances. This was particularly noticeable in his cases involving real property law. "In this country, where real estate is much more the subject of traffic than in England," said Blake in one of his first cases, "and where it is, consequently, applied in a much greater variety of ways, and changes hands much more frequently, it is peculiarly important that its transfer should be freed, as far as possible, from the technicalities of the common law system." Nowhere it seemed, was this more forcefully put by him than in the case of O'Keefe v. Taylor.

We are not dealing with the casual transfer of real property in a fully occupied and thoroughly cultivated country, but we are about to define the position of multitudes by whom a country is being peopled — by whose enterprise and labour the wastes of
this vast province are rendered subservient to the purposes of
civilization with unexampled rapidity. Under such
circumstances, where the habit of holding land for considerable
periods under contracts similar to the present, so extensively
prevails, and where the value of the soil so materially depends
upon the labour of those who occupy under that sort of tenure,
it is of vital importance, not only to the attainment of justice in
particular cases but to the general welfare, that, in this court,
where alone such contracts can be enforced, the numerous
titles which depend exclusively upon this jurisdiction for their
validity, should not be shaken by the introduction of doctrines,
which, however suited to other states of society, have no
application in our present social condition, but that they should
be shewn to rest upon settled and solid foundations. But were
we to apply the rule to be deduced from some of the English
cases which were cited, especially some of the later cases, upon
the subject of delay, without reference to the totally different
social condition of this country, we should not only produce
great practical evil and injustice, but should also, in my
opinion, very much misapply a doctrine which in England
would never have been laid down under the circumstances in
which we are placed.

In comparison there was only one case, that of Dean v. McCarty (1845-46),
where Robinson discussed something similar to Blake. In this case he
discussed the consequence of a settler accidently setting fire to a
neighbour's property. But this case was very atypical and so unlike
Robinson that, like Brode noticed also, it seems an aberration.

Somewhat more "North American" in orientation were Robinson's
cases on the legal concept of estoppel. Estoppel actions were taken in
instances when a nominee of the Crown, before receiving letters patent for
his land conveyed the land to another. Then, when he finally received his
patent, he would sell it to someone else. This landholding problem created
confusion in the province. Robinson held in a number of such cases that the
second grantee was "estopped" by the first conveyance from getting the land. This was, said Robinson in one such case, necessary, "considering that the peculiar circumstances of this country...are likely to give rise to very frequent occasions of advancing the doctrine of estoppel, which in England parties are very seldom driven to rely on." But when he was so "adventurous," Robinson in characteristic conservative fashion made known to the bar that English approval would be welcome here:

> From the circumstance to which I have alluded, the doctrine of estoppel is likely to have a much more extensive application here than in England; and it has therefore been always much desired by the court that the parties in some case would, by a special verdict or otherwise, place the question upon record in such a shape that the opinion of the Privy Council might be taken upon appeal.

In broader terms, although some new world conditions and situations in Upper Canada were different from those in England, two important studies by Risk for Upper Canada and Elizabeth Brown for the United States suggest that no dramatic "frontier" interpretation of law was revealed in either country. As Risk perceptively noted, the problem "is not to make a frontier interpretation, but to explain why one cannot be made."
The reason, as he believed, lay in the abstract character of English common law itself. As Risk explained:

> The frontier conditions were pervasive, and shaped problems and the terms of transactions in distinctive ways through the economy...But the general rules used by the courts to govern these problems were the common law that was originally made in England, and were not significantly influenced by these conditions... Generally, little tension existed between the law
and the perceived economic needs that were created by the frontier conditions. The only apparent and persistent strains were in the law about sale of land. The more important reason is the abstract character of this law. Its terms generally did not include any distinction or requirements for particular parties, purposes, or places. The private powers were, in effect, blank powers, to be used in whatever way individuals wished. The law of contract did not include any terms or requirements that differentiated between an agreement to import cotton into Manchester and an agreement to build a railroad bridge in Hamilton. The power of the fee simple did not differentiate between use of land in Sussex and the use of land in western Ontario.

Brown in two related studies examined the American bar on the frontier of Wayne County Michigan from 1796-1836. "The law practiced on the frontier in Wayne County was not the product of this environment," said Brown, who noted that lawyers there "possessed due regard for long-accepted norms of judicial and legal practice." She concluded:

There is no suggestion of any interest in innovation or bold experimentation. There is no evidence that either the frontier lawyer of folklore or the frontier law of a hundred Western movies was a factor in the administration of justice in Wayne County during these years. Rather, the evidence is all to the contrary.

If, as these studies suggest, the "frontier" was not a significant factor making for new laws in North America, then these studies, coupled with this focus on Robinson, help confirm that Robinson was not judicially interested in being innovative or concerned with making new laws. Indeed the cases where he had the occasion or the inclination to be innovative were rare, and in many such instances he was eclipsed by Blake in Chancery or by the legislature.
It seems that Robinson felt more comfortable assuming a more conservative judicial role of clarifying, interpreting or suggesting amendments to government legislation. There were many cases where Robinson wanted to explain statutes to litigants or where he wanted their legal effects to be certain and clear. As several other points are also important about this. On some occasions, he encountered areas where he felt a legislative and not a judicial response towards clarifying a legal problem might be useful. In *Mattewson v. Peter Carman* (1844-45) for example, Robinson dealt with the issue of conflicting times when notices of non-payment of a bill could be sent in Upper and Lower Canada. Seeing there were two different times, he stated on the record that "the very intimate connexion between the eastern and western parts of Canada, in commercial dealings, renders it a matter, as I conceive, of pressing importance, that but one law should prevail throughout the province in regard to protests and notices upon bills and notes; and I trust some one will take advantage of his situation in the legislature, to call attention to the necessity of an enactment for this purpose." As will be developed, this call to have the legislature amend the law and to avoid having his court do so was characteristic of Robinson and it had implications for his consistency in providing predictable legal decisions to the business community.
A final observation is pertinent. There were only a few instances where Robinson supported an issue on policy, rather than legal grounds. Policy was again a matter, he felt, within the legislative competence of the assembly. To illustrate, the issue of usury sometimes came before his court and in one instance counsel argued against the usury laws on policy grounds. Robinson said succinctly that "In determining upon the propriety of granting this amendment," in Fraser Qui Tam v. Thompson (1844-45) "I reject all arguments upon the supposed policy or impolicy of the usury laws; while they are in force, they are to be carried fairly into effect." Deference above all to established authority and not the frontier was a distinguishing characteristic of Robinson’s jurisprudence. Combined with those other aspects about him which have been already suggested, this seemed to deny any inclination or need by him to create new law in Upper Canada. It is no wonder, therefore, that Robinson’s friend and contemporary, Judge Gowan, asserted that the "motto in those days was stare super antiquias."

CONCLUSION

Robinson’s position as Chief Justice of the Court of Queen's Bench for Upper Canada gave him much direct and subtle power to influence the type of laws and society existing in the province by favouring English laws.
However, the fact that he was a loyalist, monarchist and lover of English laws does not mean that Robinson understood all of English common law or accepted all of it for the colony. He did pick out what he wanted to pick out. Mainly he selected those English common law principles relating to the administration of justice and to landholding which applied equally well, he felt, in Upper Canada as in England. In other areas Robinson did not think some of English law was applicable to the colony.

Something of Robinson's reluctance to develop new laws could be seen when he is contrasted with Blake or with the legislature. In summary, Robinson did not perceive his role as a judicial activist favouring new "Canadian" law over English. Furthermore, a frontier influence was not a significant enough factor to cause a new-world change to Robinson's determination to favour English common law principles. Neither did his position as a colonial judge make Robinson accept American decisions which were more oriented towards the new world. H.E. Read, who also examined this trait of Canadian judges, seemed to confirm this observation when he noted that "a perusal of Canadian law reports not only verifies an absence of creative approach but conveys the impression that most of the opinions reported there are those of English judges applying English law in Canada, rather than those of Canadian Judges developing Canadian law to meet Canadian needs with the guidance of English precedent." 

The distinction
is again subtle but significant and would seem to be born out in the conduct of Robinson.

One final comparative point needs repeating. While Robinson was deciding these cases, some American judges deciding similar cases involving for example waste and dower were, as Horwitz noted, rejecting these conservative English property law concepts as being restraints on the improvement of land or a clog on estates. Among the many reasons underlying this, said Horwitz, was the rise of industrialization, especially milling, in New England.\textsuperscript{81}

In contrast it might be argued that industrialization occurred much later in Upper Canada. As Gilmour states, "South Ontario’s economic dynamism derived from the primary sector and its exports."\textsuperscript{82} If this is so, then in comparison to America, Upper Canada was an agricultural community with the staple trade dominating its economy during most of Robinson’s tenure. It might then be suggested that timing was another relevant factor making Robinson’s jurisprudence different from that of American judges. Indeed a lack of industry in Upper Canada may have been a main reason why so few industrial-related cases as, for example master-servant, negligence, nuisance and the absence of the "fellow-servant rule" came before Robinson in contrast to his contemporary Chief Justice
Shaw of Massachusetts. In broader terms, it may also strengthen the arguments of Parker, Bell and Wright who warned that the concepts of Hurst and Horwitz might not apply wholly to Upper Canada, because the colony developed in different ways than the United States.
ENDNOTES


5. Another reason for holding to English laws was stare decisis. This is a legal term meaning a lower court adhering to the decisions of another court superior to it. See Mr. Justice Hodgins, "The Authority of English Decisions", Canadian Bar Review 1 (1923) 470; W. Friedman, "Stare Decisis at Common Law and Under the Civil Code of Quebec", Canadian Bar Review 31 (1953) 723.

7. Ibid., 295.


9. Doe Anderson v. Todd et al. (1845-6) 2 U.C.Q.B. 82 at 86.

10. Ibid., at 87. This case too is noted for Robinson's introduction of Mortmain into the province. See also Doe Baker v. Clark (1850-51) 7 U.C.Q.B. 44; A.H. Oosterhoff, "The Law of Mortmain: An Historical and Comparative Review", University of Toronto Law Journal, 27 (1977) 257.


12. (1830) 2 Draper's U.C.K.B. (O.S.) 204


14. Baldwin and Quesnel v. Roddy (1833) 3 U.C.K.B. (O.S.) 166 at 167. This case involved the issue of Queen's Bench supervising a district court via a prerogative writ. See also Leeming et al. Ex'ors of Leonard, Esq., Sheriff v. Hagerman, One, etc. (1836) 5 U.C.Q.B. (O.S.) 38; The Queen v. Patton (1852) 9 U.C.Q.B. 307.


16. Stanton v. Andrews (1836) 5 U.C.K.B. (O.S.) 211. Robinson held the right of an English subject to petition the King was absolutely privileged to allow freedom of action and involve the common good.

17. Michie v. Henry Allen, esq. (1850-51) 7 U.C.Q.B. 482. Robinson said this would be "an impediment to the administration of justice."
18. Hanna v. DeBlaquiere (1854) 11 U.C.Q.B. 310. Robinson said this would restrict freedom to action, for "otherwise people would be afraid to take such steps as may be necessary and proper for guarding the interests of the public or their own."

19. (1830) 2 Draper's U.C.K.B. (O.S.) 144.


22. (1845-6) 2 U.C.Q.B. 320

23. Ibid., at 324. Robinson also held this "constitutes part of the criminal law of England which we have adopted by an express statute." See also the same issue in Aubrev Qui Tam v. Smith (1850-51) 7 U.C.Q.B. 213. Said Robinson at 215: "Unfortunately our books supply us with very scanty information respecting the effect which has been given to this statute against buying and selling pretended titles. It has not engaged attention in England for more than a century, and...we find little said about it."


25. An Act For the Further Introduction of The Criminal Law of England In This Province, And for the More Effectual Punishment of Certain Offenders (1800) 40 Geo. III c.1 (U.C.). This act introduced the criminal law of England into the province as of 17 Sept. 1792.
26. Supra, note 24 at 618-619. Robinson also noted at 624: "I will only add that the law which prohibits bargains of the kind we have been now considering is supported by the strongest and most obvious considerations of morality and public policy." For other cases where Robinson held an English act was adopted into Upper Canada because he considered it to form part of the criminal law of England introduced by the act ibid., see Crow v. Widder et al. (1859) 16 U.C.Q.B. 356; Corby v. McDaniel et al. (1859) 16 U.C.Q.B. 378 and Regina v. McCormick (1860) 18 U.C.Q.B. 131.

27. (1835) 4 U.C.K.B. (O.S.) 165.


31. The "Bubble Act" was "An act passed in 1721 after the failure of the South Sea scheme, to discourage similar schemes designed merely as baits to extract money from the thoughtless. The scheme, and various other schemes similar in object, that is of defrauding the public, though different as to means, were called "bubbles"." Jowitt's Dictionary of English Law 2nd ed. vol.1 (London, 1977). See also Ronald R. Formoy, The Historical Foundations of Modern Company Law (London, 1923) 23-47.


34. Ibid., at 102. This act was designed in England to control the drinking habits of "persons of the meanest and lowest sort" and Robinson went on at 102: "It was passed in England to meet a particular evil, which was stated to be increased there of late, among a particular class of the inhabitants. We cannot say judicially that the circumstances so far correspond in this province as to make it a reasonable
intendment that a statute passed to meet such exigency in England is to be treated as a part of the general statute law of England, intended to be introduced into this province."

35. (1845-6) 2 U.C.Q.B. 211. Robinson also said at 221: "A clause here and there might be carried into effect in this colony, or anywhere, from the general nature of their provisions; but that is not sufficient to make such a statute, part of our law, when the main object and tenor of it is wholly foreign to the nature of our institutions, and it is therefore, incapable of being carried substantially and as a whole into execution."


37. Ibid., at 366. Robinson again went on at 366: "That no such use can be made of the statute, is so plain that it would hardly have been a wider departure from its provision, if we had been urged to impose the penalty upon the gentlemen who occupied the time of the court in endeavoring to establish the contrary."


39. See Evans et al. v. Shaw (1831) 2 Draper's U.C.K.B. (O.S.) 14 involving a surety for a prisoner going beyond his goal limits under a provincial act. Robinson stated at 18: "...it is a question which may be decided without the aid of cases precisely in point, because in England the same circumstances cannot occur." The principles involved here were important. See also Mullen et al. v. Kerr (1841) 6 U.C.Q.B. (O.S.) 171; Cull v. Wakefield (1841) 6 U.C.Q.B. (O.S.) 177 and Ellis v. Grubb 3 U.C.K.B. (O.S.) 611 involving the question of the sale of growing timber and whether it was within the scope of the province's Registry Act. Robinson noted at 612: "There appears to be no case decided upon this point in England."


41. An Act to Establish a Court of Chancery in this Province (1837) 7 Will. IV c. 11 (U.C.). See also, John C. Weaver, "While Equity Slumbered: Creditor Advantage, A Capitalist Land Market, and Upper Canada's Missing Court", Osgoode Hall Law Journal, 28 (1990) 871; J.D. Falconbridge, "Law and Equity in Upper Canada", Canadian Law Times, 34 (1914) 1130; W.R. Riddell, "Early Proposals For a Court of Chancery in Upper Canada", Canadian Law Times, 41 (1921) 740; "The Ordinary
Court of Chancery in Upper Canada—An Attempt by the Lieutenant-Governor to Act as Chancellor", OHSPPR 22 (1925) 222.

42. An Act to Make Further Provision for the Administration of Justice, by the Establishment of an Additional Superior Court of Common Law and also a Court of Error and Appeal in Upper Canada, and for Other Purposes (1849) 12 Vic.c.63 (Can.).


47. Johnson, supra note 46 at 60. See also Fred C. Hamil, "Col. Talbot's Principality", Ontario History 44 (1952) 183; Fred C. Hamil, Lake Erie Baron: The Story of Colonel Thomas Talbot (Toronto, 1955); Brian Dawe, "Old Oxford is Wide Awake!": Pioneer Settler's and Politicians in Oxford County, 1793-1853 (Woodstock, 1980).

risk attends the obtaining justice for these high-handed depredations" so that "it will be salutary to teach the defendants and others that they must respect private rights."

49. The Second Heir and Devisee Commission supra note 21. Also Peter Russell instituted many reforms. See Edith Firth, supra note 40.

50. (1844-5) 1 U.C.Q.B. 70.

51. Ibid., at 96. For other cases here re: surveys, boundary lines and legal descriptions, see Dennison v. Chew (1836) 5 U.C.Q.B. (O.S.) 161; Doe Hare and McDavitt v. Potts (1848-49) 5 U.C.Q.B. 492; Murney v. Markland et al. (1841) 6 U.C.Q.B. (O.S.) 220; Mahony v. Campbell (1858) 15 U.C.Q.B. 396.

52. Weller v. Burnham (1853) 11 U.C.Q.B. 90


57. (1844-45) 1 U.C.Q.B. 3.

58. Ibid., at 5. See also Bank of British North America v. Ross (1844) 1 U.C.Q.B. 199 where Robinson again noted at 210: "The learned counsel for the defendant referred, on the argument, to a case of Whiting v. Bart, decided very lately in the Supreme Court of the State of New York, in which the very point before us was considered, and he was so good as to furnish us with a report of the case, which is shortly stated in the New York Legal Observer. In any doubtful question before us, it will be always an advantage to know the light in which it has been viewed by a tribunal in another country, which follows, in the main, the same system, and where the judges are known to be men of great ability and research: and it is especially desirable when the point happens to be a novel one, arising out of transactions or circumstances unusual in England, and with which people in America are more familiar."


63. Ibid., 3. See also the English case of Beverley v. Lincoln Gas Light and Coke Co. (1837) 6 Ad.v E. 829, at 837, 112 E.R. 318 at 321 where Patteson J. said that decisions of courts in the US were "intrinsically entitled to the highest respect" but could not be cited as direct authority in English proceedings.

64. Ibid., 6. Laskin, in The British Tradition in Canadian Law (London, 1969) said at p. 98 that other examples were mechanics' liens, homestead laws, labour relations, oil and gas law and corporate legislation. Some were obviously after Robinson. For later examples again, see Frederick Vaughan, "Precedent and Nationalism in the Supreme Court of Canada", American Review of Canadian Studies, 6 (1976) 2.

65. Clara Thomas, "Vice-Chancellor Robert Symson Jameson, 1798-1854", Ontario History 56 (1964) 5. Jameson's wife Anna also was a writer and wrote the famous Winter Studies and Summer Rambles in Canada (London, 1838 repr. 1965).


68. For Squatters, see Dougall v. Lang (1856) 5 Ch. 292; The Attorney-General v. McNulty (1860) 8 Ch. 324; Attorney-General v. Hill (1861) 8 Ch. 532. For waste, see Chisholm v. Sheldon (1850) 1 Ch. 318; Lawrence v. Judge (1851) 2 Ch. 301.

69. McDonald v. Elder (1850) 1 Ch. 513 at 523.

70. (1850) 2 Ch. 95 at 98-99. See also Morin v. Wilkinson (1851)) 2 Ch. 157; Hook v. McQueen (1851) 2 Ch. 490.
71. (1845-6) 2 U.C.Q.B. 448. This case involved the issue of a person kindling a fire to clear his land. Robinson had to decide how much he was responsible for when his fire spread to neighbouring lands. Dealing with this Robinson said at p. 450: "It is not very long since this country was altogether a wilderness, as by far the greater part is still. Till the land is cleared, it can produce nothing, and the burning the wood upon the ground is a necessary part of the operation of clearing. To hold that which is so indispensable, not merely to individual interests, but to the public good, must be done wholly at the risk of the party doing to, without allowance for any casualties which the act of God may occasion, and which no human care could certainly prevent, would be to depart from a principle which, in other necessary business of mankind, is plainly settled, and always upheld."


73. Doe, Irvine v. Webster (1846) 2 U.C.Q.B. 224 at 227-228.


77. See for example the cases of McDonald et al. v. Dickenson (1844-45) 1 U.C.Q.B. 15; Maulson, Assignee of Kissock, a Bankrupt v. The Commercial Bank, M.D., (1845-46) 2 U.C.Q.B. 338; Kerr Assignee of Tennent, v. Coleman (1849-50) 6 U.C.Q.B. 218; Stephenson v. Crane (1854) 11 U.C.Q.B. 452 on the Bankruptcy Act which only came to Upper Canada in 1843. See also the case of Grant v. McLean, Esquire, Sheriff, (1834) 3 U.C.K.B. (O.S.) 443 where Robinson was deciding an old statute on fraudulent conveyances and stated at p. 460: "...such transactions as seem to have been attempted in this case are not infrequent, and their legal effect should, as soon as possible, be settled and known."

78. (1844-45) 1 U.C.Q.B. 259 at 260. See also The Queen v. McConnell (1842) 6 U.C.Q.B. (O.S.) 629; Butler and McNeil v. Donaldson (1855) 12 U.C.Q.B. 255; Bird et al. V.B. Folger, E. Folger and Peck (1859) 17 U.C.Q.B. 536. Robinson also expressed difficulties in understanding some acts, eg. the Colonial Ordnance Vesting Act and said in Lane v. Officers of the Ordnance (1852) 8 U.C.Q.B. 108 at 112: "...some provisions are contained in it which I confess myself unable fully to
comprehend and to apply in a manner consistent with some clearly acknowledged principle, and that, shall not lead to consequences which never could have been intended or contemplated." See also here, Tully et al. v. The Principal Officers of Her Majesty's Ordinance (1848-49) 5 U.C.Q.B.6.

79. (1844-45) 1 U.C.Q.B. 522 at 524. See also Bryson et al. v. Clandinan (1850-51) 7 U.C.Q.B. 198 where Robinson said at 200-201: "We have no doubt that the stipulating for a commission of four per cent on monies advanced in addition to legal interest was usurious. We have abundant reason to know that such arrangements are not unusual, in carrying on the lumber business; and it has been attempted to uphold them on the ground of the very great uncertainty, and risk attending advances made for the purpose of getting out timber, where the lender has to depend, as he generally must, on the prudence and honesty of the persons whom he thus agrees to assist, on the proceeds being insufficient to pay all expenses. But we have no authority to hold that this branch of business is exempt from the usury laws more than others." The provincial Usury Act fixed interest at 6%. See An Act to Repeal an Ordinance of the Province of Quebec, Passed in the Seventeenth Year of His Majesty's Reign, Entitled, "An Ordinance for Ascertaining Damages on Protested Bills of Exchange, and Fixing the Rate of Interest in the Province of Quebec"; also to Ascertain Damages on Protested Bills of Exchange, and Fixing the Rate of Interest in this Province (1811) 51 Geo. III c.9. In comparison the American courts did in fact rule against usury. In Churchill v. Suter (1808) 4 Mass. 156 the Massachusetts Supreme Court effectively did so, Chief Justice Parker noting at 161 that "any rule of law, tending unnecessarily to repress this circulation is therefore against public policy."

80. Quoted in Laskin, supra note 1 at 50.


83. See Paul Craven, "The Law of Master and Servant in Mid-Nineteenth Century Ontario", in David H.Flaherty (ed.) Essays in the History of Canadian Law vol.1 (Toronto, 1981) 175; Joel Franklin Brenner, "Nuisance Law and the Industrial Revolution", Journal of Legal Studies 3 (1974) 403. The "fellow-servant" rule was developed by Chief Justice Shaw in Farwell v. Boston and Worcester Rail Road 4 Metc. 49 (Mass., 1842) where he held an action by an employee for injuries received
in consequence of the carelessness of a fellow employee was not maintainable. This meant an employer was not liable for injuries caused by the negligence of a fellow employee and was among the most famous decisions given by Shaw. See Leonard W. Levy, *The Law of The Commonwealth and Chief Justice Shaw: The Evolution of American Law, 1830-1860* (New York, 1957, 1967). There was no instance of Robinson deciding anything similar. See for example, "Liability to Master for Accidents to Servant" *Upper Canada Law Journal* 8 (1862) 253 and V. Lushington, "On the Liability of Master to Servant in Cases of Accident", *Upper Canada Law Journal* 8 (1862) 283.
CHAPTER FOUR

INCORPORATION AND SUPERVISION OF CORPORATE POWERS

Down the long, meandering highway my eye rests, and my soul is pained by most irregular, unsightly, great bare poles on either side of it...

Thomas Conant, Life in Canada, 1903

Introduction

The years following Robinson's appointment as Chief Justice until his death in 1863 witnessed important economic changes in the province. By 1848 most of the canals built along the St. Lawrence to help transport staples such as wheat, flour and lumber had been completed. This decade and the next saw the beginnings of the railway era in Upper Canada. New capitalist instruments like corporations, banks, insurance companies and new technology like the telegraph (with those poles Conant remembered) were other heralds of the transition of Upper Canada from a pioneer,

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agrarian society to an early industrial state. Robinson's long thirty-three year tenure as Chief Justice saw the dawn of the new capitalist era.

Incorporation and supervision of corporate powers comprised some of the most significant functions for both the legislature and Robinson in this transitional age. Ever since incorporating the Welland Canal Company in 1824, the legislature continued to lavish a great deal of attention on companies which could develop the province economically. The central importance it accorded corporations comes as no surprise. Aggressive entrepreneurs like Donald Bethune, William Allan, William Hamilton Merritt, William Cooper, William Weller, Samuel Zimmerman and Allan McNab were all proceeding to develop canal, milling, stage, steamship and railway enterprises; these were necessary prerequisites for Upper Canada to compete with the faster-growing United States, especially after the completion of the Erie canal. Indeed, the economic well-being of the province necessitated that the legislature take steps to ensure that these businessmen's needs were met.

As was shown in Chapter One, Robinson's political career was noteworthy for helping introduce the first corporate acts to the legislature. He was retained for a short time early in his practice for the North West Company and was also an initial director of the Welland Canal Company and held stock in it even after taking to the bench. Both his brothers were active businessmen in their own right, and Robinson always took a personal
interest in the family's property in Simcoe County north of York. Robinson was also a well-connected businessman, a respected corporate counsel and, with William Allan, a recognized leader of the Family Compact. All these things contributed to his having a keen appreciation of the value of corporations to the Upper Canadian economy when he went to the bench. Moreover, every company usually had as incorporators the most eminent businessmen and politicians in Upper Canada. Many were men Robinson would have known personally.

Recognizing the role respecting corporate activity exercised by the legislature and Robinson, the sections which follow examine the start of legislative incorporation in Upper Canada and then the judicial supervision given to corporations by Robinson. Throughout Robinson's long tenure on the bench the creation of a legal context for Upper Canadian corporate capitalism was the work of both the legislature and the courts. All corporations were products of the legislature, and Robinson's efforts in providing legal judgments supporting the legislature and ensuring the financial integrity of corporations allowed him to make some "instrumental" contributions to the rise of the business corporation as one of the major capitalist instruments affecting the economy.

Corporate law really began during his time on the bench, and Robinson was an important influence in shaping some aspects of Upper Canadian commercial law in its early stages. However, it is important to
stress the fact mentioned previously that he preferred to see the legislature and not the court correcting and perfecting many features of commercial law. Therefore not only were his decisions important, but so too were his observations from the bench concerning the need for better statutes.

Corporations and the Legislature

The history of corporations in Upper Canada might be traced back to the time before the province was created in 1791, when the fur trade dominated the economy. After the English conquest of New France in 1760, English fur traders quickly took over this Canadian trade. It was not long before Englishmen and Scots combined to establish Montreal-based organizations like Todd, McGill and Company, Forsyth, Richardson and Company, McTavish, Frobisher and Company, and the important North West Company to establish control of this commercial activity. With the exception of the Hudson's Bay Company, incorporated in England by Royal charter, these Canadian "companies" were not incorporated, but were really trading associations of co-partners comprised of Montreal-based merchants and a select number of up-river traders like Richard Cartwright of Kingston, William Allan and Quetton St. George of York, Robert Hamilton of Queenston and John Askin of Detroit, who in turn later established their own trading associations.
In this early period before legislative incorporation, family, ethnicity and kinship ties were utilized by businessmen primarily for reliability, trust and security (particularly among Scots); and it was this aspect of their trade that Judge Thorpe noted in 1806 when he wrote of these "Scotch pedlars." There was, said Thorpe, "a chain of them linked from Halifax to Quebec, Montreal, Kingston, York, Niagara, and so on to Detroit."¹⁴ John Strachan also noticed this when he journeyed from Scotland to take up his post at the Cornwall grammar school, commenting how, at Montreal, he met many "fellow Aberdeensmen" who treated him with "much civility."¹⁵ These traders and their efforts in developing commerce along the St. Lawrence established what Donald Creighton grandly called the "Commercial Empire of the St. Lawrence"¹⁶ and Michael Bliss a "Northern Enterprise."¹⁷ Their trade expanded quickly from fur trading to marketing other staple crops like wheat, flour, potash and lumber, as well as to providing myriad provisioning needs for the large number of immigrants coming into the province.¹⁸

These partners and traders, connected by blood, marriage, old-country kinship ties and business relationships communicated many business concerns between themselves at every opportunity. Market demands, hints for getting goods to market quickly, market reports giving the latest prices of produce and confidential letters of credit about individuals trading in Canada were some items of their postal correspondence.¹⁹ Bruce Wilson,
who has examined this trader's "network" in detail in his book *The Enterprises of Robert Hamilton*, provides a good account of this and its significance:²⁰

For up-country merchants such as Hamilton, trade provided not only the matter of politics but the means to influence it. The network that joined traders along the St.Lawrence and the Great Lakes could be used not only for trade but for communication and political lobbying. Information and opinion as well as goods and furs moved up and down the system. In the pioneer communities along the lakes, those who had knowledge of events beyond their own locales, who were privy to the direction of central government policy, and who had the ability to make their opinions known at the centres of power, possessed a significant influence denied to the rest of their society. No group, other than the British military, had a system of communication with links throughout the province of Quebec to match that of the merchants involved in Laurentian supply. Indeed, the rest of the civilian society in the new Loyalist settlements appears to have availed itself on occasion of the merchants and their contacts in its communications with the central government. These merchants, moreover, who could communicate expeditiously with each other and who shared common political and economic objectives had the potential to become a powerful political lobby that was not available to other, more isolated groups.

Even though separated by long distances, and in winter by the closure of river travel, these merchants knew one another either personally or by reputation, and anything affecting their business would have a receptive audience. This attentiveness toward news and the "conditions" for business also included business related legal decisions, for these merchants kept watch on the Court of Queen's Bench as much as they did the legislature.

In time, though many of these trading partnerships and later retail and wholesale forwarding firms remained unincorporated,²¹ the legislature
felt a growing need to incorporate companies, specifically in the banking and transportation fields. The reasons were many, but in particular the Americans had already shown the economic benefits of incorporating. Hamilton’s Bank of the United States and the Erie Canal Company were but two prime examples of the new corporate form. In America, particularly in New York and New England, the development of a regional capital market and the use of corporations for internal transportation improvements were already having a major impact in facilitating the transition from an agrarian society towards some early industrialization. The use of corporations, said Ronald Seavoy in his study on the origins of American business corporations, had the advantages of collective ownership of real property, better mobilization of capital and limited liability for shareholders among others. As a result, the Upper Canadian legislature’s incorporation of the Welland Canal Company in 1824 and the Bank of Upper Canada in 1821 whose charter was modelled after the first Bank of the United States, represented an imitative Canadian response by the legislature. Indeed the Upper Canadian legislature borrowed corporation acts from American states and especially those of neighbouring New York to provide a comparable legislative framework for businessmen to operate in the province.

Companies were products of the legislature; it was this body that granted them corporate charters containing all the terms, conditions and
powers necessary for a company to carry on its legal existence. Risk’s article on the foundations of the business corporation in Ontario\textsuperscript{28} identified three distinct areas of helpful legislative activity. First, the legislature passed individual acts incorporating a single named company as, for example, the Desjardins’ Canal Company or the significant Niagara Harbor and Dock Company.\textsuperscript{30} Here too for reasons linked to capitalization, importance and government control there were individual acts establishing all banks and railways, such as the Commercial Bank of the Midland District and the Great Western Railway.\textsuperscript{31} Possibly there was another Upper Canadian “particularity” related to this necessity of a charter. It concerned the often overlooked efforts by some Kingston merchants in 1819 to set up a bank in that town, (which eventually became known as the “Pretended Bank of Upper Canada”) without a charter or legal authority to do so. In 1822 this “bank” failed, creating much confusion and long-term consequences as Currie explained:\textsuperscript{32}

Though most of the shareholders were wealthy, they were never sued for the Bank’s debts. Creditors found it impracticable to take action for small amounts. Noteholders did not know whom to sue except the president, cashier, and teller whose names appeared on the bills. It was obviously unfair to collect from three members out of a fairly large group. Yet, in the absence of suit, these three persons were exposed to “insinuations of fraud.” A noteholder who was also a shareholder was precluded from suit because, as a member of an illegal association, he was a party to the offence. For the same reason, stockholders had no right to sue each other in the event that one or some of them had personally to pay the debts of the entire association. Although the Legislature of Upper Canada struggled manfully to bring order out of the chaos
brought about by the collapse of the Pretended Bank, in the end its creditors recovered only 5 per cent of their claims.

In addition to creating an embarrassing financial scandal right at the start of the corporate era, this bank's failure seemed to bolster the resolve among York's Family Compact to strengthen the charter of their own "Pet" Bank of Upper Canada to prevent another failure. And, it may have given Robinson, attorney-general when it happened, a special interest in protecting the stability of the province's banks and other corporate instruments after he took to the bench. It was another important early lesson.

Secondly, as these corporations became more numerous the legislature (again copying American practice) passed general acts which allowed corporations of a similar type to be incorporated without the necessity of an individual legislative charter. Such acts included the Baldwin-LaFontaine government's seminal Companies Act of 1650 for "Manufacturing, Mining, Mechanical or Chemical Purposes" which was, said Risk, "substantially the same as an 1848 New York statute." But this act was not just influenced by the example of nearby New York. Upper Canada was also changing from a rural, agrarian society to an early capitalist state with industrial enterprises. This transition came with loud debates in the legislature. There were opponents of the great transformation. Among the more vocal critics was William Lyon Mackenzie who, like the Jacksonian Democrats in America, expressed concern about a
company's legal right of limited liability. Mackenzie also feared that banks were instruments of privilege and elite oppression. In this respect Currie provides an excellent summary of the transition going on in the province, and how it was reflected in this important act:

An important factor accounting for Canada's first general Companies Act was the business environment of the time. Despite the Annexation Manifesto of 1849, Canadian business had risen triumphant over the loss of colonial preferences in the British market. In 1854 Canada and the United States entered upon reciprocity in natural products. In the 1850's Canadians attempted to abolish imprisonment for debt and get rid of obsolete usury laws which restricted the rate of interest to 6 per cent. After many efforts they repealed the law of primogeniture and dealt effectively with Clergy Reserves and seigneurial tenure. Having just set up a system of municipal government and completed the St. Lawrence canals, they vigorously embarked on a programme of railway construction. In 1852 Toronto established a stock exchange. Mortgage and loan companies were being started and decimal currency was being introduced. Finally, the growing number of Canadians who wanted to develop manufacturing felt that adoption of the joint stock principle would promote their objective. According to Merritt, the Companies Act of 1850 would "create capital, give facilities to trade, improve and cheapen manufactures." Another member said limited liability would enable parties to carry on manufactures cheaper and better than they could without the capital of others.

It was a heady time, this dawn of the capitalist era. And, as Labrie and Palmer also noted in their important study of the Pre-Confederation history of corporations in Canada, the Companies Act of 1850 "marks the beginning of Canadian company law as we know it today." Indeed, as they continued, this act was an "extremely important landmark in the evolution of company law" for it granted charters to all applicants as a public right.
Labrie and Palmer made a resume of its main features, providing useful background to some of Robinson's case law on corporations:37

By its terms any five or more persons who wished to incorporate a business in the field of manufacturing, mining, ship-building, mechanics or chemicals could apply to a county official for incorporation. The application had to state the objects, capital structure, shareholders and term of the proposed corporation's existence, which could not exceed fifty years. Incorporation followed automatically upon the filing of the application and the corporation so established was given the usual attributes of a corporate body. During the first year there were to be from three to nine trustees who had to be stockholders and British subjects; there was to be a yearly election for directors of which 10 day's notice had to be given; and proxy voting was allowed. Each shareholder had one vote for each share. Every company was to have a chairman, who was to be chosen from among the directors. Calls on the shares were at the discretion of the trustees and the shares of delinquents were subject to forfeiture 60 days after the call. The trustees were empowered to make by-laws. Shares were deemed personal property and were transferable on conditions to be prescribed by by-law. A yearly report was to be published in the nearest newspaper showing the amount of paid up capital, the liabilities of the company, and other relevant information. Trustees were personally liable if they declared dividends which impaired the capital of the company or made it insolvent, or which were made while the company was in a state of insolvency. No loans were to be made by the company to any shareholders. If a false annual statement was published, all the directors or trustees who were a party to the misrepresentation were personally liable for the debts of the company contracted during the period covered by the statement which exceeded the amount of the capital stock. Stockholders were personally liable for the debts of the company to its officers. The company was to keep books showing the names of the shareholders, the amounts of capital paid in, and the debts and liabilities of the company; such books were to be open to creditors and shareholders of the company during regular office hours.
Lastly, the legislature passed some later acts which made important terms and conditions applicable to all similar-type companies. These acts related mostly to railways. They were passed, it seems, when the legislature began to realize the great effect railways were having on the province, and also when a horrific railway accident made legislative action imperative. Such acts included the important Railway Clauses Consolidation Act, An Act for the Better Prevention of Accidents on Railways (sparked by the 1857 Desjardins' canal bridge disaster) and the pre-Confederation "Railway Act" of 1859.38

In summary, the Upper Canadian legislature was an important legal body primarily for its creation of corporate statutes. It was interested in granting charters to companies for developing the province, mainly through a transportation infrastructure. Everything a company needed to carry on its business, from capitalization and internal controls to regulation of its operation, tolls or routes was contained within its legislative charter. In preparing the legislative context for early capitalism, the legislature borrowed some American corporate laws it felt might be useful. During the debates on the Companies Act of 1850, for example, Currie noted that D'Arcy Boulton "stood on the floor of the House with a copy of the Massachusetts Act for the incorporation of manufacturing companies in his hand" for emphasis.39 When the legislature was united with Lower Canada after 1841, it used the example of a limited partnership which was
possible in Lower Canada under the French code to introduce a similar Limited Partnership Act for Upper Canada. This happened half a century before Britain's legislature did so. The members of the Upper Canadian legislature, many of whom were themselves lawyers or businessmen, knew the importance of companies and the power and wealth behind many entrepreneurs who sought legislative preferences. The legislature was subject to much political lobbying. It was there and not in the courtroom that public debates over corporate power and banking were carried on. In essence, it was very "instrumental" in helping businessmen. This legislation more than the common law of England was the source of the laws Robinson had to work with.

Robinson and Supervision of Corporate Powers

While the efforts of the legislature to incorporate companies helped stimulate the economy, the growth in corporate activity allowed Robinson to have a key supportive role assisting the legislature's efforts developing corporate law. "This kind of enterprise, by public companies undertaking, at their own charge, the improvement of roads in different parts of the country, is beneficial to the community" stressed Robinson in an early case. And, as Horwitz noted, the very idea that a judge should work with statute law and clarify it was an attribute of instrumentalism, for prior to
1800 the idea of such a state would have been repugnant to common law judges, who were heirs to a long tradition of well-understood ancient rights and precedents upon which they had based their decisions. Indeed, one of the attributes of instrumentalism was a shifting of the basis of legal decisions from "old" common law, based on ancient established rights, to more flexible statute law that sought to dispose of rights that proved inconvenient to commerce. Robinson's legal decisions clarifying and interpreting many of the legislature's corporate statutes might similarly be considered "instrumental," but with a degree of difference.

The full development of instrumentalism, noted by Horwitz, took place in New York and New England after the American Revolution. Among its chief causal factors was a written constitution, change in political theory, industrialization, and a strong commercial bar. However, as Bell, Parker and Wright earlier cautioned, none of these underlying causal factors may have existed to a similar extent or at all in Upper Canada. Robinson exhibited some attributes of instrumentalism in dealing with new corporate statute law. But he betrayed a preference for restraints against reckless business activities. He had a stricter approach to the notion that the law should help business enterprise. Robinson's conservative views on interpreting corporate statutes may, as mentioned earlier, possibly have resulted from his close friendship with William Allan who, by the 1830's, set the examples for the York elite's business strategy. The business principles
that Allan encouraged were to take one's business responsibilities to the community seriously, keep on the secure side of investment, have one's business run by men of good character, and restrict excessive and speculative gains.\textsuperscript{44} As the first President of the Bank of Upper Canada and first Governor of the British North American Insurance Company among other ventures, Allan was, according to Magill, a kind of "elder statesman" among High Tories such as Robinson. Allan's business views were generally adopted by those in this circle.\textsuperscript{45} Allan's conservative approach to business reflected the position of an entrepreneur well aware of the risks conducting business along the St. Lawrence. Allan handled the business affairs of prominent Englishmen with large amounts of investment capital tied into Upper Canada. Due to his solid reputation, they put their trust in him.\textsuperscript{46}

This conservative business perspective of Allan's may have influenced Robinson, but there may have been another factor that inclined him to take a conservative judicial position on interpreting commercial statutes.

Robinson's own political career was notable for an accent on St. Lawrence transportation improvements and, along with this, his introduction of the first borrowing act which may have been a precedent for financing such ventures. A man who, noted Brode, ruefully admitted later on to having had the "glory" of laying the foundation of the province's debt may have been very conscious of the burden and responsibilities this placed on the
province. His concern for fiscal responsibility was shown again in his other
close business relationship, namely with William H. Merritt. Robinson was
concerned about financing the important Welland Canal, and wrote to
Merritt to ensure the financial integrity of the project and guard the
financial interests of key English stockholders. Indeed, Robinson was
always conscious of the fact that corporations had been given public funds
and great powers to develop the province economically, and that these
powers needed strict judicial supervision—not only on behalf of and for the
many individuals who invested in such companies, but for the financial
well-being of Upper Canada as a whole.

If this conjecture about motives and fiscal values is reasonable, the
chief way Robinson revealed them was to adopt a strict judicial construction
of a company's corporate charter. Indeed, Robinson so consistently held to
this throughout his judicial career that his predictability in doing so may
have been an "instrumental" attribute in itself. For lawyers to have known
Robinson and his biases or predispositions would have been important; the
knowledge could have been part of the lore of business, part of the lore of
how to avoid court.

Once incorporated by the legislature, the first aspect of corporate
activity was capitalization. Promoters were anxious to get their companies
going and get subscribers to buy stock in their new ventures. An early issue
that needed legal clarification arose over a company's right to sue a
recalcitrant subscriber for non-payment of calls for stock. Where this issue
came before Robinson it was allowed, but only when a company fully
complied with all the strict terms of its charter.48 Once capital was
acquired, these corporations could carry on the business for which they were
incorporated. However, some other important legal issues necessarily arose
and Robinson also had an impact on these.

The issue of a company's capacity to carry on business in areas not
specifically given by its charter also needed clarification. In some instances
Robinson held that corporations had the incidental power to issue promis-
sory notes and could sue for non-payment of these if nothing was mentioned
to the contrary in their charters.49 In another instance Robinson faced the
issue of whether a foreign corporation had the legal capacity to maintain an
action in Upper Canada. In the case of Bank of Montreal v. D.Bethune
(1836)50 Robinson had to decide if the Bank of Montreal,51 incorporated in
Lower Canada, could sue a Kingston entrepreneur over promissory notes he
owed to that "foreign" bank. Robinson stated this was "an important ques-
tion in several points of view, and one that is exceedingly desirable should
be settled with no unnecessary delay." He held that the Bank of Montreal's
charter "clearly contemplated their sphere of action, as confined to Lower
Canada...[and]...there is nothing in the charter to shew that the Legislature
which gave it contemplated their extending their business to other
countries."52 Yet he did allow the bank to recover the monies owed it on
equitable grounds. "The defendant has received large sums of the plaintiff's money" said Robinson, "and since it appears that he cannot be compelled to pay the notes which he gave in return; it is contrary to equity and good conscience, that he should retain the money borrowed."\textsuperscript{53} This relief was given one year before a Court of Equity was set up in the province.

Robinson also dealt with the matter of policy and the nature of corporate status in his judgment. Robinson generally felt that matters of policy were best determined by the legislature. Regarding this first aspect Robinson stated:\textsuperscript{54}

So far as the objection of impolicy might be urged, on account of the consequences in diminishing the business and profits of our own chartered banks, we could not as a court of justice proceed upon grounds so narrow. Supposing the foreign bank solvent, and well secured and their paper good, the general advantage arising from their circulating it here might, according to the circumstances, much outweigh the consideration of loss to our own bank, from diminished business; and if it were otherwise, it would rest with the Legislature, (supposing such a course of banking were otherwise legal), and not with this court, to determine the question of policy and to protect the public interest.

Of note, too, was the fact that the legislature would accommodate Robinson's judicial missives. Later the legislature passed An Act to Authorize the President, Directors, and Company of the Bank of Montreal, to Collect Debts Due to Them in This Province Notwithstanding the Expiration of Their Charter, Under Certain Restrictions Therein Mentioned (1837) 7 Will. IV c. 35. It did so also for the Bank of British North America by An Act to Enable the Proprietors or Shareholders of a Company called
the Bank of British North America, to Sue and be Sued in the Name of Any One of the Local Directors, or Manager, For the Time Being, of the Said Company in This Province, and For Other Purposes Therein Mentioned (1837) 7 Will. IV c. 34. Possibly this positive reaction by the legislature may have been one more reason why Robinson wanted that body to act on important judicial matters rather than his court. Things might have been different if Robinson perceived that the legislature ignored him.

Regarding the nature and consequences of incorporation, Robinson, as with his decisions about the reception of English law, tried his best to educate the bar. He wanted lawyers and their clients to understand how his court saw these new corporate entities. To do so, he offered the bar some helpful judicial comments:

Corporations have no natural existence—they are the mere creations of positive law, and are established for the maintenance and regulations of some particular objects of public policy. They exist only by virtue of their charter, and have no other capacity than such as is necessary for carrying into effect the purposes for which they were established. When they attempt to act beyond and out of their charter, they can, in my opinion, acquire no right or interest by virtue of such act, and their existence on such occasions, and for such purposes, cannot be recognized by the courts. They may bring all such actions as are necessary to assert their rights when invaded, or to give than a recompense for any injury done them, or a remedy for any debt or duty withheld.

In the case of Genesee Mutual Insurance Company v. Westman (1852), a New York insurance company sued Westman over an insurance contract Westman made with the company to cover his home in Upper Canada. This
case raised issues of corporate capacity and once more Robinson held that
the nature and objects of this American company’s charter made it
incapable of carrying on business in Upper Canada. However, what was
again significant was Robinson’s further elaboration to the bar of corporate
status principles. Said Robinson:57

We must consider that the law of England regards a
corporation as a thing merely existing in idea—a creation of the
law itself—that corporations are in general established for the
maintenance and regulation of some particular objects of public
policy, which it is considered beneficial to foster, by the
application of certain powers and privileges to be conferred on
certain conditions and to be exercised under a certain legal
control; that they have no other capacities then such as are
necessary for carrying into effect the purposes for which they
were established; that the powers which they can claim to
exercise are only such as are expressly given to them, and some
few incidents besides, which are tacitly annexed, when the
charter is silent respecting them. These incidents, which they
can take by implication, are the capacity to have perpetual
succession, to sue and be sued, to purchase and hold property,
to have a common seal, and to make by-laws for their
government and the regulation of their affairs.

This declaration emphatically presented a restrictive view of corporate
powers. It provides more evidence of Robinson’s conservative principles.
Moreover his lengthy elaboration of them signified that he felt they were
important and wanted them clearly understood by the bar.

In addition, in this case Robinson also had to consider (because the
plaintiff’s counsel used it) the American Supreme Court case of Bank of
Augusta v. Earle (1839),58 a case where American Chief Justice Roger B.
Taney held that a corporation incorporated in one state could contract business in another American state. As Taney stated:

We think it is well settled that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public and well known, and long continued usages of trade; the general acquiescence of the States; the particular legislation of some of them, as well as the legislation of Congress; all concur in proving the truth of this proposition.

The important effect of Taney's decision, noted Friedman in his book The History of American Law, was that combined with other leading cases like the Genesee case (1851), Gibbons v. Ogden (1824) and Swift v. Tyson (1842) which all strengthened federal congressional powers over inter-state commerce, the Supreme Court in America was trying to ensure that the whole country might be governed as a single large free-trade area.

Even though Robinson acknowledged in Westman that "it is a little surprising how entirely silent English text writers and English cases are on the point of competency of a foreign corporation to carry on its business in England," he carefully distinguished Augusta v. Earle as very different than the case before him at bar. Accordingly, this is not to suggest that by doing so he retarded such a free trade perspective possibly being established in British North America, but to strengthen the idea once again that Robinson had the power as Chief Justice to reject some important American precedents. Indeed, his symbolic rejection of this American case would have
sent an important message to the province’s lawyers and hence, in general, affected how law could develop in the colony. Once more, this case illustrates Robinson’s reluctance to change the law in this area. "If the Legislature should think that either justice or policy points to a different course, they can apply a remedy" said Robinson, "We have no discretion to say that the law is different from what we consider it to be."\textsuperscript{61} Taken together this casts more caution on viewing Robinson as a "legal continentalist." Robinson was not comfortable using American case law.

Another area of law that Robinson decided firmly and differently from American corporate law involved his ideas on the use of a company’s seal to execute contracts. As might be expected, once they were duly chartered corporations needed to make contracts for goods and services required by them to operate and to make contracts with individuals and firms for goods and services they themselves would provide. For Robinson, this power presented important legal issues over the scope and authority of a company’s agents to bind the company,\textsuperscript{62} and when or if a company had to place its seal on all of its contracts. Robinson had a consistent and strict view of English common law on this point. He held that a corporate seal was required in virtually every such instance.\textsuperscript{63} The seminal case of \textit{Hamilton v. The Niagara Harbor and Dock Co.} (1841)\textsuperscript{64} was illustrative and of great importance to businessmen. The plaintiff John Hamilton, a leading steamship entrepreneur from Kingston,\textsuperscript{65} sued the defendant,
which operated a major ship building and dry-dock facility at Niagara, for its breach of a parol or oral agreement to build him a steamboat engine.

The case involved several issues. The first was the familiar one of whether the company had the corporate capacity to build steamboat engines as per its corporate charter. Robinson provided more judicial direction to the bar on this point. Once again, he revealed his reticence to make changes in the law—believing instead that it was the role of the legislature. Said Robinson:

"It is sufficient to say that there is no clearer principle in our law than that corporations can only act in their corporate capacity, while they are promoting some purpose for which they were incorporated; as to all other matters they do not constitute a corporation. It is no more in our power to disregard this principle than any other by which courts of law are bound. The legislature must be supposed to have passed their judgment upon the powers which they intended to delegate etc. We must look into their act for a declaration of their intentions. They may alter their statute upon any view which they may take of public utility, but we cannot."

The other issue was whether Hamilton could enforce the parol agreement made without the company's corporate seal. Robinson held that Hamilton could not. "In my opinion," said Robinson, "an agreement so special in its nature, of such magnitude in its object, and so completely prospective and executory in its terms, can certainly not be binding upon a corporation, unless they have made the undertaking under their seal."

Furthermore, Robinson again felt some legislative action was necessary for changing the law involving a company's use of its corporate seal. He did not
think it appropriate that his court be the legal body to do so. He used the case to speak beyond the immediate litigants to address the legislature over certainty in the law. Robinson noted that this issue of the use of a corporate seal needed some legislative enactment to provide specific guidelines.68

This doctrine of the liability of corporations does seem to require some legislative revision. It is not a satisfactory footing for it to rest upon when the judges are left to determine what is so clearly a matter of common routine that a seal may be dispensed with, and what is without that limit; what of sufficient moment to call for such a solemnity as the corporate seal, and what is not; or what is the quantum of inconvenience or degree of haste required in the transaction, which will excuse the want of a seal. Numerous as these corporations have become, and mingling as they do in the most familiar transactions of business, there ought to be greater certainty respecting the validity of their acts; the corporations themselves, as well as those who deal with them, ought to be able to see their way more clearly before hand, and not be left dependent upon the decisions of courts, which have no other guide than the dictates of a reasonable discretion, acting on the varied circumstances of each case as it arises.

Moreover, as Robinson perceived this situation, there was entirely too much inclination among the Upper Canadian bar to utilize American precedents to support a relaxation of the use of a corporate seal. He used this case as a forum again to speak beyond these two litigants and to lecture the province's lawyers.69

It has been noticed in the English cases and in this country we are well aware that in the United States of America, where the grounds of the English common law are recognized and acted upon, the principle now in question has been in a great measure departed from; that it has indeed been so entirely departed from in all, or most of the States, as to admit of this action being sustained, I will not venture to say. But if it has been, we must still consider that our adherence to the
principles of the English common law is a duty imposed upon us by written law, and is therefore more strongly obligatory than it may be acknowledged to be in the courts of the United States. Our statute says that we are to be governed by it "in all controversies relating to property and civil rights," and the English "rules of evidence" are expressly made binding upon us. Whatever liberties therefore may have been assumed in foreign countries in departing from principles which are binding upon English courts, we are not allowed to exercise any such discretion; and it is upon the plain ground that the courts of justice in England have not, on any occasion, departed from the principle in question to such an extent as can warrant us in supporting this action, but have in distinct and strong terms refused to do so, that I feel constrained to give judgement against the plaintiff.

In addition to Robinson's conservative judicial position that only the legislature could be the agent to change the law, there was another characteristic quality to his decisions. In Blue v. Gas and Water Company (1849-50), for example, the plaintiff sued a Toronto Gas company for damages in not fulfilling a parol contract for the supply of water to his Toronto business. Three other Queen's Bench judges besides Robinson heard this case. They all agreed that the matter was routine, and done often in the ordinary course of business. Therefore, they maintained that the defendant's parol contract was binding. Robinson alone dissented, feeling that the matter was special, not made in the ordinary course of this company's business and required a corporate seal. Once again he stated that "if the legislature should choose to relieve us by a change in the law, from considering those distinctions, by dispensing with the use of the corporate seal in any contract of a personal nature we could have no
objection.” Even the combined influence of his brother judges was not enough to make him vary his views.

These cases reveal that Robinson placed a very strict interpretation on a company's charter and made his views clear and consistent to the legislature and business community. His strict interpretation on corporate capacity and use of the corporate seal was conservative in comparison to American developments, but for Robinson his main concern was not to follow American law but to keep the province's law within British precedents as required by the Reception Act. But more than this, he was also concerned to ensure the financial integrity of these companies. The "reason in the principle" behind affixing the corporate seal, said Robinson in the Niagara case, was that "it is necessary for the protection of all the members of the body" so that "there should be something to supply the evidence of a joint contract." This concern of Robinson for "protection" may again have been the result of his early experience with the failure of the "Pretended" Bank of Upper Canada, his loyalist upbringing, or a reflection of William Allan's conservative investment sensitivities. In essence, what Robinson feared was that a company's financial existence could be compromised or rendered worthless by its agents acting without the special authority given them by a charter or seal. Indeed, the idea was that he wanted corporations not to be reckless but financially sound. From
Robinson's point of view, any more costly bank failures or corporate bankruptcies might undermine investor confidence.

Supervision of Specific Corporate Interests

When the legislature granted a charter to a company, the charter gave the company all powers necessary for it to operate. Among such specific powers was that of expropriation for needed land.\textsuperscript{73} This power was a major statutory restriction on an individual's long-established common law rights to "quiet enjoyment" and "absolute dominion" of their property. In addition, a company's charter gave it powers to explore and take materials for construction. It denied an individual most common law tort claims against the company for harm caused by such conduct when the action was authorized by the charter. While provisions for compensation to individuals for a corporation's land expropriations were also included, the major defense to most actions that might have been taken against a company was "statutory authority," another legislative privilege denied any individual. Furthermore, besides helping companies by enacting borrowing statutes to provide needed funds for their financial operations,\textsuperscript{74} the legislature passed acts to protect certain company properties from harm.\textsuperscript{75} Indeed, as Upper Canada was branching out from its earlier agrarian and rural base, both the legislature and Robinson experienced increased
demands to service corporate development activities. Each acted within a distinct sphere of influence. Without appreciating the work of both in tandem, it is impossible to fully understand the development of Upper Canada’s economy during this period.

Canals

The construction of a canal network to overcome natural impediments along the St. Lawrence was a long-standing concern of the Upper Canadian legislature. Shortcomings to river travel were felt as early as the War of 1812. From the 1820’s onwards, spurred on in large measure by the huge success of America’s Erie Canal, both Upper and Lower Canada worked to make canals in each province operational. In particular, Upper Canada’s Family Compact was heavily involved with the Welland Canal. The British government, through its Board of Ordnance, completed the important Rideau Canal in 1832. By 1841, when Upper and Lower Canada were united, the immensely significant Board of Works for the new Province of Canada was established. It was a centralized institution whose broad mandate was to co-ordinate, construct and maintain the transportation facilities of the new province. In conjunction with all these projects the legislature passed acts incorporating many other canal companies and the Board of Works, passed debenture acts to facilitate the
raising of money for canal construction, an enabling act allowing the British military to construct the Rideau Canal, and an act to protect these public works from "Riots and Violent Outrages" while they were in the process of construction.  

Robinson was also involved with transportation measures. We saw earlier that he wrote several newspaper articles in Macaulay's Kingston paper suggesting the need to improve the St. Lawrence. He was an initial director of the Welland Canal Company, held stock in it, and was a lifelong personal friend of its builder, William Hamilton Merritt. Indeed when this canal was completed, its Board of Directors addressed him "as one of the first and most efficient supporters of the Welland Canal" and named the canal's southern terminus "Port Robinson" in his honour. Even the Duke of Wellington wrote to Robinson for advice about how to dispose of his shares in the company which Robinson had helped him purchase. Robinson's younger brother William was for a time Chief Commissioner of Public Works and oversaw the workings of this canal.

When contractors were building these canals, there arose some legal actions first against the Board of Ordnance, the military department of the British government. Its construction methods for the Rideau Canal were at issue in Robinson's seminal decision in Phillips v. Redpath and McKay (1830). In that case, he provided some important judicial guidelines to canal companies and others who had recourse to a defense based on
"statutory authority." In this, his first major decision since taking to the
bench, the defendants were sub-contractors employed to help build the
Rideau Canal. They had torn down the plaintiff's home, claiming it blocked
the proposed canal route. Phillips sued in trespass on the grounds that his
home was destroyed only because he was a Yankee! In his judgment,
Robinson acknowledged that the canal's completion would confer "immense
advantages" to Upper Canada, but he also noted that "it is equally
necessary for the public service, and for the peace and interests of
individuals that any legal questions likely to arise upon the extent and
application of the act alluded to should be speedily and clearly settled."
Because these canal sub-contractors sought the statutory protection of the
Rideau Canal Act, Robinson felt it necessary to provide to them, and to
all others exercising such statutory privileges, guidelines on how he would
treat future cases. They must be aware he said: 88

1st. That they must act carefully and circumspectly in availing
themselves of the privileges which the act confers.

2nd. That whenever their acts are brought in question they
must be prepared to shew by legal evidence that they have
kept within their authority.

3rd. That if they are prosecuted, and are either unable to
justify their proceedings or neglect to do so, they are liable to
such damages as a jury may think it right to give, and that
although this court has undoubtedly a right to exercise a con-
trol over the discretion of a jury, they will not do so, except
upon the same principles as would justify such an interposition
in other cases, and that they must be very strong grounds
indeed that would lead the court to think such an interference
proper in an action of trespass.
The important point to note about Robinson's position on the corporate defense of statutory authority, a major legislative privilege for economic development in the province, was his leaning towards a strict interpretation. However, Robinson was certainly not opposed to development. Indeed by taking the rare step of offering some judicial guidelines on the use of statutory authority Robinson did much to lay down corporate ground rules for future reference, so that other companies might look to these and govern themselves accordingly. Moreover, his strict interpretation of this privileged statutory defense remained a constant hallmark for all his later jurisprudence. As suggested above, Robinson's very conservative consistency, which made him so predictable, was in itself a personal expression of judicial instrumentalism.

Cases in which this defence was used continually came before him, involving not just canal companies but other transportation companies including railways. "For anything that may be thus done in strict pursuance of the power of the statute," said Robinson, "no action can be maintained, for the statute makes it legal, and is a perfect defense under the general issue." In Griffiths v. Welland Canal Company (1838), the case that prompted the previous rule, the company had power under its charter to let out surplus water from the canal in times of flooding, and the plaintiff was barred from maintaining his action for damages as this was allowed by the charter and necessary to protect the canal. "The defendant evidently rests
his defense upon an authority given by the statute, and which is no where else to be found; and he must stand or fall according as he is warranted by the statute in what he has done" Robinson noted once more in Brown v. Williams (1843). In that case, an individual (a pound keeper) sought protection under a provincial statute against an action for selling and seizing the plaintiff's horse. The subtlety was not that Robinson was against corporate development when he limited this defense through his strict interpretation of it. Rather, by making his views clear and by being consistent, he could make the defense more equitable for everyone in the province. Indeed in Robinson's view everyone did have a stake in the well-being of these companies. Though companies were important, they could only remain so if they were financially secure and did not exceed their statutory powers.

Road, Navigation and Harbour Companies

While canal building was an early corporate activity linked to the transportation needs of the St.Lawrence, road, navigation and harbour companies were also significant for linking Great Lake ports to the hinterlands of the province. Road building in particular was of great importance to York. Other areas too pushed for harbour companies and roads, pursuing development strategies devised by local merchants and
landowners. The legislature was also busy accommodating their needs. Not only did it incorporate harbour, road, bridge and navigation companies and help raise money to finance them, but it also granted exclusive privileges for those developing stage travel.\textsuperscript{31}

Robinson was involved in deciding cases concerning these other transportation enterprises, including again their use of the corporate defense of statutory authority. For example in the case of \textit{Young v. The Grand River Navigation Company} (1855) Robinson held that the company's charter gave it protection to develop this river. "A person" said Robinson, "who complains of damages sustained by him in consequence of any dams or other works erected by the company on the Grand River...within the limits of the charter, and erected or continued for purposes allowed by the statute, cannot sue the company in an action for tort, as if they had acted wrongfully in erecting or continuing such works."\textsuperscript{92} Other areas where he had occasion to be involved concerned a company's right to tolls and actions against companies for not keeping their roads or works in good repair.

In the matter of tolls, occasions sometimes arose where Robinson had to decide whether a defendant had an excuse for non-payment of tolls, or could be exempt from them. Here too the issue was usually decided by Robinson's strict interpretation of the company's charter, generally in favour of the company.\textsuperscript{93} Yet, what is perhaps more important to note was Robinson's view that the legislature's grant in a company's charter for the
collection of tolls was a special privilege which, in turn, he believed, implied a high standard of care by the company in the construction of its work. In *Phelps v. The Grand River Navigation Company* (1855), for example, Phelps was the owner of a river scow carrying a cargo of wheat down the Grand River. The boat hit an underwater tree, was upset and lost its cargo. When Phelps sued the defendant and the matter came before Robinson, he stated that by the company's charter the whole of the Grand River was subject to its corporate control, and, because it could collect tolls for ships using the river, the company "must take the burden [sic] with the privilege." In holding the company liable under its charter for works it had constructed, Robinson acknowledged that "it will shew the defendants to be subject to a liability which it is possible neither they nor others have thought much upon hitherto." In this important decision, Robinson stressed that the fact that a company had not anticipated a particular form of injury was no excuse. In return for the privilege of charging tolls, the company had a general obligation to maintain a safe navigation system. Robinson was not necessarily a favoured friend of corporations; he expected them to discharge their obligations properly and thereby promote the sound economic development of the colony.

Robinson decided cases where he felt a Road Company was not liable for accidents. In one instance the company had not yet finished building its road. In another he felt that a company's letting snow lie on its road did not
come under the notion of suffering the road to go out of repair. In another
he found no rights for a lessee to sue the Road Company as lessor for
neglecting to keep its road in repair.\footnote{96} These decisions involved special
instances and did not disturb his main idea that having the privilege to
collect tolls implied sound workmanship and safety. On this point he was
consistent to the end.

In \textit{Webb v. Port Bruce Harbor Company} (1861),\footnote{97} one of his last
cases, the plaintiff's ship was damaged when it grounded on a sandbar as it
went through the approach piers of the defendant's harbour on Lake Erie.
"By professing to have and maintain a harbor for the reception of vessels,
and charging toll upon vessels resorting to it," said Robinson, "the
defendants, in effect, invite mariners to the use of the harbor, and are
bound to be careful in removing obstructions, and also to warn all persons,
so far as they can, of the harbor being inaccessible, when it happens from
any circumstance to be so."\footnote{98} This view was affirmed on appeal.\footnote{99} In
Robinson's view, public safety should not have been compromised to speed
or wealth.

\textbf{Post Office and Telegraph Companies}

Postal communication was of great importance to Upper Canadian
businessmen. It was a government department (under Britain until 1851),
and corporate concerns involving the telegraph did not emerge until commercial lines in the United States appeared during the 1840's. Canadian entrepreneurs soon noted its business potential. When an inaugural telegraph line opened between Toronto and Hamilton in 1846, and the public had free trial use of it for a day, a Hamilton businessman "promptly availed himself of the opportunity to notify a Toronto customer of a bill that was due." The legislature was soon involved, for it incorporated telegraph companies and passed an act penalizing anyone damaging telegraph wires.

Robinson also delivered judgements that helped businessmen to use the post office. In *Dickson v. Crooks* (1830), for example, the issue was the amount of postage due from Niagara to York. By water the route was 35 miles, but by post road around the Head of the Lake it was 110 miles. Robinson held that the rate for 35 miles governed the amount to be charged. Rates, he said, ought to be based on the distance the letter was actually carried and not according to the distance by the post road between the two places. In another case, *Todd v. The Gore Bank* (1844-45), the plaintiff had the bank mail his cheque from Hamilton to Toronto; the bank took an agency fee of 1/4 percent. The cheque was lost, but Robinson held that the bank was not liable. "No one surely has conceived that in doing this," said Robinson, "they become insurers of the solvency of parties of whom they perhaps never heard, and for five shillings in a hundred pounds."
Robinson believed that the bank never assumed the risk that the cheque would be safely delivered, or that by charging only 1/4 % it was guaranteeing its delivery.

In a group of three other cases, involving the issue of proper legal notice of non-payment for a promissory note, Robinson held that such notice if sent by mail was good and sufficient. "If the holder of a note puts a proper notice into the post office in due time, and so addressed as that it might be reasonably supposed it would be more likely to reach the party than if it had been sent or directed in any other manner," said Robinson in The Bank of Upper Canada v. Smith (1846-47), "he does what is sufficient to entitle him to recover, so far as giving notice is in question."\textsuperscript{105} In another case, Commercial Bank v. Eccles (1847-48), Robinson again advised businessmen to use the mails, stating that he knew the post office delivered many letters. He said, further, that "the persons to whom they are addressed get them with the same certainty" as if notice otherwise had been left at the endorser's residence by special messenger.\textsuperscript{106} Lastly, in Bank of Upper Canada v. Bloor et al. (1848-49), Robinson held that notice of non-payment of a note sent to an endorser through the post office was sufficient. "It would embarrass commercial transactions intolerably, if we were to hold that the sending of a special messenger was necessary," said Robinson, and, "it is our opinion that the holder of a bill may be considered as having used
due diligence, when he mails his notice in due time, addressed to the endorser in the town or township in which he actually resides."

Robinson also provided a practice point to counsel on the careful use of notice by mail, which provides some evidence of his concern that business might be conducted to avoid litigation. "I apprehend, from cases which have been before me on the circuits," said Robinson, "that the holders of notes in this province are not in general aware of the degree of care proper to be used in giving notices. They seem attentive only to the time of giving notice, and not to the manner of it; though it is very certain that by want of proper care, in the latter respect, great risque [sic] of loss may sometimes by incurred." By these cases, all promoting use of the postal service, Robinson helped relieve the fear of businessmen (or more perhaps their counsel) that the technical defenses of failure to give proper notice or use due diligence would not prevail by using the mail. In addition these decisions helped further the development and usefulness of a vital business communications system in the province. Robinson was being very instrumental in helping commerce. The post office and businessmen needed each other, and Robinson's decisions facilitated a good working relationship for both.

Robinson evinced a similar "working perspective" about the telegraph. Telegraph companies were very important for overcoming the sense of isolation felt in many scattered communities, and businessmen were quick
to see its potential. It was use by businessmen that brought forward to Robinson the two cases he decided late in his judicial career. In Stevenson v. The Montreal Telegraph Company (1859) the plaintiff, a Hamilton businessman, sued the telegraph company for negligence. The firm had not sent his message in time to New York; he subsequently lost the benefits of a flour sale. Unlike the earlier Phelps decision, where Robinson expanded the idea of corporate responsibility to all things under that company's control, Robinson made this an important distinguishing factor in this case, and held that the company was not responsible for delays beyond their own line to Buffalo. This case was also decided over the issue of damages for breach of contract. Robinson held that these damages were "not reasonably to be supposed to have been within the contemplation of the parties in transacting the business in question."\(^{108}\)

In Kinghorne v. The Montreal Telegraph Co. (1860), in which a similar situation arose, Kinghorne had paid 30 cents for the company to deliver a telegraph message to his business agent at Oswego, instructing him to accept an offer to sell some rye. However, the telegraph message was delayed, and the price had fallen when it finally did arrive. Robinson again tried to help the company. "So far as we see in the present case the telegraph companies in this province have not protected themselves in any manner," noted Robinson, and "it seems hard, as well as imprudent...to look to it, as a consequence, that if any accident happens to a telegraph message
by the carelessness of a man or boy employed in its delivery, the service
which the company was to render for thirty cents might, in connection with
a single transaction of this nature, swallow up the profits for years.\textsuperscript{109}

It is important to note Robinson's supportive stance. He ruled in ways
that protected these companies and made them effective tools for
businessmen's needs. By raising the issue of breach of contract and
expectation damages, Robinson brought another legal dimension to these
cases. By holding in each case that the plaintiff's loss could not be supposed
to have been contemplated by the telegraph company at the time it received
the message, Robinson effectively limited their liability, and helped
unburden them of the possibility of costly lawsuits.

\textbf{Milling and Lumbering}

Milling was another important aspect of colonial economic life, and it
also received government assistance. Even before the province was created,
the British government made arrangements for the construction of grist
mills and the furnishing of mill stones and machinery for the loyalist
settlers coming into the area up-river from Quebec.\textsuperscript{110} Once the province
was created in 1791, Simcoe helped reserve strategic King's mill sites for
the future construction of more mills, and the province's legislature also
passed an act in its first session regulating the toll to be taken at all
mills. Settlers soon developed milling enterprises throughout the Niagara Peninsula from Newark through to Ancaster and Dundas, and along the chief river valleys like the Thames, Grand, Trent, Don and above all the Humber, where by the 1840's, seven merchant millers were operating. These millers were very aggressive. Frequently the Lieutenant-Governor was petitioned for an exemption from duties to import mill machinery from America, or to be allowed the right to overflow so much of adjoining lands above a mill as a miller needed for a mill pond. The legislature passed some acts enabling millers to construct their dams and the important Prescription Act to help settle the time allowed to claim a water-use right against others. In a recent study of the merchant millers of the Humber Valley, Sidney Fisher revealed evidence of their aggressive spirit. Fisher, who based much of his study on the business of William Cooper, documented how merchants along the Humber tried to control both banks of the river as far up as possible to prevent future competition. They requested government aid for road access, machinery and supplies, and they tried to get covenants for water rights in deeds of purchase whenever possible. Cooper ended up having what Edith Firth called a "milling empire" on the Humber covering hundreds of acres on both sides of the river. He was also a forwarder, commission merchant and, under a consortium of businessmen headed by William Allan, built an important wharf on Toronto's waterfront in 1817.
Millers were not alone in using the province’s rivers. Sometimes lumbermen competed with them on streams, especially in spring to transport logs downriver from interior forests to markets. As A.R.M. Lower so aptly stated long ago, when logs were driven downstream and encountered miller’s dams, "hard feelings and nice legal questions would be sure to arise in regard to them."\textsuperscript{117} The legislature again assisted by passing acts to compel mill dams to have "aprons" on certain streams. These devices allowed logs to slide by. Other acts were passed to prohibit trees being placed into certain rivers and creeks used for logging, for inspection of timber cut for export, to prevent the dumping of saw mill refuse into streams, and to create a general incorporation act. Later acts were passed to improve watercourses and to appoint supervisors for culling and measuring lumber. The legislature also passed a general act respecting rivers and streams and it contained provisions respecting when and how timber could be cut and floated downriver.\textsuperscript{118} However, as much as these acts were designed to prevent conflict, some occasions led to litigation.

When the province’s first mills were erected at Napanee around 1785, and before Robinson took to the Bench, the old riparian rule of "prior use" in English common law applied to a stream’s current. This rule was illustrated best in the early case of Applegarth v. Rhymal (1827) where the plaintiff Applegarth, who for many years operated a mill, sued Rhymal, who had recently erected a mill upstream from Applegarth’s, diverting the water
that had gone to Applegarth's mill. The matter came before Judge Sherwood, who noted the legal question was whether prior occupancy of the stream by Applegarth gave him the established common law right to the uninterrupted flow of the stream. Citing Blackstone, he stated that "the common law rule is that a prior occupancy does give a right and property in a current of water to the first occupant, and every subsequent occupant must exercise his right so as not to injure the first occupant."  

By the time Robinson became Chief Justice in 1829, the old riparian rule of prior use had been replaced by the "natural flow" rule. This rule was shown in the cases of McLaren v. Cook et al. (1846-47)\textsuperscript{120} and Adamson v. McNab (1849-50).\textsuperscript{121} In the latter case, Robinson stated that "occupying land on the banks of a stream, he [i.e. the plaintiff] had a common law right to have the water of the stream flow past him in its natural course, without any part of it being diverted or diminished in quantity, or deteriorated in quality to his damage by any person living above him." Robinson also advised these litigants that the old common law principle "Sic utere tuo ut alienum non laedas,[use your property so as not to damage others] is a maxim that we can seldom venture to lose sight of." In both cases he stated that only a grant or a right acquired by twenty years of continuous use could entitle someone to divert the water to make any change in the natural flow of the stream. As Robinson said in McLaren, "I conceive the principle to be settled, that nothing short of a
grant, or use of such length of time as will support the presumption of a grant, will entitle the proprietor of land on a stream to divert or pen back the water in such a manner as to occasion damage to those living above or below in the same stream, by disabling them from making any special use or appropriation of the water which would have been in their power, if the stream had been allowed to flow in its natural course."

This "natural flow" rule continued unchanged under Robinson throughout his long tenure on the bench. Robinson conceived that this rule was "well settled" and a "natural right;" possibly the scarcity of industry using streams at that time in Upper Canada may have occasioned him to continue this long established common law riparian right. As a result the majority of his milling decisions were mainly over defences and exceptions to this natural flow rule. For example, Robinson ruled on a challenge to an arbitrator’s award to whom two millers referred their dispute arising from the over-flowing of the plaintiff’s land. In another instance he decided whether a license that one party claimed allowed him to pen back water was sufficient to support his defence. In another case he had to decide whether a defendant’s plea that he had a right of easement to obstruct water, and could establish an uninterrupted use for twenty years, was enough to support his claim. Further cases involving millers concerned actions under the provincial Prescription Act."
The fact that Robinson demanded a strict adherence to the terms of the Prescription Act should come as no surprise. Furthermore, Robinson's judgements in these particular cases concerned only the immediate needs of the litigants before him; never were they extended explicitly to recognize the wider concerns of the colony's economic productivity or to the benefits of competition to the public. In McKechnie et al. v. McKeves (1852), for example, which involved the obstruction of a water course by the defendant in detriment to the plaintiff's woollen mill, Robinson's decision was dominated by an analysis of prescription rights and not of any benefits of corporate competition or the usages or wants of the community. The right of each miller to have a "reasonable use" of the water in the stream for his business enterprise was nowhere discussed. While the low level of economic activity in Upper Canada may again have been responsible for this, the fact that Robinson was not instrumental in helping industrialization in Upper Canada is important. His conduct contrasted with what American legal historians have alleged was the pattern of rulings in the United States.

As Horwitz maintained in his work, the older common law riparian doctrines of prior and natural use had been put aside early in nineteenth-century America. Indeed, in the riparian case of Palmer v. Mulligan (1805) Judge Livingston of the Supreme Court of New York felt that the main idea of property ownership implied the right to develop it for business purposes,
as "the public, whose advantage is always to be regarded, would be deprived
of the benefit which always attends competition and rivalry."\textsuperscript{125} This
"reasonable use" test, said Horwitz, emphasized a new American focus on
full productive use of one's land rather than "quiet enjoyment" of it.
American law was being refashioned by judges who, in many other cases
explicitly considered relative economic efficiency and the "usages and wants
of the community," and who attacked earlier established monopolistic and
exclusionary rights like prescription.\textsuperscript{126}

Within this changing milieu, the seminal Massachusetts case, \textit{Charles
River Bridge v. Warren Bridge} (1829), was decided. Among other things, it
held that the early grant of a charter to one bridge company did not mean a
monopoly or exclusive franchise and that it could not prohibit the building
of a nearby bridge under a different charter to compete with the original
bridge. This case graphically showed the extent to which a new liberal spirit
of economic development had spread in America. As Horwitz explained:\textsuperscript{127}

The \textit{Charles River Bridge} case represented the last great
contest in America between two different models of economic
development. For Justice Putnam of the Massachusetts court
and for Justice Story of the Supreme Court, the essential
elements for economic progress were certainty of expectations
and predictability of legal consequences. With these conditions
satisfied, Putnam predicted, "men of capital and energy would
embark their funds in enterprises of a public character, in the
hope that their own fortunes might be advanced with the
public prosperity... But let the reverse of this be suspected, and
public credit will be paralyzed." Story could "conceive of no
surer plan to arrest all public improvements, founded on
private capital and enterprise, than to make the outlay of that
capital uncertain, and questionable both as to security, and as
to productiveness.” Justice Morton, on the other hand, though conceding that “exclusive rights for short periods sometimes encourage enterprise, of public usefulness,” believed nevertheless that “generally their tendency is to impede the march of public improvement, and to interrupt that fair and equal competition which it has ever been the policy of our country to encourage.”

In effect, said Horwitz, this case meant that older common law rights allowing monopolistic privileges based on one’s prior or long-established usage was transformed by American judges. They emphasized new conceptions of public policy, which they interpreted to be the promotion of competition, efficiency and economic improvement.

As suggested, there was nothing comparable to America’s industrialization in Upper Canada. But this may not completely explain why Robinson continued to adhere to the older, monopolistic “natural flow” test in riparian law. An answer may possibly be gleaned from the only case analogous to the Charles River Bridge decision. It captured Robinson’s ideas on competition relative to the legislature’s power to grant an exclusive right for a public ferry. This grant was the exclusive prerogative of either the Crown or the legislature; a franchise was granted to ensure that passage across narrow waters in the province was government-regulated for the advantage, convenience and safety of the public. In a major case involving a disturbance of a grantee’s right to ferry, Robinson provided some personal thoughts which contrast vividly with the new American judicial thinking in the Charles River Bridge case. In Kerby v. Lewis et al. (1841), the plaintiff
was the lessee of a Crown grant for a ferry between Fort Erie and Black Rock (Buffalo). When the defendant set up a new ferry in competition with him, the plaintiff brought the action for disturbing his exclusive right. During the course of his decision, Robinson stated:¹²⁹

> It is quite obvious that if all were left to chance, and no one could be protected in an exclusive right, it would not be worth the while of any person to make and maintain such provision for the public accommodation as would ensure dispatch and safety; competition would at one time reduce the charge of ferrying so low, that no one would find it for his advantage to keep a sufficient establishment for the 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.

Granted there are no exact parallels between these cases, but the same concerns over certainty and competition existed in Kerby to make it germane to the Charles River Bridge case. In Kerby, Robinson did seem in accord with the minority views of Judges Putnam and Story. He had a personal fear that competition would be harmful rather than beneficial to the public. This might have been related to his conservative perception of economic development and what was necessary to sustain it in Upper Canada. Like Judges Putnam and Story, "certainty of expectations" and "predictability of legal consequences" were what Robinson also believed best able to attract capital to the province. If men with capital could not rely on the legal framework of laws in Upper Canada, because of their uncertainty, then they might go elsewhere, with potentially disastrous effects on the
province. It may have been his personal fear of competition that made Robinson adhere to long established commercial and property law concepts; anxiety about what unrestricted competition might do to Upper Canada made him less instrumental in the promotion of competition than American judges. 130

Conclusion

Both the legislature and Robinson worked closely to initiate and supervise early corporate capitalism in the province. While the legislature was the primary source of corporate law, once companies were incorporated many subsequent issues that could not have been anticipated required Robinson's legal adjudication. These included issues like the continued use of a corporate seal, limits to the corporate defense of statutory authority and the proper measure of damages involving corporate activities. These areas were the legal preserve of Robinson, and his judgments complemented the legislation and facilitated the usefulness of corporations.

Several "particularities" may have helped formulate Robinson's conservative stance respecting judicial instrumentalism. The significant effects that the early failure of the "Pretended" Bank of Upper Canada may have had on Robinson, his close friendship with businessman William Allan and his own personal fear of what competition could lead to in the province
meant in general terms that Robinson took the instrumentalist route less frequently than courts in the United States. While Robinson necessarily upheld the corporate acts of the legislature, as Chief Justice he was himself concerned that these corporations be financially sound and adhere strictly to their charter. This was his way of protecting them, and also those with capital who had invested in them. In return, much was expected. They had to be responsible and careful in developing the province, for much depended upon their success.

Robinson's very consistency and predictability in deciding commercial cases was so noticeable as to be his own form of judicial instrumentalism. In retrospect, one may assume that some corporate litigation was avoided because businessmen or their counsel could predict in advance Robinson's probable response to a practice and govern themselves accordingly. Robinson as Chief Justice made predictable "rules of the game" of which businessmen would be cognizant. Robinson regarded his predictability and certainty as assets for businessmen, and especially for men with capital, who could feel safe knowing that as Chief Justice he tried to ensure that the province was a safe and secure place for investment.
ENDNOTES


3. Edith G. Firth, "William Cooper" DCB, 7, 207.


9. "As to my own trifling amount of stock, I should always have disposed of it at par from the time of my becoming a Judge, because every now and then something was coming up in the court in which I presided and in which the Company were more or
less concerned, although the interest was too minute to be talked of. I need not tell you that we live in an ill-natured world, and I should always have been better pleased at being free, as I ought to be, of all direct pecuniary interest in the Company." Letter, Robinson to Merritt, Toronto December 7, 1841 in Merritt, Biography of the Hon. W.H. Merritt, M.P. supra note 2 at 244-245. Robinson also owned stock in the Desjardins' Canal at Dundas. See Copy of Desjardins Canal Stock Certificate, OA Robinson Papers Ms 4 reel 4.


20. Wilson, supra note 13 at 48.


25. An Act to Incorporate Certain Persons Therein Mentioned Under the Style and Title of "The Welland Canal Company" (1824) 4 Geo. IV c.17 (U.C.)

26. An Act to Incorporate Sundry persons Under the Style and Title of the President, Directors and Company of the Bank of Upper Canada (1819) 59 Geo. III c.24 (U.C.) Royal assent was not given until 1821.


28. In addition to the Bank of Upper Canada following closely the charter of Hamilton's First Bank of America, Jamieson *ibid.*, at 7 also stated that the Free Banking Act of 1850 was influenced by one in New York.


30. An Act to Incorporate Certain Persons Therein Mentioned, Under the Style and Title of "Desjardins' Canal Company" (1826) 7 Geo. IV c. 18 (U.C.); An Act to Incorporate the Niagara Harbor and Dock Company (1831) 1 Will. IV c. 13 (U.C.).

31. An Act to Incorporate Certain Persons Under the Style and Title of the President, Directors and Company of the Commercial Bank of the Midland District (1832) 2 Will. IV c. 11 (U.C.). An Act to Incorporate Certain Persons Under the Style and Title of the London and Gore Rail Road Company (1834) 4 Will. IV c. 29 (U.C.), the name was changed to the Great Western by An Act
to Alter and Amend the Act Incorporating Sundry Persons under the name of the London and Gore Rail Road Company, and to Grant Them a Sum of Money by Way of Loan (1837) 7 Will. IV c. 61 (U.C.)


34. An Act to Provide for the Formation of Incorporated Joint Stock Companies, for Manufacturing, Mining, Mechanical or Chemical Purposes (1850) 13 & 14 Vic. c. 28 (Can.). Risk, supra note 29 at 277. So too said Risk was An Act to Provide by One General Law for the Incorporation of Electric Telegraph Companies (1852) 16 Vic. c. 10 (Can.)

35. Currie, supra note 32 at 393.


37. Ibid., at 56-57.

38. An Act to Consolidate and Regulate the General Clauses Relating to Railways (1851) 14 & 15 Vic.c. 51 (Can.); An Act for the Better Prevention of Accidents on Railways (1857) 20 Vic. c. 11 (Can.) and An Act Respecting Railways (1859) 22 Vic.c.66 (Can.).


40. Ibid., at 404. An Act to Authorize Limited Partnerships in Upper Canada (1849) 12 Vic.c. 75 (Can.).


43. Nichols v. King and Garside (1844-49) 5 U.C.Q.B. 324 at 325.


50. (1836) 4 U.C.K.B. (O.S.) 341.

52. Supra note 50 at 347.

53. Ibid., at 355. For other cases here see McMartin v. Traveller (1836) 5 U.C.K.B. (O.S.) 155 and Doe ex. Dem. The Trustees of the Methodist Episcopal Church in the Township of Kingston v. Bell (1836) 5 U.C.K.B. (O.S.) 344 and An Act to Establish a Court of Chancery in this Province (1837) 7 Will. IV c. 11.

54. Ibid., at 349. See also Bank of British North America v. James Browne (1849-50) 6 U.C.Q.B. 490.

55. Ibid., 351.

56. (1852) 8 U.C.Q.B. 487.


58. 13 Pet. 519 (US. 1839).


60. Lawrence M. Friedman, A History of American Law 2nd ed. (New York, 1973, 1985) 261. Gibbons v. Ogden 9 Wheat. 1 (U.S. 1824) enlarged the scope of the Congressional commerce power. There a New York grant of a monopoly to operate steamboats between New York and New Jersey was held invalid as conflicting with an act of Congress regulating coastal trade; Swift v. Tyson 16 Pet. 1 (U.S. 1842) held the federal judiciary could decide a case on the basis of "general principles of commercial law" while Genessee Chief (Genessee Chief v. Fitzhugh) 12 How 443 (U.S. 1851) extended federal admiralty jurisdiction to inland waterways.

61. Robinson, supra note 56 at 498.

62. For liability of a company's officers making a contract under seal see The City Bank v. Chenev et al. (1858) 15 U.C.Q.B. 400. For a case on whether agents could bind their company see Canada Company v. Pettis (1852) 9 U.C.Q.B. 669. Robinson was concerned that agents might do things outside their authority and as he said at 675: "...these plaintiff(sic) could have their interest in some thousands of acres of land compromised and rendered worthless to them by anything done by their ordinary agents, without any special authority to bind them in this particular manner."
63. The only instance where Robinson held a seal was not necessary was in one case where an architect performed services under a verbal agreement to a corporation and Robinson held that as the corporation received and used his services and benefited from his labour it constituted a binding promise to pay. See Clark v. The Hamilton and Gore Mechanic's Institute (1855) 12 U.C.Q.B. 178.

64. (1841) 6 U.C.Q.B. (O.S.) 381.


67. Robinson, supra note 64 at 385 (emphasis in original).

68. Ibid., 395-396.

69. Ibid., 399.

70. (1849-50) 6 U.C.Q.B. 174. An Act to Incorporate a Company Under the Style and Title of "The City of Toronto Gas Light and Water Company" (1841) 4 & 5 Vic. c. 65.

71. Ibid., 177. For other cases regarding the use of the corporate seal see Quin v. The School Trustees (1850-51) 7 U.C.Q.B. 130; Saxton v. Ridley (1856) 13 U.C.Q.B. 522; Bartlett v. The Municipality of Amherstburg (1857) 14 U.C.Q.B. 152 and In The Matter of Croft and The Municipality of The Township of Brooke (1859) 17 U.C.Q.B. 269.

72. Niagara, supra note 64 at 387.

73. See for example An Act to Consolidate and Regulate the General Clauses Relating to Rail-Ways (1851) 14 & 15 Vic. c. 51 see 9, 10, 11.

74. An Act for Raising, By Way of Loan, a Sum Not Exceeding Four Millions of Pounds Currency, for Making a Main Trunk Line of Rail-Way Throughout the Length of This Province (1851) 14 & 15 Vic. c. 75.
75. See An Act to Protect from Injury Electro-Magnetic Telegraphs in This Province (1850) 13 & 14 Vic. c. 31.


81. An Act to Incorporate Certain Persons Therein Mentioned Under the Style and Title of "The Welland Canal Company" (1824) 4 Geo. IV c. 17 (U.C.); An Act to Confer Upon His Majesty Certain Powers and Authorities, Necessary to the Making, Maintaining and Using the Canal Intended to be Completed Under His Majesty's Direction, for Connecting the Waters of Lake Ontario with the River Ottawa, and for Other Purposes therein Mentioned (1827) 8 Geo. IV c. 1 (U.C.); An Act Granting to His Majesty a Sum of Money to be Raised by Debenture, for the Improvement of the Navigation of the River Saint Lawrence (1833) 3 Will. IV c. 18 (U.C.); An Act to Afford Further Facilities to Negotiate Debentures for the Completion of Certain Works (1839) 2 Vic. c. 72 (U.C.); An
Act to Repeal Certain Ordinances Therein Mentioned and to Establish a Board of Works in This Province (1841) 4 & 5 Vic. c. 38 (Can.); An Act to Authorize the Raising by Way of Loan, in England, the Sum of One Million Five Hundred Thousand Pounds, Sterling, for the Construction and Completion of Certain Public Works in Canada (1842) 6 Vic. c. 8 (Can.); An Act to Continue an Act Passed in the Eighth Year of the Reign of Her Majesty, entitled, An Act for the Better Preservation of the Peace and the Prevention of Riots and Violent Outrages at or near Public Works, While in Progress of Construction, and to Extend the Operation thereof to Certain Works Undertaken by Incorporated Companies (1851) 14 & 15 Vic. c. 76 (Can.). See also Michael S. Cross, "'The Laws Are Like Cobwebs': Popular Resistance to Authority in Mid-Nineteenth Century British North America" Dalhousie Law Review 8 (1984) 103.

82. Letter, Board of Directors of the Welland Canal Co. to the Chief Justice, announcing the completion of the canal June 5, 1833. OA Robinson Papers Ms 4 reel 4.

83. Copy, letter London April 29, 1844 Duke of Wellington to Robinson on how to dispose of his shares in the Welland Canal Co. Ibid.

84. Letter, D. Daly, Secretary to the Gov. Gen., to Hon. W. B. Robinson, offering him the position of Chief Commissioner of Public Works, June 12, 1846, Montreal. Ibid.

85. Tullv et al. v. The Principal Officers of Her Majesty’s Ordnance (1848-49) 5 U.C.Q.B. 6; Lane v. Officers of the Ordnance (1852) 8 U.C.Q.B. 108 and Denaut v. The Principal Officers of Her Majesty’s Ordnance (1853) 10 U.C.Q.B. 189.

86. (1830) 2 Draper’s U.C.K.B. (O.S.) 68.

87. Supra note 81.

88. Supra note 86 at 81.

89. (1838) 5 U.C.Q.B. (O.S.) 686.

90. (1843) 6 U.C.Q.B. (O.S.) 656 at 600. See also Myers v. Howard et al. (1835) 4 U.C.K.B. (O.S.) 113.

91. See for example, An Act to Provide for the Laying Out, Amending, and Keeping in Repair, the Public Highways and Roads of this Province, and to Repeal the Laws now in Force for that Purpose (1810) 50 Geo. III c. (U.C.); An Act to Incorporate Certain Persons Therein Mentioned, Under the Style and Title of "The Catarraqui Bridge Company" (1827) 8 Geo. IV c. 12 (U.C.); An Act Granting to Chauncey Beadle the Exclusive Privilege of Establishing and
Running a Line of Public Stages Between the Village of Ancaster, in the Gore District, and the Town of Sandwich, in the Western District (1827) 8 Geo. IV c. 16 (U.C.); An Act to Incorporate Certain Persons Therein Named, Under the Style and Title of the "Port Hope Harbor and Wharf Company" (1829) 10 Geo. IV c. 12 (U.C.); An Act to Incorporate Certain Persons for the Purpose of Making a Turnpike Road in the County of Halton, Under the name of the "Dundas and Waterloo Turnpike Company" (1829) 10 Geo. IV c. 15 (U.C.); An Act Granting to His Majesty a Sum of Money, to be Raised by Debenture, for the Improvement of Roads and Bridges in the Several Districts of the Province (1831) 1 Will. IV c. 17 (U.C.); An Act to Incorporate a Joint Stock Company, to Improve the Navigation of the Grand River (1832) 2 Will. IV c. 13 (U.C.); An Act for Erecting a Suspension Bridge Over the Niagara River at or Near Queenston, in Upper Canada (1836) 6 Will. IV c. 12 (U.C.); and the general incorporation statute An Act to Authorize the Formation of Joint Stock Companies for the Construction of Roads, and Other Works in Upper Canada (1849) 12 Vic. c. 84 (Can.). See also, J.J.Talman, "Travel in Ontario Before the Coming of the Railway" OHSPR, 29 (1933) 85.

92. (1855) 12 UCQB 75 at 77. See also a decision by Judge Draper Kerby v. The Grand River Navigation Company (1854) 11 U.C.Q.B. 334.


95. Ibid., 248.


97. (1861) 19 U.C.Q.B. 615.

98. Ibid., 621.
99. Said Chief Justice Draper in the Court of Error and Appeal, *ibid.*, at 626: "I look upon the defendants as having contracted, in consideration of their being allowed to charge tolls, to construct a harbor capable of receiving and sheltering vessels, and as long as they continue to charge tolls to maintain the harbor and approaches to it in such a state that vessels of such size as the harbor itself is fitted for may enter for shelter, as well as to secure or deliver cargo, without danger from such destructions as are reasonably and properly under the defendant's control." See also *March v. The Port Dover and Otterville Road Company* (18580 15 U.C.Q.B. 138 and *Johnson v. The Port Dover Harbour Company* (1859) 17 U.C.Q.B. 151.

100. Ernest Green, "Canada's First Electric Telegraph" OHSPR, 24 (1927) 366 at 369.

101. See for example, *An Act to Incorporate the Toronto, Hamilton, Niagara and St. Catharines Electric-Magnetic Telegraph Company* (1847) 10 & 11 Vic. 81 (Can.); *An Act to Protect from Injury Electro-Magnetic Telegraphs in this Province* (1850) 13 & 14 Vic. c. 31 (Can.) and the general incorporating statute *An Act to Provide by One General Law for the Incorporation of Electric Telegraph Companies* (1852) 16 Vic. c. 10 (Can.).

102. (1830) 2 Draper's U.C.K.B. (O.S.) 117.

103. (1844-45) 1 U.C.Q.B. 40.


105. (1846-47) 2 U.C.Q.B. 358 at 359.

106. (1847-48) 4 U.C.Q.B. 376 at 337.


108. (1859) 16 U.C.Q.B. 530 at 538. Curiously, Robinson did not cite the case of *Hadley v. Baxendale* on expectation damages and said at 534: "I find no case bearing upon this point, where the principles of law happen to have been laid down in regard to a telegraph company. We must take them, I think, from analogy with what has been laid down in regard to railway companies."

109. (1860) 18 U.C.Q.B. 60 at 67-68. Note again Robinson's comment on expectation damages at 69: "A possible loss or gain to the plaintiff depending on the time at which the message would arrive was a consequence which the defendants could not appreciate, and cannot be supposed to have contemplated at the time they received the message."

111. An Act to Regulate the Toll to be taken in Mills (1792) 32 Geo. III c. 7 (U.C.).


113. See the petition of William Purdy of Ops Township to Sir F. B. Head for this overflow right in Edwin C. Guillet, The Valley of the Trent (Toronto, 1957) 260.

114. See An Act to Authorize the Erection of Mill Dams upon the River Thames, in the London District (1833) 3 Will. IV c. 42 (U.C.); An Act to Authorize Richard Tunks, to Erect a Mill Dam Upon the River Thames, in the London District (1834) 4 Will. IV c. 36 (U.C.); An Act to Authorize Jacob Hespeler, his Heirs or Assigns, to Erect a Dam or Breakwater on the Grand River at or near the Village of Preston, in the County of Waterloo (1857) 18 Vic., c. 246 (Can.); An Act to Authorize G.S. Wilkes to Construct a Dam on the Grand River at Holmedale (1857) 20 Vic., c. 246 (Can.); An Act Respecting Mills and Mill Dams (1859) 22 Vic. c. 48 (Can.). As well see An Act for Shortening the Time of Prescription in Certain Cases, and for Other Purposes Therein Mentioned (1847) 10 & 11 Vic. c. 5 (Can.)


118. An Act to Provide for the Construction of Aprons to Mill Dams Over Certain Streams In The Province (1828) 9 Geo. IV c. 4 (U.C.); An Act to Prevent the Felling of Trees into Certain Rivers and Creeks Within This Province" (1839) 2 Vic. c. 16 (U.C.); An Act to Regulate the Inspection and Measurement of Timber, Masts, Spars Deals, Staves and Other Articles of a Like Nature, Intended for Shipment and Exportation from This Province, and for Other Purposes Relative to the Same (1842) 6 Vic. c. 7 (Can.); An Act to Prevent Obstructions in Rivers and Rivulets, in Upper Canada (1843) 7 Vic. c.36 (Can.); An Act to Amend an Act Passed in the Parliament of Upper Canada in the Ninth Year of the Reign of His Late Majesty King George the Fourth, Entitled, An Act to Provide for the Construction of Aprons to Mill Dams over Certain Streams in This Province, and to Make Further Provision in Respect Thereof (1843) 12 Vic. c. 88 (Can.); An Act to Authorize the Formation of Joint Stock Companies to Construct Works Necessary to Facilitate the Transmission of Timber Down the Rivers and Streams of Upper Canada (1853) 16 Vic., c. 191 (Can.); An Act to Authorize the Improvement of Watercourses (1856) 19 & 20 Vic. c. 104 (Can.); An Act Respecting the Culling and Measuring of Lumber (1859), 22 Vic. c. 46 (Can.) and An Act Respecting Rivers and Streams (1859) 22 Vic. c. 47 (Can.).

119. (1827) 1 Taylor U.C.Q.B. (O.S.) 427 at 431. See also *Eastwood and Shinner v. Helliwell* (1835) 4 U.C.Q.B. (O.S.) 38 where Judge Sherwood again stated at 49: "Where one man has lawfully occupied a mill-site, and afterwards another man erects a dam below, whereby the water is forced back, to the injury of the first occupant, the owner of the dam below is answerable for all damages."

120. (1846-47) 3 U.C.Q.B. 299.

121. (1849-50) 6 U.C.Q.B. 113.

122. *Supra* note 120 at 300. Note also that the "natural flow" rule prevailed as well in Chancery. In *Graham v. Burr* (1853) 4 Ch.1 involving the right to an injunction between two proprietors along the Humber River, Blake stated at 7: "It is now well settled that every riparian proprietor is entitled to the natural flow of the waters, without diminution or obstruction. Mere appropriation confers no right."
123. For the gist of this action see Adamson v. McNab (1848-49) 5 U.C.Q.B. 438; Nigh v. Sowerine (1855) 12 U.C.Q.B. 67 where Robinson said at 70: "The gist of the action is the actual penning back of the water by the defendant, beyond the extent to which it had been kept back before...The mere making the dam higher, or longer or wider, is no grievance of itself, unless by keeping it up...the defendant did in fact overflow the plaintiff's land to a greater extent than had been done before." For arbitration cases see Caster v. Ransom et al. (1837) 5 U.C.K.B.(O.S.) 513; Williams v. Squair (1883) 10 U.C.Q.B. 24. For License and easement cases see Brown v. Street (1844-45) 1 U.C.Q.B. 124; Robinson v. Henry Fettler and Gordon Fettler (1852) 8 U.C.Q.B. 340; Beaver v. Reed (1852) 9 U.C.Q.B. 152; Harris v. Fraser (1855) 12 U.C.Q.B. 402. For 20 years use see Buell v. Read (1848-49) 5 U.C.Q.B. 546; McNab v. Adamson (1849-50 ) 6 U.C.Q.B. 100 and (1852) 8 U.C.Q.B. 119; Bechtel v. Street (1861) 20 U.C.Q.B. 15. For cases under the Prescription Act see Bowlby v. Woodley (1852) 8 U.C.Q.B 318 and Halev v. Ennis et al. (1853) 10 U.C.Q.B. 404.

124. (1852) 9 U.C.Q.B. 563 and (1853) 10 U.C.Q.B. 37.


126. Ibid., 37-47.

127. Ibid., 134.

128. See An Act for the Regulation of Ferries (1797) 37 Geo. III c. 10 (U.C.). By it the Crown had the power to grant such a right "for the convenience of his Majesty's subjects." See also An Act for Better Enforcing the Provisions of the Act of the Legislature of Upper Canada, for the Regulation of Ferries, and for Protecting the rights of the Lessees of Ferries (1845) 8 Vic. c. 50 (Can.); An Act Relating to Ferries (1850) 22 Vic. c. 46 (Can.).

129. (1841) 6 U.C.Q.B. (O.S.) 207 at 210.

130. For other cases on disturbing a plaintiff's franchise to have a ferry operation see Burford v. Oliver 2 Draper's U.C.K.B. (O.S.) 9; Jones v. Fraser (1841-42) 6 U.C.Q.B. (O.S.) 426; Ives et al. v. Calvin (1846-47) 3 U.C.Q.B. 464; Higgins v. Hogan (1850-51) 7 U.C.Q.B. 401 and Regina v. Davenport (1859) 16 U.C.Q.B. 411.
CHAPTER FIVE

ROBINSON AND THE COMMERCIAL EMPIRE OF THE ST. LAWRENCE

The chain of lakes and rivers, from Lake Superior downwards, composes the noblest inland channel of fresh waters on the globe; and it is, I think, no extravagant pretention to challenge for the St. Lawrence the pre-eminence over every other river in the world.

John Beverley Robinson, *Canada and the Canada Bill* (1840)

Introduction

Upper Canada was the first British colony established without a seaport. As a result the colony's leading merchants who comprised the St. Lawrence trading network from Richard Cartwright, Robert Hamilton and William Allan to John Baldwin¹ and Peter and Isaac Buchanan² for example, recognized the necessity and problems of importing and transporting goods into Upper Canada from Montreal. The distances involved in shipping goods up-river and the difficulties of shipping wheat and other staples back downstream demanded frequent communication among these merchants. This included concerns and problems over business invoices, bills of lading, government accounts, consignments, ship schedules,
army provisioning needs, prevention of wheat or flour spoilage and market conditions. Indeed the surviving accounts of their affairs reveal how much these businessmen worried about costs for ocean freight and travel expenses for boat hire, including things like pilotage, cartage, canal tolls, wages, insurance, commissions and storage charges for getting their supplies upriver for the coming agricultural season. In effect, their's was a highly competitive trading system along the St. Lawrence fraught with many insecurities over needed capital, farm credit, debt, risks, high transaction costs, shipping hazards and the fickle weather of the Great Lakes.

As a result, these merchants banded together to form "networks" of reliable kinship and business associates deemed vital to their success. They also put forward many of their business concerns to the government, requesting laws and institutions that would help protect and encourage their business interests. Ever since Donald Creighton first wrote about their concerns in The Commercial Empire of the St. Lawrence (1937), stressing the centrality of their staple exports to the later political development of Canada, merchant encouragement of state development has come to be associated with the "Laurentian interpretation" of Canadian history.

Their trade developed during a time of profound technological change in water transportation along the St. Lawrence brought on by the new use of steam. The days of sailing ships were becoming numbered once the first
steamships appeared on the Great Lakes soon after the War of 1812.6 "The year 1830 may be taken as the commencement of a new order of things" recalled Caniff Haight looking back again at this era, for the new age of steam, he said, "completely revolutionized the commerce of the world."7 The period between the age of sail and the coming of the railway in the late 1840’s was the great heyday of steam transportation on the St. Lawrence. New shipbuilding increased and new entrepreneurs like John Hamilton, Donald Bethune and Henry Gildersleeve of Kingston, Hugh Richardson of Toronto, James Sutherland of Hamilton and Samuel Zimmerman of Niagara soon competed with each other to capture the trade and benefits of this steam technology.8

However, while the political and economic implications of this St. Lawrence commercial system have been expanded on, until recently very little work has been done on the related legal environment necessary for the successful working of this commercial system. Indeed these traders faced many important legal issues. For example, what were the legal implications and responsibilities of being adjudged a common carrier, warehouseman, or wharfinger? Who was legally responsible when a ship’s captain had to throw deck cargo overboard in a lake storm to lighten the load to save the ship? How effective could an exemption clause be in a trader’s bill of lading to protect him against liability for damages? What was the legal standard of care required in a collision between two vessels? These issues and others
were just some of the practical ones affecting business. As might be expected, Robinson was another important influence because many of his judgements addressed these issues.

Robinson was a frequent traveler along the St. Lawrence, going downriver on judicial circuit or else to England. He had a keen appreciation for shipping and businessmen working this great river. Upper Canada, unlike Lower Canada, touched no sea and therefore had no Vice-Admiralty Court which had jurisdiction to hear cases, for example, relating to ship collisions, damages, pilotage, salvage, and mariner’s contracts. The province also had nothing comparable to Lower Canada’s Trinity House at Quebec City, which regulated St. Lawrence shipping and the conduct of river pilots in that province. In contrast, Robinson assumed jurisdiction over many similar maritime shipping cases in Upper Canada without referring to these other bodies, so that his own jurisprudence was unique. But this also begs the question why this was so, for Lower Canada’s Vice-Admiralty Court could have been another source of related shipping precedents, specifically when, as will be shown, Robinson admitted to unfamiliarity in deciding many of these issues.

The legislature of Upper Canada before 1841, and for both provinces thereafter, was also interested in St. Lawrence shipping and in businessmen trading along the river. It too played a major part in helping commerce along the St. Lawrence. Besides capital expenditures for building canals, the
legislature passed other acts relating to business needs and steamship
tavel in the broader interests of public safety. Thus, once more, both
Robinson and the legislature must be seen in tandem to appreciate how
commercial laws were developed in the province. Both worked to provide an
important legal framework within which businessmen could transact their
long-distance operations in this new age of steam and commerce.

The Legislature and the St. Lawrence

The legislature was involved in developing transportation and
commerce along the St. Lawrence, first by building canals along that river
and between the Great Lakes. But this was not the end of its involvement.
It also incorporated pier and harbour, dry dock, steam navigation,
warehouse and wharfage companies as part of the St. Lawrence commercial
infrastructure. In this new age of steamship travel the legislature also
tried to ensure greater public safety on these faster, more complex vessels.
All inland vessels were required to be registered and to have a certificate of
ownership. Lights and signals were stipulated for their operation, and
government inspectors were appointed to examine safety precautions on
board these vessels.

The legislature was also sensitive to the needs of businessmen
trading along the St. Lawrence. Boards of Trade and Exchanges were
incorporated in the major trading centres along the river in order to afford facilities for merchants to transact business.\textsuperscript{12} The legislature also acted to protect merchants receiving assignments, to regulate duties between master and servant and to punish those giving false receipts, bills of exchange and invoices.\textsuperscript{13} Because many businessmen were involved with the staple trades in wheat, flour, pot and pearl ash or timber for export, the legislature passed numerous inspection acts and appointed a Board of Examiners chosen by the Board of Trade in Quebec, Montreal, Kingston, and Toronto. These examiners were to check the brands of flour being milled and to establish a standard weight for the different kinds of grains being traded.\textsuperscript{14}

As these acts reveal, the legislature actively assisted business by passing legislation to provide a legal framework within which business could be conducted. It helped to ensure greater public use and trust in steam technology by attempting to regulate safer navigation and by introducing fire and machinery safety regulations on board these vessels. But many legal issues faced these traders as problems involved with operating a business along the St. Lawrence invariably arose. Many of the legal issues came before Robinson, who was the second supportive component in creating the legal framework for the St. Lawrence commercial system.
Robinson and Transportation Law

Many businessmen worked in different positions along the St. Lawrence. Among the most important were those acting as forwarders, warehousemen and wharfingers, who were all necessary to farmers and retailers for shipping, importing and storing their wheat, flour and consumer goods. For those businessmen engaged as forwarders, that is as shippers of goods along the St. Lawrence, the key legal aspect about their business was whether or not they could be considered "common carriers." By the common law, common carriers had many added responsibilities to the general public, the most important being as insurer of the goods entrusted to them for carriage, and liable for their loss or injury unless caused by "an act of God or the Queen's enemies." Some cases came before Robinson where he had to define what exactly constituted a "common carrier." In Benedict v. Arthur (1849-50), for example, the defendant was a farmer and teamster who transported flour from Guelph to Hamilton. The flour got wet. "By the law of England," said Robinson, "something more is necessary to shew a man liable as a common carrier," and, "a person engaging to transport goods for hire, is not by virtue of such engagement, merely a common carrier, and as such liable for all accidents, whether negligent or not."
In other cases he had to define what exactly was an "act of God." This definition was especially important, for common carriers generally argued in their defence that storms upsetting ships were in fact acts of God, allowing them to be exempt from their strict legal liability to those who consigned cargo to them. Robinson faced this issue in *Smith v. Whiting* (1834-35)\(^{17}\) where, as the trial judge, he "observed that the case, upon the opening of counsel, was treated as one of much general interest and importance in a commercial view, and upon which the decision of the court was looked to with some interest." This helps to confirm that businessmen paid close attention to his court. Robinson held that the defendant, who was engaged to forward the plaintiff's goods from Montreal to Toronto, was in fact a common carrier. But the issue arose whether a lake storm that had caused the plaintiff's goods to be lost in transit allowed the defendant to be exempt from legal liability. In deciding this issue, Robinson accepted the jury's finding that the storm was an act of God. But he felt he needed to do more as well, especially to advocate and promote the full use of business insurance. This was one more example of his desire to see businessmen protected adequately. "The effects of storms, such as occurred in this instance," said Robinson, "are among the dangers of navigation against which it is usual for the owners of goods to secure themselves by insurance; for it is well known that carriers do not insure, and are not expected to insure against all elements." In Robinson's assessment parties might
prevent costly litigation in future if they would try to insure their cargoes,
as he made clear:  

It is desirable, I think, for all parties not to attempt too great 
refinement in drawing the line between the act of God and the 
ordinary dangers of navigation, against which skill and 
prudence may guard, because that would encourage litigation 
in most cases of loss, from the uncertainty of the decision, each 
party hoping to shift the loss upon the other. It is better for 
the parties themselves to be impressed with the conviction, 
that if they wish to be secure against all dangers, they must be 
careful to insure. When they fail to do so, it should be 
considered that they take the risk of tempests upon 
themselves, and they should not seek to be rigid in throwing 
upon the carriers such risks as they ought to have guarded 
against by insurance.

Indeed, this last aspect was important, for as Robinson noted later in 
the key case of Ham v. McPherson et al. (1842) 19 "the rule which lays 
down the liability of common carriers is rigid and inflexible, when it applies; 
and therefore, on the other hand, the court are [sic] careful not to apply it, 
when, under the circumstances, the application would be unreasonable and 
unjust." In this particular case the plaintiff sent his goods to the defendant 
in winter and, as the defendant could not transport them downriver to 
Montreal because of winter ice, he stored them until spring. When an 
accidental fire occurred in his storehouse during the winter season, the 
issue arose whether the defendants were then at that particular time 
common carriers and therefore strictly liable for the loss of the goods, or 
merely warehousemen and subject to a less onerous standard of care. 
Robinson felt such a question was not properly addressed at trial and was
significant enough for him to send the case back to the jury to reconsider in a new trial. Therefore, the important distinction of when this characterization applied was a major legal determination affecting businessmen in a country where winter ice governed the ability of common carriers to carry on business along the St. Lawrence.

For other businessmen engaged in St. Lawrence trade as warehousemen or wharfingers, different legal liability issues applied besides the question of timing. For warehousemen, Robinson decided cases where liability arose when directions given them by farmers, millers and others were improperly carried out or when, under the law of bailment which governed them, they failed to take the ordinary and average care of goods that were entrusted in their care.

For wharfingers, Robinson decided cases on whether they were in fact wharfingers according to their corporate charter. In some other cases, a plaintiff would load his goods onto a wharfinger's wharf without the wharfinger's actual knowledge. As might be expected, Robinson held that the wharfinger was not responsible if such goods became lost or damaged, for "the goods must be in such a manner placed in his charge as that he may in person, or through his servants or agents, be privy to their delivery, and have the opportunity of taking care of them." A wharfinger would sometimes lease his wharf "with all the privileges thereto belonging" to a steamship company, and, when the steamship company went into arrears
with its rent, the issue arose whether or not its vessel attached to the wharf by the usual fastenings could be distrained upon for rent owing. Robinson held that the vessel could not be so distrained, and this had implications throughout the St. Lawrence business community.

Those businessmen operating as common carriers, who had the highest standard of care to the public, generally tried to limit their legal liability through exemption clauses in their bills of lading. In Warren v. Wilson (1841-42), the owner of a vessel undertook by his bill of lading to carry goods without any exception as to the dangers of navigation or otherwise and, when the goods were lost in a storm, was held liable. Robinson later had to decide if damage to a steamship by an accidental fire in its boiler was included under the exemption clause "dangers of the lake excepted." "At present it is my impression," said Robinson in Larned v. McRae (1844-45), "that an accident by fire, not arising from explosion or other casualties attending steam, against which there may be no certain security, but arising from the fire in the furnace not being well secured or guarded, would not come within the exceptions of 'dangers of the lake'." Again, in the case of Harnden v. Proctor (1852), a ship company's bill of lading contained an exemption clause against loss by "dangers of navigation." There the question of negligence was important when a storm sunk the vessel. As Robinson acknowledged, "I have stated the facts minutely, because these cases present questions of much interest in a
commercial country such as this is; and if what is decided in one case is to
form in any degree a precedent to be acted upon in others, it is essential
that all the circumstances which could have influenced the decision should
be known." Robinson continued to admonish that businessmen insure
against all perils. He again explained: 29

To find for the plaintiff in such a case, upon a rigid view of the
point of alleged negligence, would encourage owners of cargo to
save themselves the expense of insuring, and to attempt in case
of loss to make out some case for negligence or unskillfulness,
that might take the case out of the exception in the bill of
lading of losses by perils of navigation, and throw the loss upon
the shipowners. This, as was remarked by the Court of King's
Bench in Walker v. Maitland, 5 B. & Al. 171, would introduce
very troublesome and uncertain inquiries, and would be
inconsistent with the security that should prevail in
commercial transactions.

As with his earlier decisions, he was making a point about the need to
protect transportation enterprises. These needed to be kept profitable.

Common carriers also faced situations where a plaintiff's goods had
been lost on board their ships. In these cases Robinson's judgements were
again notable for his attempts to keep their legal liability in bounds. In
McLeod v. Eberts et al. (1850-51), 30 for example, the plaintiff had a parcel
which contained a large sum of money delivered on board a ship. However,
the plaintiff placed it there through a private understanding with a ship's
passenger and not through official channels. When the parcel became lost
during the trip Robinson absolved the ship's owners of their legal liability
because, he said, "the sum is considerable, and when we reflect how great
the liability is which common carriers unavoidably incur, we cannot but feel it to be important that this liability should not be stretched beyond its just limit.31

Two other legal issues relating to transporting goods along the St. Lawrence were significant. The legislature had passed acts compelling steam vessels to carry and shine lights during the night.32 In a number of cases involving night-time collisions between two steamships, Robinson made it clearly known to the litigants that all the provisions of such legislative acts had to be fully and strictly observed to prevent a shipowner being held liable.33

Robinson sometimes had to deal with the matter of ship collisions, and whether or not the particular maritime concept of "averaging" applied in Upper Canada. Averaging has been defined by Osborn as follows.34

The apportionment of loss incurred in mercantile transactions, such as contracts of affreightment or insurance, between the person suffering the loss and other persons concerned or interested; the contribution payable by such others to the person so suffering the loss (sometimes the term is applied to the loss or damage itself). General average is any loss or damage voluntarily incurred for the general safety of the ship and cargo, e.g., where goods are thrown overboard in a storm for the purpose of saving the ship and the rest of the cargo. The several persons interested in the ship, freight and cargo must contribute rateably to indemnify the person whose goods have been sacrificed against all but his proportion of the general loss.

There was no Vice-Admiralty Court in Upper Canada, as there were in Lower Canada and Nova Scotia, so that Robinson assumed jurisdiction over
cases involving this and other maritime matters that would have been handled by these courts.35 But nowhere in any judgments dealing with such maritime issues did Robinson ever refer to these other court decisions where, for example, they might have helped him.36 The reasons why remain speculative and may be related to the fact that Upper Canada had no sea and, as Admiralty Courts were limited to things "done upon the sea," Robinson perhaps felt that these decisions would not be useful. In any event, it helps confirm once more the insular perspective of the Court of Queen's Bench with respect to cases in other British North American colonies.

Without benefit of Admiralty precedents Robinson decided a number of specialized cases involving maritime issues pertaining to St. Lawrence shipping. One such category of cases involved a ship's emergency, where a captain needed deck cargo thrown overboard in a storm to help save his vessel by lightening it. As mentioned, this issue involved averaging. Robinson held in one such case that the owners of a vessel where the captain did throw deck cargo overboard were liable for a general average to the owners of the deck cargo cast off. Robinson allowed and upheld this practice based upon what he perceived to be "common usage" prevailing among shippers in respect to deck cargo loading in Upper Canada.37 But in another such case involving the related issue of whether or not owners of goods stored below deck were also liable for a general average to the owners
of goods stored on deck which were lost by being thrown overboard from necessity in a storm, Robinson held they were not liable to contribute. There his decision was based not on general common usage prevailing in Upper Canada, but on "general authority."

This point about general authority was notable in other cases whether general average applied to all the owners of a ship's cargo when a vessel became stranded and the shipowners needed another ship to haul the stranded vessel off to its original destination. In Grover v. Bullock (1848-49), Robinson held that owners of all the cargo were liable on a general average in a decision based upon "what is received and admitted, and acted upon as law in such cases in the maritime States of Europe, and in the United States of America." In that case, Robinson used such maritime texts as Molloy's treatise De Jure Maritimo, Benneck on General Average and even an Italian writer Baldasseroni to decide the case within generally accepted principles of maritime law among trading nations. According to Robinson "it need hardly be said, that a principle resting on that foundation must be applicable in navigating our great lakes, as well as in the case of voyages on the ocean, for 'natural justice' is independent of such considerations, as whether the voyage is long or short, or the water salt or fresh." In Rogers v. Hooker et al. (1858), a similar case, Robinson confirmed once more that all cargo owners were liable. This decision, said Robinson, would be "perfectly in accordance with what has
been held in other commercial countries, as in France and in the United States." Robinson based these decisions on international maritime law because in both these cases he could find no exact English precedent to help him make his decision.43

Robinson decided other issues that had significance for businessmen and transportation along the St. Lawrence. The legislature had passed a Ship Registry Act44 which required that a certificate of registry of ownership be recited in any transfer of a ship made by way of mortgage with power of sale, as well as by absolute sale of a ship. Under the Act, if this recital was omitted the mortgage or sale was void. Several cases came before Robinson involving transfers where the recital of the certificate of registry had been omitted or was done insufficiently.45 Not surprisingly Robinson followed his usual strict interpretation and in such cases held that the certificate in question had to meet fully all the requirements of the legislative act or else the mortgage or the sale of the ship was void.

Similarly the Bank of Upper Canada by its amended charter was prevented from holding ships either as absolute property or as a mortgagee. Some instances arose, particularly after a steamship entrepreneur went bankrupt or had severe financial troubles, whereby the bank ended up holding an interest in his ships through his assignments or other legal transfers. In such cases Robinson once again took a characteristically cautious approach toward the bank holding ships in clear contravention of its
corporate charter. In *McDonnel et al. v. Assignees of Donald Bethune, a Bankrupt.* The Bank of Upper Canada (1850-51),\(^4^6\) for instance,

Robinson revealed more of his views on why this point was always important to him. He stated:\(^4^7\)

> Corporations are mere creations of the law; the intention of charters granted to trading corporations especially, is to confer certain facilities, privileges and exemptions, which may encourage and enable them to prosecute their objects effectually —...yet the legislature has in each case to take care that they set just bounds to the facilities and privileges granted, in order that such corporation may not interfere prejudicially with private individual enterprise, and may not, so far as depends on the solvency of the corporation, endanger the public interest by engaging in imprudent transactions which may involve it in ruin. Whenever we can see that a motive of public policy must have led to some particular restriction which is imposed in the charter, it is our duty to give effect to the intention of the legislature when plainly expressed, and to hold that the corporation cannot legally apply its corporate powers and capacity in a manner totally and unequivocally forbidden by its charter.

This deep concern that Robinson had about the possibility that corporations might endanger the financial integrity of the province by straying from their corporate charters was once more expressed by him in the case of *Lyman et al. v. the Bank of Upper Canada* (1852).\(^4^8\) In a similar case the Bank ending up holding a ship. Robinson outlined again in clear terms to the bar the reasons why he always felt so strongly about this practice:\(^4^9\)

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

Whether it was the early failure of the "Pretended" Bank of Upper Canada at Kingston that prompted this long-standing concern by Robinson remains open to conjecture. However, it was evident that Robinson was still concerned that businesses be financially sound and that businessmen working along the St. Lawrence could rely on "his" court to deal consistently and predictably with legal issues affecting them. He wanted security to prevail in commercial transactions, and this meant judgments that would protect the security of capital. Indeed, there was a reason, according to Robinson, for predictable judgments in business, and this was to avoid the uncertainty and confusion that would occur if his judgments could not be relied upon.

Robinson and Business Law

Some of the most significant aspects for businessmen trading along the St. Lawrence were the distances involved in dealing with other businessmen and the transportation of goods into and out of Upper Canada.
The freedom to make contracts for all kinds of business needs represented a crucial aspect of this long distance trade. Richard Risk called contract law the symbol and dominant element of the market in nineteenth-century Upper Canada in this, its "golden age." "It was an article of faith, and a pervasive and working institution" noted Risk, "Philosophers believed that freedom of contract was a fundamental requirement of government, and businessmen used this freedom to order their affairs." Robinson was often involved, for disputes over contracts frequently came before his court. Robinson was helpful to businessmen, for he knew well the workings of their trade and presented judgments which were fair to most concerned. He did so mainly by being consistent, by taking the realities of distance into account, and by deciding cases in accordance with the nature of trading along the St. Lawrence.

Some aspects of all these things were illustrated in a series of contract cases Robinson decided relative to millers who shipped to others along the St. Lawrence. The legislature had passed many acts requiring millers to mark their flour's brand and quality on all storage barrels and provided penalties for failure to do so. Problems invariably arose, however, when sometimes millers failed to do so, or when subsequent buyers resold this flour. In The Queen v. Beekman (1845-46) Robinson held that a subsequent seller who re-sold unmarked flour was not liable under the provincial statute because this applied only to the manufacturer. In Bunnel
v. Whitelaw (1857) Robinson faced a similar case where the defendant, who milled flour at his Paris mill, sold 2000 barrels of "Victoria Extra" quality flour to the plaintiff at Brantford, who then resold it to a merchant at Buffalo. This later purchaser then found out that its quality was of a lower grade, and the Paris miller, not the purchaser at Brantford, was held liable. As Robinson stated:

It is true, I have no doubt, as one of the affidavits states, that when parcels of flour are passed from one to another among merchants, the use of such words as descriptive of the article sold does not make the vendor liable as upon a warranty. The vendor is understood to sell the lot according to the designation by which he has received it; and where no description is used he is not considered liable for any deficiency in quality, unless indeed he had given an undertaking that it shall pass inspection as of the quality mentioned in the brand, or shall in truth be of that quality. But it is different in the case of a person buying from one who manufactures the article, because the quality of the article, and the use of the brand, are under his control.

In another case, Bain v. Gooderham et al. (1858), the plaintiff bought 300 barrels of flour from the defendant miller to be sent from Toronto to Montreal and, as part of the purchase agreement, the flour was to guarantee to pass inspection as "No. 1 Superfine" at Montreal. However, once the flour arrived at Montreal, the purchaser found that it was an inferior quality. Robinson held that if flour was guaranteed to pass inspection as a particular grade it must do so, and if it did not the guarantee was broken. "The question raised in this case is one of consequence to persons in the trade and to the public generally," said Robin-
son, who was conscious this time of protecting consumers relying on these representations.\textsuperscript{55}

Lastly, in \textit{Chisholm v. Proudfoot} (1856),\textsuperscript{56} the defendant, a miller in Oakville, sold his best "Trafalgar Mills, Extra Superfine" flour to Chisholm, who then re-sold this flour at Montreal. There it did not pass inspection as "Extra Superfine," and Robinson held the miller liable. In doing so, Robinson noted that "I have been particular in stating the pleadings and evidence, because the questions presented in such cases are so important to persons engaged in the branch of trade that the ground on which we decide them ought to be clearly understood."\textsuperscript{57} To do this Robinson considered evidence of usual and generally accepted business practice. In this case, for example, reviewing the trial evidence of two members of the firm of Gooderham Howland & Co. on the workings of the St. Lawrence flour trade.

As this last case also revealed, Robinson was closely attuned to understanding business realities in trading along the St. Lawrence. Accepting particular evidence of the common workings of flour trading was something he used to make his judgements predictable, acceptable and fair to businessmen. "When we know what the general usage of trade is in regard to any branch of business," said Robinson in \textit{Brown and McDonell v. Browne} (1852)\textsuperscript{58} involving a shipment of coal through the Welland Canal, "we are to look on the parties as intending to contract with reference to it, unless we have proof that they meant to deviate from it."\textsuperscript{59} By judicially
developing the idea of an express warranty of flour grades and quality, indicating clearly to whom it applied and using generally accepted business usage to understand a transaction, Robinson again acted in his own personal instrumental fashion. But more than this, in that era when government inspection was not as pervasive or as effective as today, for want of a large bureaucracy or other administrative assistance, Robinson utilized the court to reinforce the work of the legislature. Businessmen would become aware of his major legal decisions as the Smith v. Whiting case indicated, and any judgments affecting their work would probably have made them govern themselves accordingly. In a subtle way his decisions helped produce compliance to legislative desires by setting clear examples for acceptable business practices.

Of course Robinson could never be forceful enough to stop all contract disputes. One frequent problem that he encountered was the use of parol evidence, that is the use of additional oral testimony to complete or explain the meaning of a written contract. Here Robinson was entirely consistent in holding that such parol evidence was not admissible to vary the terms of a written contract, but only in some few instances to explain an ambiguous term. The principle behind Robinson’s strict stance in such instances was to preserve the integrity of the Statute of Frauds, as he made clear in his first major decision on this issue.69
A constant struggle has been occasioned by the effort to maintain the general efficacy of the Statute of Frauds (which has been regarded as a very salutary act in the main), and at the same time to prevent an unjust and unconscientious case being made of its provisions in any particular case. So far as we can find certain principles established with regard to the construction and application of the statute, I hold myself bound stare decisis, and to adopt them, although they might seem to me, as some of them have to individual judges in England, to intrench upon the strict letter of the statute.

Whenever another case had this in issue, Robinson let the litigants know in no uncertain terms that the parol evidence rule was sacrosanct for his court. "I do not refer to any authority, for the general principle that the terms of a written contract are not to be varied or controlled by parol testimony," said Robinson in The Bank of Upper Canada v. Boulton (1850-51). "There is no point that stands more clear or is sustained by more numerous decisions, and that the present is a case within the principle, I consider to be too clear to admit of doubt." 61

Risk has interpreted this judicial position as one where the court felt that the rule "facilitated reliance, stability, and planning" and, he said, the court "never undertook any of the subtle analysis and debate that it can cause. These cases are an important manifestation of a general unwillingness to make individualized adjustments to agreements that were unfair, or that had gone astray because of mistakes or unexpected circumstances." 62 This point is important, for there was never a plethora of such cases that came before Robinson, 63 and the assumption has been made that businessmen might have drafted their contracts so as to take
Robinson's predictable position on this point into account and to have acted accordingly—or else they went instead to the Court of Equity for relief.\textsuperscript{64}

But Risk's idea of Robinson giving a general, rather than a particular interpretation to the parol evidence rule possibly had other implications, for if so the idea implies more than the usual common law position that judges decide only on the merits of each particular case. Robinson it seems, wanted businessmen to rely on contracts covering long distances, and the way he perhaps accommodated this was to be consistent with the parol evidence rule. "Reliance, stability and planning" were important aspects of Robinson's judgments for businessmen. Robinson was not rigidly conservative in holding steadfast to his position on the parol evidence rule as much as he was consistent. In his view, this was more important to businessmen than changing the law. Businessmen needed clear and consistent rules to operate along the St. Lawrence, and Robinson's consistent legal stance here might have been valued.

Those growing wheat and milling it often had other problems transporting their grain and flour downriver to Montreal for export markets. As several authors have mentioned, one of the main problems was keeping wheat and flour dry in the holds of bateaux or Durham boats used for this purpose.\textsuperscript{65} Legal problems also invariably arose which sometimes led to litigation. Robinson dealt with a myriad of problems arising from mistakes in delivering the wheat by business agents, or from problems with
the delivery and storage of wheat with warehousemen or wharfingers.\textsuperscript{66}

Sometimes this resulted in damage or loss to the wheat. In \textit{Wilmot v. Wadsworth et al.} (1853),\textsuperscript{67} for example, Wilmot bought 1100 barrels of flour from Wadsworth through Wadsworth’s agent, which was guaranteed to pass inspection as “No.1 Superfine” at Montreal, and was to be delivered free on board in good order and condition. The flour was to be sold in Boston, but when it reached there it was found to be wet, and Robinson held that Wadsworth was liable for the damages. His analysis of the case was based on ownership and where title to the flour lay until the full terms of the contract had been met.\textsuperscript{68}

However, businessmen tried to protect themselves through insurance, something that we have seen Robinson strongly advocated. It should then come as no surprise that such insurance contracts were strictly interpreted by him. "In such transactions,” said Robinson speaking of insurance policies covering wheat cargoes in \textit{McFaul v. The Montreal Inland Insurance Company} (1845-46), "almost more than in any others, the utmost good faith should prevail. Any suppression of a fact, on which it may be important to the insurer that he should be allowed to exercise his judgement, either as to taking or refusing the risk, or in fixing the rate of premium, invalidates the policy."\textsuperscript{69} The utmost good faith—\textit{uberrima fidei}—was the general standard for marine insurance contracts. This was Robinson’s consistent watchword.
His same strict and consistent approach held true also for fire insurance policies. In almost all of the cases he had occasion to adjudge, if any conditions were not strictly complied with, that is if a policy was not signed as required by the President, was not under seal, if vouchers and affidavits as required were not sent in, if all conditions were not met, or if the insured increased the risk on his premises or took out a second policy without advising the first insurance company, then under Robinson these facts usually invalidated a policy.70 "We know that in all countries many frauds are practiced upon insurance companies, and many more attempted," said Robinson in one such case, "and as a necessary protection to them, the law had deemed it wise, as well as just, to exact the utmost good faith, the most exact observance of conditions in all such contracts."71 Notice again his concern to stress "protection" for these companies. The idea implied also was that businessmen could protect themselves too if they carefully observed their insurance policies.

One other point was notable about insurance contracts. Robinson candidly admitted in one case that he was not very familiar with actions on marine insurance policies, primarily because the English courts did not furnish him with many precedents.72 There were instances when he faced some difficult matters of interpretation without English precedents. In these he used his own familiarity with working conditions along the St. Lawrence to reach a decision. In Gillespie et al. v. The British America Fire and Life
Assurance Company (1850-51), for instance, the plaintiff sued the defendant on a marine policy for the loss of a vessel. There was an exception clause in the policy. The company was not liable for losses occasioned by carelessness or ignorance, and Robinson had to decide if the jury's finding was correct.

Said Robinson:73

A diagram was put in proof, which was not objected to as inaccurate, and which exhibited the blunder or carelessness in so strong a light as to make the conclusion seem irresistible; and considering how familiar we almost all are with the navigation of the river between Kingston and Brockville, I dare say that the jury, which included several merchants, who must be in the frequent habit of making the passage, had little difficulty in determining that if this condition in the policy, as to not being liable for losses occasioned by carelessness or ignorance, is to have effect given to it in the present, for there was no stress of weather—no unfavourable circumstance—nothing to produce accident but an ignorance, or inattention to what every one undertaking to conduct a vessel down the river should be supposed to know.

Yet, while he sometimes bemoaned the lack of English cases on the subject, Robinson did sometimes look at the American work by Angell on Insurance.74 He was interested to see how Angell "discussed" the issue, but he was still consistent in favouring British law over American when both were available. For example, in the case of Meagher v. The Aetna Insurance Company, decided as late as 1861, one year before his retirement, Robinson was faced with deciding whether to apply the American test for determining "total loss" of a ship (i.e. when the expense of repairs, including the charge of floating the ship, would exceed half the value declared in the
policy) as argued by counsel, or to apply instead the English test. The English test was used, as Robinson explained:

But it is enough to say that there is no authority for applying such a test according to the law of this province—in other words, the law of England, for we have no peculiar law or custom on the subject. The test by the law of England clearly is whether a prudent man would think it worth his while to attempt to save and repair the vessel, and it is assumed that he would not do it unless it had the prospect of gaining something by the attempt; in other words, that he would not make the attempt unless it appeared probable that the vessel, when got off and restored to the state she was in before the accident, would be worth as much as the operation would cost him. The English authorities have, as we conceive, at last fully established that as the criterion of a total loss.

Thus, even though Robinson recognized the lack of English precedents covering marine insurance which led him to examine corresponding American works, the sequence of his doing so was always significant. Also significant was the fact that he examined American works not as providing precedents per se but only for their principles and reasoning. A British precedent, if available, was always preferred.

This aspect of Robinson's jurisprudence—determining liability for loss and following this giving remedies for breach of contract—is the final area of contract law that we will consider. It should be remembered that as Queen's Bench was a common law court, only monetary awards for damages could be given and not, as for the Court of Chancery, specific performance or injunctions. Perhaps the most germane point to his decisions involving breach of contract was that not all losses would be compensated. As shown
in the cases of Stevenson and Kinghorn v. The Montreal Telegraph Company, Robinson imposed some limits, generally holding that compensation would be awarded only for losses that could reasonably have been expected to be caused by the breach. This followed the leading English case of Hadley v. Baxendale (1854) on damages, and was upheld by Judge Burns rendering judgment of the Court of Queen's Bench in Feehan v. Hallinan (1856).76

Feehan had entered into a contract with Hallinan to supply cordwood for his brick ovens. Feehan claimed that Hallinan delayed so long in his delivery that the price of bricks fell, and he wanted to recover all aspects of his loss. However, the court felt that the proper measure of damages for Feehan was only the difference between the original contract price of the cordwood and the price Feehan had to pay for it elsewhere. Judge Burns, following Hadley, agreed that "this principle seems clear, that it is only the immediate injury following the contract broken which is to be compensated for, unless both parties are made acquainted with special circumstances connected with the contract, and the contract can be reasonably understood to be entered into with a view to such special circumstances, expressed or necessarily implied from the knowledge and understanding of the parties."77 Thus once more Robinson's court was aware of British precedent and its affect on the business community. The result suggests that
Robinson's court was concerned with facilitating business transactions by limiting liability in cases of breach of contract to reasonable expectations.

**Conclusion**

Robinson was of great importance to the commercial system of the St. Lawrence. Indeed, many of his legal decisions assisted the work of St. Lawrence-based businessmen in their transporting staple products. The legal component of this river trade was critical to the success of their trading system and complements the Laurentian interpretation for Canadian history. As Chief Justice for Upper Canada, Robinson worked to facilitate their trade. He did so by providing businessmen with laws that offered certainty of expectations and predictability of legal consequences. In most cases, businessmen could rely on Robinson to provide a consistent albeit conservative approach to the law. His characteristically strict interpretation of transportation statutes and his consistency in interpretation of the parol evidence rule held true here as much as they did in his cases about corporate and real property law.

His decisions affecting the practices of those working along the river as common carriers, warehousemen or wharfingers were also noteworthy for the degree of protection he recommended to businessmen. He stressed the value of insurance, referring to it often as something which would assist the
security of both large business concerns and individual traders. His
development of the idea of a flour warranty tied directly to the miller did
much to help traders and consumers rely on representations over long
distances, as well as to make millers more responsible for their products. All
this occurred without the assistance of a large government civil service or of
an agency to regulate this trade itself. Robinson's willingness to judge many
cases in accordance with generally accepted business practices along the St.
Lawrence suggests also that he wanted businessmen to realize that, as
cases came before his court, he would be in touch with their concerns. By
doing so Robinson again exhibited some attributes of instrumentalism.

All the same, his instrumentalism was not exactly the same kind of
judicial instrumentalism then flourishing in the United States, as described
by Horwitz. Robinson never expressed a feeling that he was making new
law for businessmen's needs. It was better, in his view, to be consistent
rather than innovative. Even in the area of "averaging" he stressed that he
was linking Upper Canada with generally accepted maritime law rather
than making anything new. Neither did he think he was promoting
competition among businessmen for the best interests of society. Nor did he
feel that his decisions had behind them the idea of maximizing the
productivity of commerce. Never did he believe that the law he propounded
was an instrument of the people's will.
In summary, Robinson's personal instrumentalism never had the same contextual meaning or effect for rapidly transforming society as Horwitz argued that instrumentalism was having in America. Robinson's decisions facilitated commerce, but not for the same reasons as Horwitz argued that judges were then articulating in America. This conclusion confirms criticisms of Horwitz by Bell, Parker and Wright. Horwitz's theoretical perspective on instrumentalism had a specific and local basis. American instrumentalism could not readily be exported to a different country like Upper Canada. One must be cautious in assuming that American instrumentalism in the form of liberal economic concepts partly justified by liberal political theory was so persuasive and intrinsic to capitalism as to have spread elsewhere.
ENDNOTES


5. This "Laurentian School" was summarized by Careless, who wrote that it "...largely rests on the idea that the long St. Lawrence water route and its connections across the continent became the basis of an extensive communications system around which Canada itself took shape." J.M.S. Careless, "Frontierism, Metropolitanism, and Canadian History" CHR, 35 (1954) 1, 14.


7. Canniff Haight, Country Life in Canada Fifty Years Ago: Personal Recollections and Reminiscences of a Sexagenarian (Toronto, 1885), 125.


10. An Act to Incorporate Certain Persons Therein Mentioned Under the Style and Title of the President, Directors and Company, of the Grimsby Breakwater, Pier and Harbour Company (1835) 5 Will. IV c. 16 (U.C.); An Act to Incorporate The Toronto Dry-Dock Company (1847) 10 & 11 Vic.c. 85 (Can.); An Act to Incorporate The Canadian Steam Navigation Company (1853) 16 Vic. c. 131 (Can.); An Act to Incorporate Certain Persons Under the name of the St. Lawrence Warehouse, Dock and Wharfage Company (1857) 20 Vic. c. 174 (Can.) and An Act Respecting Joint Stock Companies for the Construction of Piers, Wharves, Dry Docks and Harbours (1859) 22 Vic. c. 50 (Can.).

11. An Act to Compel Vessels to Carry a Light During the Night, and to Make Sundry Provisions to Regulate the Navigation of the Waters of This Province (1837) 7 Will. IV c. 22 (U.C.); An Act to Amend an Act, Entitled, An Act to Compel Vessels to Carry a Light During the Night, and to Make Sundry Provisions to Regulate the Navigation of the Waters of this Province (1851) 14 & 15 Vic. c. 26 (Can.); An Act Respecting the Registration of Inland Vessels (1859) 22 Vic. c. 41 (Can.); An Act Respecting the Navigation of Canadian Waters (1859) 22 Vic.c. 44 (Can.); An Act Respecting the Inspection of Steamboats; and for the Greater Safety of Passengers by Them (1859) 22 Vic. c. 45 (Can.); An Act to Protect the Public Against Accidental Injury from Machinery Used in Mills, and for Other Purposes (1837-38) 1 Vic. c. 18 (U.C.); An Act to Amend a Certain Act Therein Mentioned, so as Better Provide for the Security of the Lives of Passengers on Board of Steam Vessels (1857) 20 Vic.c.34 (Can.); An Act to Prevent Accidents from Machinery (1859) 22 Vic. c. 79 (Can.); An Act to Make Further Provision for the Safety of Passengers by Steamboats (1860) 23 Vic. c. 28 (Can.).

12. An Act to Incorporate the Montreal Board of Trade (1841) 4 & 5 Vic. c.90 (Can.); An Act to Incorporate the Quebec Board of Trade (1841) 4 & 5 Vic. c. 92 (Can.); An Act to Incorporate the Board of Trade for the City of Toronto (1845) 8 Vic. c. 24 (Can.); An Act to Incorporate the Montreal Exchange (1853) 16 Vic. c. 146 (Can.) and An Act to Incorporate The Toronto Exchange (1854) 18 Vic. c. 54 (Can.).

13. An Act for the Better Protection of Merchants and Others who May Hereafter, Receive Assignments and Enter Into Contracts and Agreements In Relation to Goods and Merchandize Entrusted to Agents (1847) 10 & 11 Vic. c. 10 (Can.); An Act to Regulate the Duties Between Master and Servant, and for Other Purposes Therein Mentioned (1847) 10 & 11 Vic. c. 23 (Can.); An Act for the Punishment of
Warehousemen and Others Giving False Receipts for Merchandise and of Persons Receiving Advances Upon Goods, and Afterwards Fraudulently Disposing of Same (1849) 12 Vic. c. 12 (Can.); An Act to Amend the Law Regulating Inland Bills Of Exchange and Promissory Notes, and the Protesting Thereof, and Foreign Bills, In Certain Cases (1849) 12 Vic. c. 22 (Can.); and An Act for Better Preventing the Fraudulent Use of False Invoices for Customs Purposes (1861) 24 Vic. c. 3 (Can.)

14. For wheat and flour acts see An Act to Authorize the Governor, Lieutenant Governor, or Person Administering the Government, to Appoint Inspectors of Flour, Pot and Pearl Ashes, Within This Province (1801) 41 Geo. III c. 7 (U.C.); An Act to Regulate the Inspection of Flour and Meal (1841) 4 & 5 Vic. c. 89 (Can.); An Act to Amend and to Continue as Amended the Laws Regulating the Inspection of Flour and Meal (1850) 13 & 14 Vic. c. 29 (Can.); An Act to Establish a Standard Weight for the Different Kinds of Grain and Pulse and Seeds in Upper Canada (1853) 16 Vic. c. 193 (Can.); An Act to Extend to Lower Canada the Provisions of the Act to Establish a Standard Weight for the Different Kinds of Grain, Pulse and Seeds in Upper Canada (1854) 18 Vic. c. 15 (Can.); An Act for the Inspection of Flour, Indian Meal and Oatmeal (1856) 19-20 Vic. c. 87 (Can.); An Act Respecting the Inspection of Four and Meal (1859) 22 Vic.c.47 (Can.); An Act Respecting the Inspection of Wheat and Other Grain (1863) 26 Vic. c. 3 (Can.) For Pot and Pearl Ashes see An Act to Regulate the Inspection of Pot and Pearl Ashes (1842) 6 Vic. c. 6 (Can.), (1854) 18 Vic. c. 11 (Can.) and (1859) 22 Vic. c. 49 (Can.). For timber inspection acts see An Act to Regulate the Inspection and Measurement of Timber, Masts, Spars, Deals, Staves, and Other Articles of a Like Nature, Intended for Shipment and Exportation from This Province, and for Other Purposes Relative to the Same (1842) 6 Vic. c. 7 (Can.); An Act to Authorize the Formation of Joint Stock Companies to Construct Works Necessary to Facilitate the Transmission of Timber Down the Rivers and Streams of Upper Canada (1853) 16 Vic. c. 1919 (Can.) and An Act Respecting the Culling and Measuring of Lumber (1859) 22 Vic.c. 46 (Can.).

15. P.G. Osborn, A Concise Law Dictionary (London, 1964) defines "common carrier" at 61: "One who, by profession to the public, undertakes for hire to transport from place to place, either by land or water, the goods of such persons as may choose to employ him. He is bound to convey the goods of any person who offers to pay his hire, and he is an insurer of goods entrusted to him; that is, he is liable for their loss or injury, in the absence of a special agreement or statutory exemption unless the loss or injury was caused by the act of God or the Queen's enemies."

16. (1849-50) 6 U.C.Q.B. 204.


20. Said Robinson, *ibid.*, at 374: "We all know that in this country there are about five months of the year, from the beginning of December to the early part of May, when the business of common carriers by water between Kingston and Montreal is of necessity suspended; the navigation being closed by ice." See also the similar case of *Thirkell v. McPherson et al.* (1844-45) 1 U.C.Q.B. 318 where Robinson said at 320: "The difference is one on which the case turns, because it is only as common carriers that they are charged in this action and it is only as common carriers that they would be liable in law for a loss occurring from a fire under such circumstances."


28. (1852) 9 U.C.Q.B. 592.


30. (1850-51) 7 U.C.Q.B. 244.


32. An Act to Compel Vessels to Carry a Light During the Night, and To Make Sundry Provisions to Regulate the Navigation of the Waters of This Province (1837) 7 Will. IV c. 22 (U.C.) and An Act to Amend an Act Entitled, An Act to Compel Vessels to Carry a Light During the Night, and to make Sundry Provisions to Regulate the Navigation of the Waters of This Province (1851) 14 & 15 Vic.c. 126.
33. See Eberts et al. v. Smythe et al. (1846-47) 3 U.C.Q.B. 189 (Can.) And Gildersleeve v. Bonter et al. (1855) 12 U.C.Q.B. 489. For other ship collisions where the act was not involved see Sutherland et al. v. Bethune (1853) 10 U.C.Q.B. 388 (Can.) and The Cataraqui Bridge Company v. Holcomb et al. (1861-62) 21 U.C.Q.B. 273 (Can.).


36. See again George Okill Stuart, ibid., The Admiralty Court in Lower Canada heard cases on mariner's wages, attachment, collisions, damages, evidence, pilotage, salvage, mariner's contracts, wrecks and maritime liens among others. Judge Henry Black, who was a judge in this court from 1836-1873, was very learned and enjoyed a high reputation in maritime law. He was also made a Companion of the Bath. See Jacques Monet, "Henry Black" DCB, 10, 68.

37. In Grousselle v. Ferrie et al. (1842) 6 U.C.Q.B. (O.S.) 454 Robinson said at 455: "The usage is notorious and universal, and the exigencies of commerce require it. The nature of the navigation on our inland waters makes the usage a reasonable one; and in point of fact the loss of a deck cargo, when properly stowed, is not of frequent occurrence." See also Paterson v. Black (8148-49) 5 U.C.Q.B. 481.

38. Gibb v. McDonnell (1850-51) 7 U.C.Q.B. 356. Said Robinson at 363: "...though the question is not left upon satisfactory ground by the few English authorities upon the subject of contribution, we consider that we are adopting the view of the case which up to this time is most consistent with authority, in holding that the owner of the deck cargo in the case before us had no claim on the plaintiff for contribution."


40. Ibid., at 300.

41. (1858) 15 U.C.Q.B. 63.

42. Said Robinson, ibid., at 72: "It is laid down as clearly established in English law, in conformity with the uniform tenor of the continental and American authorities, that in cases where the original ship is disabled by the perils of the seas, by any event which the master has not occasioned, and over which he had no control, the master is empowered to procure another ship in which to forward the goods to their
place of destination; and on their arrival in such substituted ship, the owner is entitled to receive from the merchant the whole amount to freight which he might have claimed had they arrived on board the original ship."

43. Said Robinson, *ibid.*, at 69: "It is singular that no case appears to have arisen in England in which the right, under circumstances such as occurred in this case, to charge increased freight to the owners of cargo saved from the wreck, and forwarded in another ship to the place of destination, has been the point in question."

44. (1845) 8 Vic.c.5 (Can.). See also An Act to Encourage Shipbuilding Within This Province (1856) 19 Vic. c. 50 (Can.) and An Act for the Encouragement of Ship-Building (1859) 22 Vic. c. 42 (Can.).


46. (1850-51) 7 U.C.Q.B. 252.


48. (1852) 8 U.C.Q.B. 354.


51. (1845-46) 2 U.C.Q.B. 57.

52. (1857) 14 U.C.Q.B. 241.


54. (1858) 15 U.C.Q.B. 33.

55. The *Upper Canada Law Journal* 3 (1857) 189 felt this area was of particular interest to its readers to advise them of "Some recent and important decisions of commercial interest." Commenting on *Bain* the author stated, at 190: "As flour is in Canada an article of universal consumption, the security of the public no less than
the maintenance of good faith between man and man, alike required the decision so
righteously pronounced in this case."

56. (1858) 15 U.C.Q.B. 203.

57. Ibid., 210. For another case involving a warranty on a manufacturer of threshing
machines, see Grant v. Cadwell (1852) 8 U.C.Q.B. 161. For mechanization of the
farm in the 1830's, see D.A. Lawr, "The Development of Ontario Farming, 1807-1914;
Patterns of Growth and Change" Ontario History, 64 (1972) 240.

58. (1852) 9 U.C.Q.B. 312.

59. Ibid., 314. In Tilt v. Silverthorne (1854) 11 U.C.Q.B. 619 Robinson also
considered business practice, saying at 620: "Being aware, as we are, from what has
often been proved before as in relation to contracts in this description of business,
that it is the usage of the trade, and the common understanding of the parties, that
wheat delivered in large quantities at a mill, as this case, is not expected or intended
to be kept apart and ground for the person delivering it." For evidence of use of
business practice in the timber trade see Tumblay v. Mevers (1858) 16 U.C.Q.B. 143.


61. (1850-51) 7 U.C.Q.B. 235.

62. Risk, supra note 50 at 311.

63. See Walker v. Boulton (1833) 3 U.C.K.B. (O.S.) 252; Miller v. Palmer and Carr
(1834) 3 U.C.K.B. (O.S.) 425; Bradbury v. Oliver (1838) 5 U.C.Q.B. (O.S.) 703;
Gilmour v. Hayes (1842) 6 U.C.Q.B. (O.S.) 631; Hart et al. v. Davy (1844-45) 1
U.C.Q.B. 218; Doe Lowry v. Grant (1850-51) 7 U.C.Q.B. 125; Scouler v. Haley (1852)
8 U.C.Q.B. 2555; Gerow v. Clark (1852) 9 U.C.Q.B. 219; Shaw v. Caughell (1853) 10
(1861-62) 21 U.C.Q.B. 103.

64. See Merritt v. Ives (1846-48) 2 Upper Canada Jurist 25 a decision of Vice-
Chancellor Jameson in Chancery, 23 and 27 August 1844 in which his court received
parole evidence to rectify a written instrument on the ground of either fraud or
mistake.

65. See G.P de T. Glazebrook, A History of Transportation in Canada (Toronto, 1938)
68 and Robert L. Jones, History of Agriculture in Ontario 1613-1880 (Toronto, 1946)
29. For some interesting parallels with America, see Thomas D. Odle, "The American
Grain Trade of the Great Lakes, 1825-1873", Inland Seas, 8 (1951) 237, 8 (1952) 23,


67. (1853) 10 U.C.Q.B. 594.


72. Said Robinson in Crawford v. St. Lawrence Insurance Company (1852) 8 U.C.Q.B. 135 at 138: "I was desirous of having any point that had been raised reconsidered, for we are not yet very familiar with actions on marine policies, and the courts in England do not furnish many cases: the losses, when they occur, being universally amicably adjusted by reference to merchants, or to counsel where questions arise."

73. (1850-51) 7 U.C.Q.B. 123. See also Silverthorne v. Gillespie, Moffat, et al. (1852) 9 U.C.Q.B. 414.

74. In Noad et al. v. The Provincial Insurance Company (1860) 18 U.C.Q.B. 584 the issue in the fire insurance policy was that the defendant claimed the plaintiff had a second insurance policy without having notice of it or endorsing this on the policy.
The plaintiff claimed he gave the Insurance Company due notice and it neglected to endorse this on the policy. Robinson said at 589: "There is but little to be found in English works or cases respecting conditions of this nature, so that we are obliged to refer to American treatises for discussions on the effect of them. I refer to Angell on Insurance, sections 88 to 95, from which we may gather that a condition of this nature must be strictly complied with, by having the endorsement made, and that where the company, on receiving notice refuses or neglects to make it, assured cannot enforce [sic] his policy in the face of such a condition not complied with, whatever remedy in equity or otherwise he may have against the company for declining to endorse it." Nevertheless, Robinson did however, decide the case by examining the company's charter that double insurance needed the consent of the director's endorsed on the policy.

75. (1861) 20 U.C.Q.B. 602 at 620.

76. (1856) 13 U.C.Q.B. 440.

77. Ibid., 441. In McCallum v. Daves (1852) 8 U.C.Q.B 150 decided several years earlier the case involved an action for breach of covenant and Robinson noted at 153 that "It is a general principle that, upon a breach of covenant, a person is liable only for such damages as are the natural consequences of his act or omission." See also Colton v. Good (1854) 11 U.C.Q.B. 153; Young v. The Grand River Navigation Company (1856) 13 U.C.Q.B.506; The Union Road Company v. Talbot (1857), 15 U.C.Q.B. 106 and Brunskill v. Mair (1858) 15 U.C.Q.B. 213.
CHAPTER SIX

ROBINSON AND THE FORMATIVE ERA OF

RAILWAY LAW

...against the rapidity, cheapness, certainty and ease of the railway transit, the canals were little better than rushlights compared with a profuse gas illumination.

The Economist, "Railway Enterprise in Canada,"
October 6, 1860, 1091.

Introduction

Almost as soon as the canal system made the St. Lawrence-Great Lakes river system operational around the late 1840's, men like Thomas Keefer, William Hamilton Merritt and Samuel Zimmerman, all previously involved with canal building, vigorously supported a continuation of improved inland communications via railways. These men knew the disadvantages of a cold Canadian winter to river travel when, said Keefer in his influential essay The Philosophy of Railroads (1850), "the animation of business is suspended, the life blood of commerce is curdled and stagnant in the St. Lawrence—the great aorta of the North.""1 Keefer and Merritt were early transportation theorists. "The great central theme of Keefer's writing,"

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said D.C. Masters, "was the age-long struggle between the St. Lawrence and
eastern American lines of transportation for control of the western trade."²
Merritt’s entire career he noted, "was based on a coherent and feasible
system which was calculated, by a programme of improved inland
communications and a gradual removal of fiscal restrictions, to make
Canada the avenue of trade between Great Britain and the western
states."³ As well, these men were tremendous publicists for what they saw
as the great advantages of railway travel.

"Railroads, Railroads! The Canadian world is at last thoroughly alive
on the subject of Railroads," stated George Brown’s Toronto Globe in 1850;
"Every newspaper teems with the proceedings of public meetings, with
discussions as to the best routes, urgent appeals to capitalists to lend their
aid to the several schemes now before the public, and confident predictions
as to the advantages to be reaped on them. Opposition seems to have died
away, and there seems to be an unanimous desire to build the roads, some
way or other; the prospect that something effectual will at last be done
seems really good."⁴ These men, especially railway contractors like
Zimmerman, also lost no time in exploiting public events of all kinds to
foster needed support. When, for example, the Ontario Simcoe and Huron
Railroad had its inaugural run from Toronto northwards in 1855, over 5,000
people were on hand for a civic celebration to watch the start of this new
transportation era.⁵
Besides the advantages of all weather transportation, railway promoters were keenly aware of the commercial advantages that railways offered for developing a city’s hinterland, and for penetrating the lucrative American market, especially after changes occurred in Britain’s colonial mercantile system and after the province had Reciprocity with America in 1854.⁶ Here the lead seems to have been taken by Hamilton’s Alan McNab who, with leading London Ontario businessmen in the 1830’s, helped promote and later build the important Great Western Railway.⁷ This railway was among the first constructed in Upper Canada and was a harbinger of other provincial railways. The promoters employed American contractors to build it and secured American as well as English capital to finance it. The company encountered many initial start-up problems with accidents brought on by winter freezing of its rails, by collapsed embankments, by animals on the railbeds, and by human error.⁸ Soon, almost every other city or town in Upper Canada also wanted a railway. Leading businessmen considered that it was part of a city’s civic pride and economic necessity that it secure a rail link.⁹

From Toronto, came challenges to the Great Western. Leading Toronto businessmen in 1836 incorporated the "City of Toronto and Lake Huron Rail Road Company" to tap and service the expanding hinterland north of that city.¹⁰ The Simcoe district north of Toronto was an important agricultural area as many newly-arrived settlers travelled up Yonge Street
to establish new farms there. Like the Great Western, Toronto's first railway venture also had initial capital shortages and difficulties with American contractors; but there was no escaping a desire to establish a rail line north from Toronto to service its hinterland. In 1850, at the beginning of this new era there were, said Terry Ferris in his work on the Railways of British North America, only about 66 miles of railways, but by 1860 this had increased to 2,065 miles. Though less impressive than railway mileage in the United States, it nevertheless meant a significant railway network for the colonies. Indeed, the coming of the railway contributed to the shift from a predominantly rural and agricultural society to an urban and industrial one. The railways, like banks, canals, insurance companies and corporations were also critical in the transition.

Leading railway entrepreneurs like Samuel Zimmerman, Frederick Capreol, A.T. Galt and Alan McNab, for example, required and received much government assistance; and the legislature's efforts to aid railways should once more not be overlooked. The legislature's involvement with railway transportation was far greater than it had been in the earlier canal era, and possibly much can be attributed to the personal efforts of Francis Hincks when he was finance minister in the Baldwin-LaFontaine ministry of 1848.

Hincks, coming to Upper Canada from Ireland in the 1830's, quickly established himself as a leader in the reform cause, and he became the chief
ministerial advocate for a concerted effort to facilitate new railway
construction by the reform government. As he noted in his autobiography
Reminiscences of His Public Life (1884), his "railroad policy" started with
the important Guarantee Act of 1849, which had much to do with his
government's financial aid to railways. According to this act, whenever a
new company agreed to build a railway over seventy-five miles in length
and had completed one half of the construction the Government would
guarantee the interest at a rate not exceeding six percent on a bond issue
sufficient to complete the railway. In addition to this, Hincks also helped
railway financing when his government introduced the Municipal
Corporations Act to the assembly. Among other things, it created local
governments with taxing powers, and the resulting monies could be spent
on railway debentures. In conjunction with this Hincks helped introduce
the Consolidated Municipal Loan Fund Act which helped municipalities
market their railway debentures with the aid of the provincial government.
When Hincks introduced the act incorporating the Grand Trunk railway, a
company which for the first time had aspirations to link all of British North
America, he did so with a companion act to raise money by loan to help
finance it.

Besides these enabling acts, Hincks introduced other legislation,
recommended by the British Colonial Office, for a general railway law that
would apply to all new railways. His important Railway Clauses
Consolidation Act of 1851 did so.\textsuperscript{19} This act was crucial for all future railways built after its passing, and has been summarized by McLean as follows:\textsuperscript{20}

The general powers incident to a railway charter were declared to be: to receive grants of land, purchase lands, occupy beaches, carry the railway across the lands of a corporation, carry the railway across or along streams, complete the railway with one or more tracks, to erect necessary buildings, to make branch railways, if required and provided by the special acts; to exercise all other powers necessary to a railway, to convey goods and persons on the railway, to borrow money at a rate not exceeding 8 per cent., to enter upon Her Majesty's land without previous license, to make surveys, to fell or remove trees to the distance of six rods from the railway, to make crossings over other railways or to unite with them. When disputes arose concerning the value of lands required by a railway the matter was to be settled by arbitration. The tolls and fares were to be determined in by-laws passed by the directors of the railway, but these by-laws were not operative until they had first been approved by the governor-in-council; there was also a further requirement that there had to be two weekly publications in the Canada Gazette, not only of the by-laws, but also of the order-in-council approving them. The tolls and rates might be raised or lowered by the railway, but preferences were forbidden. The table of tolls and rates had to be posted up in a public place. The rates of the railway were subject to revision at any time by the governor-in-council. To the legislature was reserved the right to reduce the tolls and fares, but not without the consent of the railway, or so as to produce a dividend less than 15 per cent. The stock of the company might be increased by a two thirds vote of the shareholders. Municipalities might subscribe for stock in or lend money to railway companies. The head of a municipality subscribing £5000 was to be ex officio a director of the railway. The mail, troops, police, etc., were to be carried on terms agreed upon.

This was only a first step in subjecting railways to government regulatory measures, including an important amendment to this act,\textsuperscript{21} an act punish-
ing railway officers or servants contravening railway by-laws, an act to prevent accidents on railways and the more inclusive pre-Confederation "Railway Act" of 1859. By these acts, Hincks helped establish a systematic and comprehensive railway policy.

The advent of railways, planned and built primarily in the 1850's when necessary capital was finally secured, came late in Robinson's judicial career. Robinson was to retire from the Court of Queen's Bench in 1862 because of ill health. He then assumed the less strenuous and newly-created post of President of the Court of Error and Appeal. In the approximately ten years time he had left on the bench, Robinson heard only the first railway cases that came before his court. As might be expected, therefore, the majority of cases related to railway construction. Cases relating to many other areas, for example determining the rights, duties and liabilities of railways as common carriers, did not have the occasion to come before Robinson that frequently. As a result Robinson's railway jurisprudence was not as rich in comparative terms as it was for a notable American contemporary, Chief Justice Shaw of Massachusetts. Shaw, said his biographer Leonard Levy, "more than any other judicial figure...formulated the fundamentals of American railroad law." Whereas by 1860 there were 2,065 miles of railway track in British North America, there were 30,626 miles of track in America. This fact alone provided Shaw and other American judges with a wider variety of new and important legal questions
that called for solutions. Judges cannot always control the types of cases that come before their court, or the lack of them, for potential cases are a direct reflection of what exists or does not exist in the society of the time.

Though Robinson heard only a small number of railway cases late in his judicial career, his decisions were nevertheless important for railway growth in the province even in its early stages. Robinson also recognized the tremendous impact that the railway was having on the social, economic, and industrial face of Upper Canada. As a large absentee landholder in Simcoe County north of Toronto, he knew specifically, like other Toronto businessmen, what benefits a railway could bring to an outlying area. Yet, while this may have predisposed him to favour railways, it never prevented him from being objective about their operation. Robinson was as consistent and predictable in his railway decisions as when he decided corporate or canal cases years earlier. A strict interpretation of a railway's charter and continued use of a railway's corporate seal, for example, were characteristic of his decisions even at this late date in his judicial career.

Railways were corporate entities of a distinctive kind and did raise new questions. Their need to invade private property to build tracks, requirements authorized by legislative charters and by government policy, threw into greater relief a conflict between new and old ideas. Small yeoman farmers, who had sacrificed much to re-establish themselves in Upper Canada, trusted in the common law to protect their private property.
Even if they lacked a knowledge of the law, they imagined they had rights. While promoters were clamouring for railways and received the benefits of the legislature's solicitude, many Upper Canadian farmers opposed the railway, underscoring the persistence of ancient rights by common folk that were not created by the legislature, but which they believed, were entrusted in the common law. These individuals confronted railways with their charters and public policy supports in the courts. When Robinson sat as judge, he recognized the worth of each side; his characteristic strict interpretation of a railway's charter may also have been his attempt to ensure both sides achieved acceptable justice. All railways were products of the legislature, but in deciding cases Robinson was cognizant of the established property rights of the public as well as of the railway. This understanding and balance tempered his judgments. If private interests had, by legislative charter, to yield to the larger interests of the railway, Robinson tried to assure that they yielded only after careful review and after the limitations of a railway's powers were spelled out.

The Development of Railway Law Under Robinson

One of the main reasons why it took so long for railways to begin construction in Upper Canada compared to America was the scarcity of capital. There was not enough capital in Upper Canada, and railway
entrepreneurs and politicians like McNab and Hincks had to go to England and America to obtain funds. As a result many early railway charters that had been granted in the late 1830's had expired for non-use, primarily because of this problem.29 One example was the "City of Toronto and Lake Huron Rail Road Company." It had failed to raise enough capital and fell into disuse. However, once Toronto's financial situation had improved by 1849, William Allan headed a drive to reactivate the company, and the company was reborn as the "Toronto, Simcoe and Lake Huron Union Railroad Company."30 But there were some problems here. Robinson had to adjudicate whether the directors of the later railway could sue in debt one of the original stockholders of the first railway for an installment still unpaid on the stock for which he had originally subscribed. The City of Toronto and Lake Huron Rail Road Company v. The Honourable George Crookshank (1847-48),31 as might be expected, was a case of much consequence to the Toronto business community. Crookshank was a man of some influence. His defense was that the original company was extinct and the new charter was void and prejudicial to him. However, Robinson, showing consistent deference towards legislative authority, declared that the legislature had powers to waive the forfeiture and continue the original act. As this was, he found, the declared will of the legislature, all were under an obligation to conform to it. "We could not hold their act void," said Robinson in what was perhaps his strongest endorsement of legislative
supremacy, "merely because it could be shown to be inconsiderate, or unreasonable, or unjust." This case could have been used by other railway promoters and directors as a precedent, but it is difficult to know how conducive it was for railway financing, as few other cases came before Robinson on this point. However, the main element to recognize was that it showed Robinson’s continuing deference to legislative supremacy.

Once chartered and having obtained necessary financing, railway promoters began to build their railways. It was here that several other legal issues became important. The history of early railway activity in Upper Canada was rife with many horrible train accidents involving much loss of life. While many of these were attributable to human error or to animals on the tracks, some were caused by cold winters affecting the rails, collapsed embankments, fill subsiding, or generally poor maintenance of the roadbed. Because many of these railway companies used American contractors, there arose a distrust, particularly among the Anglo-Canadian engineering fraternity, of shoddy American construction work. While this led to much legislative activity to improve railway safety, it did not lead to a similar increase in judicial activity by Robinson. Robinson’s only opportunity to make a judicial contribution respecting railway fatalities came late in his career, specifically when some fatality cases resulting from the notorious Desjardins’ Canal bridge disaster of 1857 came before his court. Timing was then a factor. Moreover in these cases the Great
Western Railway had allowed judgment to be entered against it by default, so that in these cases brought under the legislative act for compensating the families of persons killed by accident, Robinson's judgments focused only on the legal issue of the measure of damages. Robinson was involved much more with issues related to the actual construction of railways. Railway charters and the Railway Clauses Consolidation Act of 1851 provided for railways to expropriate private property deemed necessary to build their work. This was the Canadian counterpart of the great instrumentalist area of "eminent domain" that figured so prominently in the industrialization of the United States, especially when this doctrine was transferred from the public to the private sector in the 1800's. However, Robinson took a strict judicial construction towards such important powers in a railway's charter, and this made him less instrumentalist than, for example, his contemporary Shaw in Massachusetts. Shaw had asserted that "the rights of property, though adequately protected, ranked second to the rights of the Commonwealth." Under Robinson, expropriation cases could go either way. In Sommerville v. Great Western Rail Road Company (1854), for instance, Robinson upheld a charter's provision that the Great Western might enter upon land for purposes of their road. As he said, "the legislature certainly seems to have meant that the company might enter at once, and do whatever is charged in this declaration to have been done, without being
trespassers." But in *Johnson v. The Ontario, Simcoe and Huron Railroad Company*, which was decided in the same year,42 the court held that the railway's charter, which stipulated that the railway should make satisfaction "to all persons and corporations interested" in any lands taken for the railway, would also include doing so with a tenant for a term of years. A tenant could maintain a trespass action against the railway, which had previously compensated only the owner of the land needed for its tracks.43

The same neutral position was taken by Robinson in several railway arbitration cases. Railway charters and the Railway Clauses Consolidation Act provided for the appointment of arbitrators to valuate land needed and taken by the railway. Robinson had a general feeling with most cases arising from arbitration that arbitrators did their job fairly, and the court would need clear and strong reasons to intervene in their decision. As he said in *Schobell v. Gilmour* (1848-49), "the whole course of the courts, both of law and equity, in dealing with awards, is such as to preclude us, except under clear and extraordinary circumstances from going into a consideration of the merits after the arbitrators have awarded upon them."44 However, Robinson was more inclined to review an arbitrator's award over railways, if only because they were more pressing and numerous than others before his court.
The arbitration process could be complicated by time delays, re-
appointments and decisions about the proper subject matter for ar-
bitration. Robinson did not favour one party over the other. In some
cases, he did set aside an arbitrator's award where the railway argued that
it was an excessive valuation and Robinson felt that the arbitrators had not
strictly conformed to the statute in making their estimate. In *Great
Western Railroad Company v. Babv et al.* (1855), for example, Robinson said
that "it appears to us that the valuation is so excessive as to make it plain
that the arbitrators have not conformed to the statute in making their
estimate, but have made the company pay, and apparently pay most
extravagantly, for the expected advantage of an immense trade which the
railway has brought or is expected to bring here, and for the effect of that
trade in enhancing the value of property."46

In other cases, he did not upset the arbitration award.47 But one
should not forget that there were many more arbitration cases where only
the railway claimed relief, for any incorrect or excessive valuations could
readily upset their profit margin. They were more inclined and financially
able than small landholders to pursue this issue strenuously right through
to Queen's Bench. Robinson may not have been a vigorous instrumentalist--
as that term is understood in American legal history--but the courts were
an instrument that helped large corporations.
Once land was expropriated, then the construction of a railway could begin. Promoters were anxious to proceed with building their railways as quickly as possible. However, problems with sub-contractors often plagued the chief engineer, the person in charge of all construction work. The case of Jarvis _et al._ v. Dalrymple (1854)\(^4\) was important, for it impliedly set out Robinson's position clearly for other sub-contractors to notice. There is a sense in this case that the decision was made for a wider audience than just the immediate litigants. Here the sub-contractors had entered into an agreement with the main contractor of the Great Western to perform work on the railbed at a fixed rate per cubic yard, according to the estimate of the chief engineer. Upset with how the chief engineer measured their work, they claimed more, and called in another engineer to back up demands for more money. Robinson felt this was a clear case where it was necessary to hold sub-contractors to the express terms of their agreement. "It is of consequence that parties should be held to the terms of their contract," said Robinson, "or no one would be able to proceed with confidence in executing the works which are now in progress, and which are so important to the community. It would encourage litigation of a very harassing kind, and probably to a great extent, if parties were allowed thus to escape from their own agreements, and bring losses upon others contrary to the plain terms of their contract."\(^4\) Another important point to note was Robinson's strict construction of the terms of a contract. Railways were important, as he
acknowledged, but so too was the legal idea that contracts must be
honoured. Under Robinson this would apply to the railway as well as to
sub-contractors.

A railway's agents often contracted for needed construction supplies
such as rails, gravel or wood for railway ties. Some cases ended up in
Robinson's court concerning the issue of a railway's agent failing to use or
have affixed to such contracts the railway company's seal. Even at this late
date in his judicial career, Robinson remained characteristically consistent.
In all such contract cases Robinson held that a railway company's seal was
necessary. For example, in *McDonald et al. v. McMillan* (1859), the
plaintiff made a contract with McMillan, agent for the Great Western, to
furnish cordwood to the railway. When problems brought this contract to
court, Robinson held that the contract was unenforceable for want of a
corporate seal. "The plaintiffs were as much bound to know as the
defendant was," said Robinson, "that if they desired to have the company
legally bound to that which the defendant had stipulated for in their name,
it would be necessary to have a proper agreement in the name of the
company, sealed with the corporate seal." Indeed the idea of being "bound
to know" is important. Robinson expected both sides to know this and they
were perhaps, being punished for their ignorance of the law and for their
foolishness.
In another such case, counsel made Robinson aware of some relaxation of the use of a corporate seal even in England. Nevertheless, after Robinson examined the cases cited, he held steadfast to his position. "Upon that point the language of several late judgments in England shews a tendency to relax from the well settled principles of former times," said Robinson in this case, but he went on to declare that "the opinion of the judges upon it seems unsettled and inconsistent, so that there is some reason to fear the same inconvenience from fluctuating decisions on that branch of the question that has been felt for some years past from the conflict of authorities upon the other point." In other words, faced with the opportunity (and challenge) to relax a well-settled rule in his court he chose not to do so. Instead he stuck to his ideas of certainty of expectations and predictability of legal consequences. But Robinson's position—even though conservative—was in a subtle way instrumental, for, as suggested earlier, businessmen presumably would have expected his reaction on advice through their counsel. As this case reveals, for Robinson certainty of the law was again more useful than unsettled innovation.

Once the railway had acquired capital, land and materials to complete its tracks it could begin operation once the tracks were put down. The majority of cases that came before Robinson once trains began running involved property disputes between the railway and adjoining landowners over damages to a farmer's land or his livestock. Despite Robinson's
awareness of the benefits that the railway was bringing to Upper Canada, there was no clear favouritism for the railway in his decisions. As many cases went against the railway as they did in its favour. The main reason for this balance related to Robinson’s strict construction of a railway’s privileges contained in its charter.

There were several instances where Robinson held against the railways. In one such instance, an adjoining landowner sued the railway in negligence, complaining that sparks from a locomotive had set fire to some of his property. This happened in Hewitt v. the Ontario, Simcoe, and Huron Railroad Union Company (1854), and Robinson’s judgment carried a strong message to the railway. Said Robinson:

In actions of this nature it is always necessary to be borne in mind...that the business which they are conducting should be always so managed as to prevent accidents, though undoubtedly they are bound to do what they can to prevent mischief to others; and any want of due precaution, or care, or skill, in their management, which can fairly subject the company or their servants to the charge of negligence, or unskillfulness, will expose them to the necessity of making compensation to those who may suffer loss from their business being conducted improperly.

Indeed, this was the same concern Robinson had with toll road companies, and railways were treated no differently.

In another set of instances, adjoining landowners sued railways for negligently constructing their lines across their farms so that streams or watercourses became obstructed, causing flooding or crop damage. For their defence, the railways often used the six month’s time limitation stipulated
for bringing such actions contained in their charter, or else claimed a
farmer's cause of action was not one for a court but instead for arbitration.
However, as Robinson acknowledged, farmers might not have known about
the possible obstruction to a stream until a heavy rain fell, long after the six
month's time limit had passed. In such cases he favoured farmer's actions
by holding that their cause of action first arose when the damage was
realized.\textsuperscript{55}

Moreover, the railway's defense of "statutory authority" was
interpreted strictly by Robinson. The Great Western, for instance, had a
clause in its charter that it was to restore a stream to its former state "so as
not to impair its usefulness," a condition Robinson took seriously. In
\textbf{Anderson et al. v. the Great Western Railroad Company (1854)}\textsuperscript{56} which
involved this issue, Robinson came out strongly against the railway:\textsuperscript{57}

\begin{quote}
Then, we cannot say that the statute 4 Wm. IV., ch. 29, sec. 9,
gives authority to the company to stop or divert at their
pleasure, and without necessity, and as long as they please, the
flow of any stream of water over which they have occasion to
construct their railway. If it was necessary to do so in this
instance for a time, while they were constructing their road,
they should have set forth the necessity and admitted that they
did stop or divert the stream, and should have averred that
they were proceeding with all reasonable diligence in the
completion of the road, so as to shew that they were continuing
the obstruction no longer than was necessary. It was
indispensable also, that they should have averred that they
gave that notice to the plaintiff of their intention to interfere
with the flow of water to his mill which the statute requires.
\end{quote}

Robinson's strict construction of a railway's charter applied as well for
drainage ditch cases. Once again, the Great Western's charter provided that
in crossing private property it was to cause "as little damage as may be" to ditches, which meant said Robinson, that plaintiffs were entitled to verdicts against the railway whenever it occasioned unnecessary injury "by the neglect of proper precautions." 58

A railway's charter also provided that it had to build and maintain sufficient fencing along its tracks while laying them down and afterwards, and to build farm crossings and cattle-guards where required. Occasionally the railway failed to do so, and an adjoining farmer's property was damaged or his cattle were killed or injured. In such instances, Robinson allowed a plaintiff relief where the railway failed to adhere to the strict terms of its charter or the Railway Clauses Consolidation Act. 59

Once trains began running the likelihood of accidents increased due to the confrontation between machinery and animals. All trains had to give proper signals and to slow down when approaching road crossings, but in many instances train engineers never did so and horses and cattle on the tracks were killed. In Renaud v. The Great Western Railway Company (1855) 60 the Great Western’s train, going at its usual speed at a highway crossing, killed two cows. Their owner sued the railway in negligence for failure to slacken speed at the crossing, and the railway pleaded not guilty "by statute." Robinson, however, found the railway guilty of negligence, which if proved under him could defeat the railway's defence of statutory authority. "Indeed, what we constantly find done upon railways, where the
track crosses a public highway which is unenclosed, is a sufficient proof that caution is deemed to be necessary," said Robinson, "for we usually see the speed slackened, and the train going at such a rate, that in case of anything unexpected being found to be upon the track it could be stopped in time to prevent mischief. And it is surely the most reckless folly not to observe this caution."61

In another instance Robinson allowed a plaintiff relief when a train killed four of his horses—even where the owner was himself negligent in leaving open a farm gate which allowed his horses to escape onto the track. Precautions, said Robinson, still had to be taken by the train's engineer.62 Indeed, the failure of engineers to slacken speed or exercise caution at cattle crossings were such persistent problems that Robinson even took occasion in one case to publicly warn railways to improve their conduct. In Tyson v. The Grand Trunk Railway Company of Canada (1861),63 one of his last cases before retiring from Queen's Bench, Robinson noted:64

These cases of collision on railways are among the most unsatisfactory that juries have to deal with, from the difficulty of getting clearly at the real facts. On the one hand, when the signals have been properly given, it seems generally possible to find persons who having been either in or near the train are ready to give evidence that they heard no bell or whistle, and this may well have happened from their not thinking of it at the moment, and so not noticing the signals. And, on the other hand, there is, we must say, too much reason to fear that a neglect to give the signals at the proper time, and to continue them as they proceed to the crossing, is a matter of very common occurrence, so much so as to make it incumbent on railway companies for their own sake to be most earnest with their servants upon that point.
Yet there were also cases where Robinson decided in the railway's favour. Once again his main reason was a strict interpretation of the railway's charter. Robinson's court did allow relief to the railway in some instances where a locomotive's sparks had set fire to a plaintiff's adjoining property. Perhaps the most important case was *Hill v. The Ontario, Simcoe, and Huron Railroad Union Company* (1856). In that case, where Judge Burns and not Robinson delivered the judgment of the court, a plaintiff sued the railway for damages caused when sparks from a passing locomotive set fire to his barn. The case on its facts was like *Hewitt*, decided by Robinson two years earlier, but the result under Burns was the opposite. Burns placed the onus on the plaintiff to show that he was not negligent. "The question is not that the defendants are liable for all the consequences in every event which may follow the use of a dangerous agent sanctioned by the Legislature," said Burns, "but it is, whether the defendants have used all reasonable precautions and appliances to prevent accidents." Burns took the view that the railway was to be protected as part of government policy, as he made clear.:

There is no doubt of the general principle, that every individual and company must so use his or their property as not to occasion injury to others; but when the Legislature has sanctioned the use of an extraordinary agent, then the principle must be qualified by the usages and appliances of science, and that must be governed also by the object of the matter which has been so sanctioned by the Legislature...If the plaintiff has a right to say that in passing his premises the defendants are bound to shut off the steam to prevent the emission of sparks, then it must follow that every person along
the line of the railway who chose to build near the track, upon
the principle that each person in the use of his property is
bound not to injure his neighbour in the use of his property,
would have the same right, and the use of the railway might in
consequence be very much impaired. It is quite clear that it
must be considered the Legislature intended the railway should
be used for the public benefit, even though some individual
interests might suffer; and if the defendants use all the
precautions which can be reasonably expected from them,
though using the railway for their own private and particular
advantage, yet that is all that can be expected. We must
suppose the Legislature contemplated the rights of all parties
when they sanctioned the use of an agent as a locomotive
steam-engine for the transportation of passengers and
goods...The true view of the subject seems to be this: not that
the company is bound to adopt such a care as to prevent any
accident, but that if the property of an individual is so situated
as to be subject to the risk of ordinary care on the part of the
defendants in the use of such an agent as a locomotive steam-
engine, he is subject to what the Legislature has subjected him
to; and if he chooses, after the railway is constructed, to incur a
risk, he does so voluntarily, and cannot complain.

Robinson himself found for the railway in cases involving obstructions
to watercourses. This depended on whether the railway strictly followed its
charter and whether negligence could be established. As Robinson said in a
dissenting opinion in L’Esperance v. The Great Western Railway Company
(1857), 67 involving an action over drainage, "whether the defendants are
liable to damages or not in such action, depends upon whether they have
done nothing more than exercise with care and judgment the powers given
to them by law." 68 In other instances, too, he held for the railway if it
tried its best to adhere to its charter. In Regina v. Great Western Railway
Company (1855), 69 for example, the railway company by its charter had to
restore any highway that its track intersected "to its former state, or in a
sufficient manner not to impair its usefulness." In constructing its tracks through the City of Hamilton it crossed a street sixty-six feet wide and re-connected the street by a bridge across the track forty feet two inches wide. Robinson held that this was sufficient compliance with the act and the new bridge was built in a manner not to impair the road's usefulness. He stated that the legislature did not demand of the railway exact compliance, as the City of Hamilton insisted. He declared that "if it could be carried into effect in all other cases, [it] would probably not leave a bridge standing in the province."70 The legislature, continued Robinson, "never could have been so unreasonable as to intend that every bridge across a road that is sixty-six feet wide must itself be sixty-six feet wide." Sometimes, even if the railway seriously impaired a plaintiff's property, it could escape liability if it did things strictly according to its charter. In *Carroll v. The Great Western Railway Company* (1857),71 for example, the plaintiff owned land along the river Thames at an elbow in the river, and conveyed to the railway parts of it to construct its tracks. However, in doing so the railway left no passage from his land above to that below its tracks. Robinson, on a close examination of the railway's charter, held that the railway was not bound to provide any such passage.

The majority of Robinson's cases where he found for the railway concerned its obligation to fence adjoining lands to prevent livestock getting on its track. For example, in *Ferris v. The Grand Trunk Railway Company*
(1859), the plaintiff sued the defendant in negligence for not putting up fences and cattle guards. Consequently, his horse got on the track and was killed. Robinson's view was that there was no evidence to show that the railway's fences or cattle guards were bad or defective. Nor was there negligence introduced by the plaintiff to show that the train was driven improperly. Instead, said Robinson, the evidence showed that the horse escaped from the plaintiff's field onto a highway, and it was when the horse was on the highway that it was killed. By An Act for the Better Prevention of Accidents on Railways, a plaintiff could not recover if an animal was allowed to be at large on any highway within one-half mile of any railway. Here, said Robinson, as the plaintiff's horse was unlawfully at large upon a highway contrary to this act, the railway was not liable.

Other instances occurred where a plaintiff, whose land never adjoined the railway, discovered his cattle had wandered onto another's property which did adjoin the railway. From there the cattle had gotten onto the railway's tracks where some were killed by the defendant's train. In such cases Robinson held that the railway was bound to fence its tracks only beside the owners of adjoining lands, and was not liable when circumstances like this occurred. "The effect of holding the company liable for accidents (and no negligence is charged against them here) happening to cattle not belonging to the owner of the land against which they are bound to fence, nor being upon his land with his privity," said Robinson in one
such case, "would make them liable for accidents to all the cattle of the township."\textsuperscript{74}

There was also a clause in the Accidents on Railways Act that a railway would not be liable for injury to livestock upon its tracks if the livestock were not under the control or "in charge" of a person. In \textit{Thompson v. Grand Trunk Railway Company of Canada} (1860),\textsuperscript{75} the plaintiff's fourteen year old son was driving four of the plaintiff's horses along the highway to put them into a field next to the railway. When he opened a gate, the horses got on the track and three were killed by the defendant's train. Robinson held that these horses were not "in charge of" the boy within the meaning of the act. The plaintiff was prevented by the statute from sustaining an action. "In a case such as this, where the animals get upon the railway in consequence of being allowed to run upon the highway near a crossing, in violation of the statute, and are killed at the point of intersection, the owner can maintain no action for their loss," said Robinson, "for the safety of the public the statute throws the loss upon the owner of the cattle in all such cases, and without any qualification as to the company being careful to avoid collision."\textsuperscript{76}

Two other issues related to adjoining owners were also relevant. They involved actions not with individuals but with a business claiming losses against an adjoining railway. In \textit{Snure v. The Great Western Railway Company} (1856),\textsuperscript{77} the plaintiff operated a tannery up-river on Twenty
Mile Creek in the Niagara Peninsula. When the railway built a bridge across this creek Snure sued, claiming losses because the bridge obstructed navigation on the stream up to his tannery. But the railway claimed an act gave it the authority to cross streams provided that the free and uninterrupted navigation should not be interfered with. The railway argued this had been done but only temporarily. However, Robinson held strictly that the act required "that the navigation shall be left open at all times" and found for the plaintiff.

Apparently, this decision was significant enough for the Great Western to have a special act passed allowing it to erect this bridge, giving a right to compensation only for any damage sustained. Accordingly, when one Wismer later brought a case similar to Snure's against the railway, Robinson held that Wismer could not do so by statute. "The statute makes that lawful which the plaintiff complains of as unlawful," noted Robinson, "and though the plaintiff may have a right of action against the defendants, it can only be a right of action under the statute for not making compensation for any injury the plaintiff may have suffered, he cannot treat the defendants as wrong-doers in putting up or continuing the bridge, and we cannot consistently with the act adjudge them to be wrong-doers in that respect." Indeed, another implication of this action seems to be that the railway viewed the legislature more conducive to its needs than Robinson. If so, then it implies another difference between Robinson and American
judges respecting railway law. The latter made railway law, but Robinson left that chore largely to the legislature. A firm conclusion on this point however would require a more detailed study of the relations between court decisions and legislative actions in American jurisdictions.

Some cases occurred where adjoining road companies brought actions against the railway for damages because the railway erected a bridge or failed to so maintain one that travel was impeded on their toll roads. In deciding these competing business cases, Robinson was not just concerned with interpreting railway charters, but whether negligence could be established. He was also concerned with deciding whether the plaintiff could establish a claim for a private and not a public nuisance. This was an important distinction at law, for, if a plaintiff could establish a private nuisance, that some particular interest of his was damaged, he could proceed; whereas if the nuisance was held to be public, such action had to be by public prosecution. In The Streetsville Plank Road Company v. The Hamilton and Toronto Railway Company (1856), the plaintiffs were successful in an action against the railway for failing to make a proper bridge over their land. This case rested, said Robinson, on negligence. The railway failed to make within a reasonable time a proper bridge over its tracks where they crossed the plaintiff's road. But in Hamilton and Brock Road Company v. The Great Western Railway Company (1859), the matter was decided differently. Though the railway was bound by an act to
maintain in good repair a bridge across the plaintiff's toll road, the case focussed on whether the plaintiff could establish a special injury. Despite the fact that the plaintiff had an interest in tolls taken on its highway, when it sued the railway for failing to repair the bridge, Robinson held that the loss of tolls was not sufficient to enable the plaintiff to maintain its action. Robinson acknowledged, however, that such instances were "not all easy to be reconciled with each other, for it is most difficult in such cases to draw a line shewing what kind of injury can be fairly treated as a particular injury, and what such an injury only as should be looked upon as the individual's share of a public inconvenience for which the remedy must be sought by a public prosecution." Robinson held against the plaintiff for fear of future lawsuits. While this case seems ultimately very pro-railway, it really must be distinguished in its facts. One has the impression that had plaintiff's counsel brought his action in negligence rather than nuisance, where Robinson said the Railway was bound to keep the highway in good repair, the case may well have been decided differently.

Actions between individuals and the railway over property damage comprised the majority of cases that Robinson decided. Other actions, involving the railway's liabilities as a common carrier or involving personal injury were few in number. The reason, it seems, was a question of timing. Such cases did not get to Queen's Bench in great numbers before Robinson retired. However, these actions were examined by Robinson, albeit briefly.
Although few cases involving actions against railways in negligence for personal injuries were tried before Robinson, the first railway case, however, which Robinson decided involved this matter. He allowed the claim in negligence. In Thompson v. Macklem et al. (1845-46), the plaintiff sued the owners of a horse-drawn railway running between Queenston and Chippewa for the negligence of their train driver who ran over the plaintiff’s leg. At trial, the jury awarded the plaintiff £200 damages. On appeal, Robinson recognized that the damage award was high, but he noted the balance between the railway’s diversion of operating capital to pay the award and the irreparable damage done to the plaintiff. He agreed with the amount awarded and allowed the negligence to stand, as he did in the few other comparable cases.85

However, Robinson decided for the railway on the basis of its liability as a common carrier. In what apparently was his only decision, Rogers v. The Great Western Railway Company (1859),86 Rogers sued the railway in negligence for failing to forward his furs to New York. The defendant’s railway went only as far as the Suspension Bridge at Niagara Falls, where it delivered the furs to the New York Central Railway for forwarding to New York. The defendants had given notice to the plaintiff via a receipt that it was not liable if the goods were forwarded by other means. Robinson upheld this disclaimer which was, acknowledged his brother Judge Burns, "an important one to the mercantile community."87
Robinson also heard a few "lost ticket" cases in which a passenger claimed to have lost his or her ticket, and the conductor had the train stopped and the passenger removed. In these cases, Robinson held that the action of the conductor was perfectly justifiable, and the plaintiff had no recourse against the railway. In giving judgements in these cases, the subtlety was that Robinson favoured not so much railways individually, but the railway "system" of public travel. Thus in *Duke and Wife v. The Great Western Railway Company* (1857), the first such case, Robinson noted: 88

It may seem hard to a man who has lost his ticket, or perhaps had it stolen from him, that he should have to pay his fare a second time; but it is better and more reasonable that a passenger should now and then have to suffer the consequences of his own want of care, than that a system should be rendered impracticable which seems necessary to the transaction of this important branch of business. It is not for the sole advantage, or for the pleasure or caprice of the railway company that these things are done in a hurry. The public, whether wisely or not, desire to travel at the rate of four or five hundred miles a day, and that rapidity of movement cannot be accomplished without peculiar arrangements to suit the exigency, which must sometimes be found to produce inconvenience. If the passenger in this case, who I have no doubt lost her ticket, could claim as a matter of right to have it believed on her word that she paid her passage to Paris, everybody else in a similar case must have the same right to tell the same story and to be carried through without paying the conductor, and without shewing to him a proof that he had paid any one.

In *Fulton v. The Grand Trunk Railway Company* (1859), Robinson again favoured the conductor's action when he had a passenger put off the train for lack of a ticket. Haggling with the conductor threatened the system, as Robinson explained: 89
It would be impossible that the business on a railway train could be conducted in that loose way without manifest risk of accidents, because it would never be known how long they might be detained haggling with the passengers at several stations, and one or more conductors would have to watch the passengers in every car. It is a matter in which the public are interested, that there should be no such impediment in the way to obstruct the prompt and regular progress of the train, because the conductors of it must keep their time, or the chance of collision with other trains is much increased, and the danger of other accidents, in consequence of the train having to be driven at greater speed in order to make up for such detentions.

Where property rights were not involved, but the issue concerned a utilitarian working aspect of this new technology, Robinson clearly favoured it as he did with the telegraph cases. He may not have wanted to travel four or five hundred miles a day when he was close to retirement, but he recognized the public wanted this and did his best to accommodate them.

**Conclusion**

The advent of railway travel was the last great area of law examined by Robinson. For someone who was born in the same year as the province was created and who witnessed many changes to the province since those far-off days when he was a fatherless boy at York, the coming of the railway no doubt was among the most important events witnessed in an eventful life. The railway had the ability to transform Upper Canada. Robinson realized the importance and capabilities of this new technology and in some
influential judgments tried to uphold its usefulness as a vital transportation system. Yet, because the railway generally came later to Upper Canada than it did in America, and because problems associated with acquiring needed capital generally were greater than in America, Robinson decided only some areas of railway law before his retirement from the Court of Queen’s Bench in 1862. Unlike his contemporary, Chief Justice Shaw of Massachusetts, Robinson was not mainly responsible for formulating the fundamentals of Canadian railway law. Not enough railway cases came to Queen's Bench for him to make a significant contribution.

This caution does not deny him some importance. Like other areas of corporation and transportation law, the legislature and Robinson worked together to promote new railway development in the province. Generally Robinson’s judicial decisions helped railways, but he never favoured their interests over others in the province. Here Robinson differed greatly from Shaw. Levy noted that Shaw did have occasion to decide many railway cases, and more than any other judicial figure he formulated the principles of American railway law. But more that this said Levy, Shaw clearly favoured railways.  

The evidence drawn from case law thus indicates that the Shaw Court was biased in favor of railroads. The Chief Justice, like so many of his time, linked that which was beneficial to railroads with industrial expansion, which in turn was linked with the grand march of the Commonwealth toward a more prosperous life. The new mode of transportation held forth the promise, and the fulfillment as well, of rescuing Boston from economic disaster...Strictly private interests were
invariable forced to yield to the larger interests of the railroad, symbol of corporate enterprise, industrial expansion, and the public interest.

We must accept Levy's conclusion, for the current study is not a comprehensive comparative assessment. If we do accept Levy's assessment, then there were differences between Shaw and Robinson. Shaw's concept of public interest was not fully shared by the Upper Canadian. As Robinson's judgments revealed, private property was often just as important to him as the public's interest in railways, and was never invariably forced to yield to the larger interests of the railway. Instead, in dealing with the railway, as he did earlier with canal companies and with corporations, Robinson applied a strict interpretation of their charters or to subsequent legislation to allow them no more than the legislature allowed. To Robinson, this seemed a fair approach to all concerned, and never once did he defer to or use one of Shaw's railway decisions. Consequently, one should be cautious about claiming extensive similarities between Robinson and American judges and with the idea that a well developed legal continentalism existed between Upper Canada and the United States.
ENDNOTES


7. This railway was incorporated first in 1834 under An Act to Incorporate Certain Persons Under the Style and Title of The London and Gore Rail Road Company (1834) 4 Will. IV c. 29 (U.C.). In 1837, the name was changed to "The Great Western Rail Road Company" under An Act to Alter and Amend the Act Incorporating Sundry Persons Under the Name of the London and Gore Rail
Road Company, and to Grant Them a Sum of Money by Way of Loan, (1837) 7 Will. IV c. 61 (U.C.). In 1855 the name was again changed to the "Great Western Railway Company" under An Act to Increase the Capital Stock of the Great Western Railroad Company, and to Alter the Name of the Said Company (1853) 16 Vic. c. 89 (Can.).


10. An Act to Incorporate the City of Toronto and Lake Huron Rail Road Company (1836) 6 Will. IV c. 5 (U.C.). This railroad had a hard time getting started and in 1849 a new charter was granted for it as An Act to Incorporate the Toronto, Simcoe and Lake Huron Union Railroad Company (1849) 12 Vic. c. 196 (Can.). After 1858 this railway was by (1859) 22 Vic. c. 89 known as the "Northern" Railway of Canada.


13. Sir Francis Hincks, Reminiscences of His Public Life (Montreal, 1884) especially ch. 10 "The Railroad Policy" 201. See also S.J. McLean, "An Early Chapter in Canadian Railroad Policy", Journal of Political Economy 6 (1898) 323 where McLean notes at 351 that Hincks was "...determined to develop a railroad system through the active intervention of the government, and bent all his energies to this work."

14. Ronald Stewart Longley, Sir Francis Hincks: A Study of Canadian Politics, Railways, and Finance in the Nineteenth Century (Toronto, 1943) 190. Longley notes at 191; "Hincks' Guarantee Act of 1849 inaugurated a new era in the construction of Canadian railways. Hitherto it had been considered that railways should be constructed by means of private capital, and that the government had done its full duty when it had granted the necessary charters. But the financial struggle of the St. Lawrence and Atlantic Railway convinced the Inspector-General that Canadians did not have the necessary capital to finance large undertakings. It was equally evident that if the Maritime Provinces were to be connected with the St. Lawrence by rail, the imperial government must render assistance. Hence Hincks adopted the policy of giving financial aid to Canadian railways and urging upon the imperial government the advantages of constructing the Intercolonial railway." See An Act for Affording the Guarantee of the Province to the Bonds of Rail-Way Companies on Certain Conditions, and for Rendering Assistance in the Construction of the Halifax and Quebec Railway (1849) 12 Vic. c. 29 (Can.).

15. An Act to Provide, by One General Law, for the Erection of Municipal Corporations, and the Establishment of Regulations of Police, in and for the Several Counties, Cities, Towns, Townships and Villages of Upper Canada (1849) 12 Vic. c. 81 (Can.).


17. An Act to Make Provision For the Construction of a Main Trunk Line of Rail-Way Throughout the Whole Length of This Province (1851) 14 & 15 Vic. c. 73 (Can.); An Act for Raising By Way of Loan, a Sum not Exceeding Four Millions of Pounds Currency, for Making a Main Trunk Line of Rail-Way Throughout the Length of This Province (1851) 14 & 15 Vic. c. 75 (Can.); An Act to Incorporate the Grand Trunk Rail-Way of Canada (1852) 16 Vic. c. 37 (Can.) and An Act to Empower any Rail-Way Company Whose Railway, Forms Part of the Main Trunk Line of Rail-Way Throughout This Province, to Unite
with Any Other Such Company or to Purchase the Property and Rights of Any
Such Company; and to Repeal Certain Acts Therein Mentioned Incorporating
Rail-Way Companies (1852) 16 Vic. c. 39 (Can.).

of Political Economy 9 (1900-1901) 191, 351.

19. An Act to Consolidate and Regulate the General Clauses Relating to Rail-
Ways (1851) 14 & 15 Vic. c.51 (Can.).


21. An Act in Addition to the General Railway Clauses Consolidation Act
(1853) 16 Vic. c. 169 (Can.). This act contained in addition to certain
stipulations affecting all future railways, punishments for persons injuring
railway property.

22. An Act for the Punishment of the Officers and Servants of Railway
Companies Contravening the By-Laws of such Companies, to the Danger of
Person and Property (1856) 19 Vic. c. 11 (Can.).

c. 12 (Can.). This act helped set up a Board of Railway Commissioners and
Inspectors of Railways to help prevent railway disasters. It was set up largely
after the infamous Desjardins’ Railway Bridge disaster in Hamilton in 1857.
See also An Act Respecting Compensation to the Families of Persons Killed By
Accident, and in Duels (1859) 22 Vic. c. 78 (Can.).


25. Robinson Papers PAC MG 24 B9 contains three interesting letters from
John A. Macdonald, then attorney-general to Robinson concerning Robinson’s
resignation and asks Robinson’s help concerning a proposed bill to establish
the rank of President, the oath of office and the salary for this post. See An
Act Respecting the Court of Error and Appeal in Upper Canada (1862) 25 Vic.
c. 18 (Can.) which established that the presiding Judge of this Court was to
have rank and precedence over all other Judges in Upper Canada.


27. Ferris, _supra_ note 12 at 41.

28. Smith, _supra_ note 11 quotes from a representative of the Canadian
_Journal_ on the first trip north on the Northern Railway from Toronto to
Bradford in 1853 who observed that "Although the line has been opened for a
very few weeks, yet it seems to have given already an extraordinary impetus to the growth of the villages through which it passes" (at p. 34). White, supra note 11 also stated that reformers believed that Tories supported the railway north primarily to increase the value of their land holdings along the route (at p. 35). Robinson himself corresponded with Judge James Gowan, District Judge of Simcoe County at Barrie regarding the prospects of the railway going through Robinson's lands there in that county. See their correspondence in OA Robinson Papers, Ms 4 reel 5.

29. See An Act to Incorporate Certain Persons Therein Mentioned, Under the Name and Style of the Erie and Ontario Rail Road Company (1835) 5 Will. IV c. 19 (U.C.); An Act to Incorporate Sundry Persons Under the Style and Title of the Hamilton and Port Dover Rail Road Company (1835) 5 Will. IV c. 17 (U.C.); An Act to Incorporate a Company to Construct a Rail Road from Burlington Bay to Lake Huron (1836) 6 Will. IV c. 7 (U.C.); An Act to Incorporate Certain Persons Therein Mentioned Under the Name and Style of the Niagara and Detroit Rivers Rail Road Company (1836) 6 Will. IV c. 6 (U.C.) and An Act Granting a Charter to an Incorporated Company, under the Style and Title of the President and Directors of the London and Devonport Rail Road and Harbour Company (1837) 7 Will. IV c. 52 (U.C.).

30. (1845) 8 Vic. c. 83 (Can.). See also Smith, White and Armstrong, supra note 11.


32. Ibid., 318. Robinson went on to note at 318 that only "if it were attempted to affect other rights or interest of individuals, in any preceding wholly apart from this act, by, assuming as incontrovertible facts whatever might happen to be asserted in it then I apprehend we should be clearly warranted by authority in holding individuals not to be bound by such recitals in any other respect than for the purposes of that act." However, said Robinson: "The few instances put, in which acts might be supposed to be passed, so utterly at variance with natural justice, and the inherent rights of individuals that courts of justice could refuse to treat them as binding, are sufficient to shew us that it is not in a case of this kind, that such ground could be taken."


34. Smith, supra note 8 at 219-221.

35. This was especially noticeable for the Great Western. "There was thus a chain of Yankee engineers and contractors on the whole line of the road..." wrote Silas Burt, an American engineer working on the railway and "While the Canadians greeted us as the harbingers of prosperity for their country, they were strongly prejudiced against us as "Yankees", a term applied to all born in the United States." Quoted in A.G. Bague, Lillian R. Benson (eds.) "An Engineer on the Great Western, A Selection from the Personal Reminiscences of Silas Wright Burt" Western Ontario History Nuggets 167 (1952) 10. See also Frank Norman Walter (ed.) Daylight Through the Mountain: Letters and Labours of Civil Engineers Walter and Francis Shanley (Montreal, 1957).


37. An Act for Compensating the Families of Persons Killed by Accident, and for Other Purposes Therein Mentioned (1847) 10 & 11 Vic. c. 6 (Can.).


40. Levy, supra note 26 at 139.

41. (1854) 11 U.C.Q.B.304.

42. (1854) 11 U.C.Q.B. 246.

43. For another such case where damages were awarded a plaintiff for problems associated with a railway's failure to give proper notice to expropriate see Wilkes v. Gzowski et al. (1856) 13 U.C.Q.B. 308.

44. (1848-49) 5 U.C.Q.B. 48 at 50. See also Commissioners of Public Works v. Daly et al. (1849-50) 6 U.C.Q.B. 33; Watson v. The City of Toronto Gas Light and Water Company (1848-49) 5 U.C.Q.B. 523 and In The Matter of Arbitration Between the Municipal Council of the County of Middlesex and the Mayor, Aldermen and Commonality of the City of London (1857) 15 U.C.Q.B. 334.


46. (1855) 12 U.C.Q.B. 106 at 120. See also Great Western Railroad Company v. Hunt (1855) 12 U.C.Q.B. 124; Great Western Railroad Company v. Dougall (1855) 12 U.C.Q.B. 131; Great Western Railroad Company v. Dodds (1855) 12 U.C.Q.B. 133 and In Re Miller and The Great Western Railway Company (1856) 13 U.C.Q.B. 582.

47. See Great Western Railway Company v. Miller (1855) 12 U.C.Q.B. 554.

48. (1854) 11 U.C.Q.B. 393.


53. (1854) 11 *U.C.Q.B.* 604.


56. (1854) 11 *U.C.Q.B.* 126.


60. (1855) 12 *U.C.Q.B.* 408.


63. (1861) 20 *U.C.Q.B.* 256.

64. *Ibid.*, at 258.

65. (1856) 13 *U.C.Q.B.* 503.
66. Ibid., at 504-505. See also Brian H. Morrison "Robert Easton Burns" DCB, 9, 108.


69. (1855) 12 U.C.Q.B. 250.

70. Ibid., at 254.

71. (1857) 14 U.C.Q.B. 614.


73. See also Elliott v. Buffalo and Lake Huron Railway Company (1859) 16 U.C.Q.B. 289 and a decision by judge Draper in Rutledge v. The Woodstock and Lake Erie Railway and Harbour Company, Burgess v. The Same (1855) 121 U.C.Q.B. 663.


75. (1860) 18 U.C.Q.B. 92.

76. Ibid., at 96. See also Simpson v. The Great Western Railway Company (1859) 17 U.C.Q.B. 57 and Cooley v. The Grand Trunk Railway Company of Canada (1860) 18 U.C.Q.B. 96.

77. (1856) 13 U.C.Q.B. 376.

78. An Act to Increase the Capital Stock of the Great Western Railroad Company, and to Alter the Name of the Said Company (1853) 16 Vic. c. 176 (Can.).

79. An Act to Enable the Great Western Railway Company to Construct a Branch Railway to the Town of Brantford, and for Other Purposes Therein Mentioned (1855) 18 Vic. c. 176 (Can.).

81. (1856) 13 U.C.Q.B. 600.

82. (1859) 17 U.C.Q.B. 567.

83. Said Robinson, *ibid.*, at 571: "...and if the principle they contend for should be admitted, then they would have the same right of action on account of any other part of any other highway, whether a bridge or otherwise, being suffered to be out of repair, provided they could shew that some of the persons using such highway would, in the ordinary course of things, probably have occasion to go from it onto their road, and along their road for enough to subject them to toll. At what distance could we say that the part of any other road that is out of repair ought to be from their road to make it right to hold that the principle should not apply? We do not see how a line could properly be drawn" See *An Act to Authorize the Town of Dundas to Grant its Security to the Great Western Rail-Road Company, on Behalf of the Desjardins Canal Company, for Certain Improvements on the Said Canal* (1856) 16 Vic. c. 54. (Can). See also P.S. Atiyah, "Liability for Railway Nuisance in the English Common Law: A Historical Footnote" *Journal of Law and Economics* 23 (1980) 191.

84. (1845-46) 2 U.C.Q.B. 300.

85. Said Robinson, *ibid.*, at 303: "The sum it must be admitted, is considerable, and such perhaps as the profits upon the undertaking in which the defendants are engaged may not well enable them to bear; but, on the other hand, the injury which the plaintiff has undoubtedly suffered, is irreparable, and is so great, that no one can support the opinion that 200£ is more than an adequate compensation for it, or more than the defendants ought to pay, if it was really occasioned by the carelessness of their servants." See also *Thomas Fitzpatrick and His Wife v. The Great Western Railway Company* (1855) 12 U.C.Q.B. 465 (Draper J.); *Roberts v. The Great Western Railway Company* (1856) 13 U.C.Q.B. 615; *L’Esperance v. The Great Western Railway Company* (1857) 14 U.C.Q.B. 187; *Griffin v. The Great Western Railway Company* (1858) 15 U.C.Q.B. 507; *Browne v. The Brockville and Ottawa Railway Company of Canada* (1858) 20 U.C.Q.B. 202 and *Torp v. The Grand Trunk Railway Company of Canada* (1861) 20 U.C.Q.B. 446.

86. (1859) 16 U.C.Q.B. 389.


89. (1859) 17 U.C.Q.B. 428 at 433. See also Huntsmen v. The Great Western Railway Company (1861) 20 U.C.Q.B. 24, and Davis v. The Great Western Railway Company (1861) 20 U.C.Q.B. 27.

90. Levy, supra note 26 at 164-165.
CONCLUSION

THREE DECADES AS CHIEF JUSTICE

It must have afforded Sir John B. Robinson and some of his contemporaries, who sat near at hand, a strong contrast to what would have been exhibited on a like occasion when they were first called to the bar, when Toronto was a petty hamlet, and the neighbouring country almost a wilderness. And Sir John B. Robinson might look around him with pride, and say perhaps not "all this I have created," but certainly "in all this I have had my full share, doing my whole duty to my country."

-Account of Retirement Dinner for Robinson
Given by the Upper Canadian Bar,
Toronto Globe June 20, 1862

Sir John Beverley Robinson’s tenure as Chief Justice of Upper Canada spanned much of the history of the colony before Confederation. During this time, Upper Canada was being transformed by the formation of new corporate interests, public works in transportation, steam technology and urbanization. Robinson’s career as Chief Justice provides a useful vantage point to view the dynamics of the birth of corporate capitalism in Upper Canada during this transitional era. It also provides a point of comparison with how law was then being developed in the United States.
Morton Horwitz has shown that America was also being transformed in this era, generally at a faster pace than was occurring in Upper Canada. There, argued Horwitz, particularly in the Northeast, American judges developed a judicial style he termed "instrumentalism" to maximize the productivity of land, industry and capital. This concept was contingent upon a particular set of historical influences unique to that area. These included the reality and effects of a Revolution, the federal form of government, a new written constitution as the supreme law of the land, a Bill of Rights, industrialization and the start of the factory system, a strong commercial bar, and a significant emphasis by American lawyers on the formulation of American legal works for the profession. Horwitz's ideas cannot be denied; they are central to the corpus of modern legal history and provide advantages for a comparative insight.

Canadian legal historians have been wary about the applicability of instrumentalism to Canada. A preoccupation with instrumentalism, Canadian legal historians feel, precludes a full discussion and development of Canadian themes that may be more germane to an understanding of Canada's relatively neglected legal past. Indeed, the central argument of this work is that Robinson's jurisprudence was different from that of American judges, and especially with regards to instrumentalism. It reveals that understanding these differences can best be done by relating Robinson's career to unique political, social, economic and other
particularities within Upper Canada prior to Confederation.

If instrumentalism was contingent upon a particular set of historical influences peculiar to the Northeastern United States, then this work has shown that it is erroneous to assume they existed elsewhere—especially in another country. Upper Canada had no Revolution, no federal form of government, no written constitution, no Bill of Rights, comparatively little industrialization, no strong commercial bar or much Canadian legal scholarship. Moreover none of these particular historical influences could be easily imported—even across a porous border. Instead the province was dominated by many influential loyalists suspicious of American constitutional practices, and Upper Canada remained a colony of Britain. By dint of these particular historical influences and others examined in this work, Robinson never developed judgments similar to those prepared by American judges. No judgments by Robinson came close to Palmer v. Mulligan (1805),¹ for example, where Judge Livingston of New York refused to apply the old English common law riparian right of prior use of a stream’s water to the exclusion of others, believing that "the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry."² There were no judgments similar to Churchill v. Suter (1808)³ where the Massachusetts’s Supreme Court negated usury laws, Jackson v. Brownson (1810)⁴ where Justice Spencer of New York felt that "the doctrine of waste, as understood in England, is
inapplicable to a new, unsettled country\textsuperscript{5} like America because of its restraint on the improvement of land, or \textit{Conner v. Shepherd} (1818)\textsuperscript{6} where the Massachusetts's Court rejected the English rule of allowing dower on unimproved lands as a clog on estates and contrary to the free alienation of land. There were no cases decided by Robinson to compare with \textit{Gibbons v. Ogden} (1824)\textsuperscript{7} against the right of New York state to grant a steamboat operating monopoly between that state and New Jersey, or \textit{Charles River Bridge v. Warren Bridge} (1837)\textsuperscript{8} against an earlier bridge company's monopoly to operate a bridge across Boston's Charles River. Never, like Chief Justice Marshall in \textit{Marbury v. Madison} (1803),\textsuperscript{9} did Robinson ever rule a legislative act unconstitutional. The idea behind many of these American judgments was free alienation of land and the encouragement of competition and rivalry which, argued Horwitz, American judges felt were in the best interests of the country.

Instead, Robinson's judgments were generally devoid of this kind of thinking. Most upheld traditional and settled English common law property concepts that supported gentlemen of capital and large landholders. Most times he was reluctant even to examine American judgments. Robinson seemingly ignored Chief Justice Shaw of Massachusetts. He carefully distinguished the applicability of the American Supreme Court case of \textit{Bank of Augusta v. Earle} (1839)\textsuperscript{10} which allowed corporations to do business outside of the states where they were chartered. He admonished the
province's lawyers in Hamilton v. The Niagara Harbor and Dock Co. for arguing in support of American developments lessening the requirements for the use of a corporate seal. Indeed, when Robinson perceived that changes in the law might be needed as, for example, with usury, dower, time of notice for promissory notes or the use of a corporate seal, he stated clearly on the record that it was up to the legislature—and not the court—to make the changes. All of this suggests that there was not a strong legal supra-nationalism making Robinson a Canadian or, at least, northern instrumentalist, as this term is used by Horwitz. In summary, the main difference between Robinson and American judges was the way in which his particular upbringing made him react to English law, and how he perceived his role once he became Chief Justice.

As the first Canadian-born Chief Justice, Robinson had a different relationship to English law than American judges. In Upper Canada, the important unity of English common law remained unbroken. While Chief Justice, Robinson perceived that it was his duty to uphold English law in the province. Even though Robinson was aware of this, he did not deify English law. Indeed, to have been a loyalist, monarchist and lover of English law was not necessarily to understand all of English law or to accept all of it for Upper Canada. Robinson was particular about English law and what it could do both for the province and for him.
Even though Robinson favoured English law, it was not always possible for him to adopt all of it fully to the colony. In general, the introduction of English law was problematic. By the province’s Reception Act, English law was introduced as the basis for decision in all matters of controversy relative to property and civil rights. But this was not a perfectly clear guide. English law consisted of a myriad of things besides the common law. There were also Courts of Equity, and Ecclesiastical and Admiralty Courts, none of which were initially established in the province. Indeed, Ecclesiastical and Vice-Admiralty Courts were never established in the province, and the legislature established a Court of Equity only after much controversy. English law consisted also of Decrees of the Sovereign and of parliamentary statutes. By the Reception Act, the laws of England for the maintenance of the poor and for bankruptcy were specifically not introduced. By the eighteenth-century, English law was a muddle filled with peculiarities and problems, and much of it evolved out of an ancient and complex society whose complexity was not always apparent in Upper Canada. The concept of a body of "English law" was often complicated and offered contradictory precedents or, as Robinson sometimes acknowledged, none at all. It was not static; it was changing, especially when the Industrial Revolution swept that country. Despite the fact that Robinson had been called to the English bar, he did not keep up with its latest developments and was never an expert in it.
Furthermore, the bulk of English law was a target for reform (as Bentham and Dickens revealed), and Robinson did not think that some of it was applicable to Canada. As a colonial, he could see that much of its bulk and contradictory elements made rejection sometimes necessary. As Chief Justice he was selective and adopted what he wanted for Upper Canada. Generally he chose those principles of English common law which applied equally as well in Upper Canada as in England, as for example the need of Parliament to authorize the use of public funds or the principle against buying and selling government offices. The great benefit of English law for Robinson personally was that it was not American. Its use was an important bulwark against American influences and helped preserve, for Robinson's prestige and liking, an English flavour to the province.

The main difference between Robinson and contemporary American judges was how he perceived his role as Chief Justice interpreting English laws. In general, Robinson wanted to provide businessmen and others with some semblance of order and consistency drawn from the great bulk of English laws. He wanted to provide a predictable and consistent body of clear decisions upon which businessmen and capitalists could feel secure conducting business and investing their money in Upper Canada. Indeed, perhaps because of the complexity of English law, it made him feel his role was to propound only well-established common law principles. When, for example, he was faced with counsel's argument that even English judges
were relaxing the rules governing the use of a corporate seal, he refused to
do likewise, citing the dangers and inconvenience of "fluctuating decisions"
which, he felt, would upset the context for a predictable business
infrastructure in the province. Furthermore, Robinson favoured those with
capital and land through his stress on "certainty of expectation" and
"predictability of legal consequences" which these men needed from the
bench. If those with capital felt insecure about investing money in Upper
Canada, then they could go elsewhere, with disastrous results for the
colony.

Robinson recognized the value of capital because he realized that the
province was less well developed than the United States. He was desirous
of protecting capitalist instruments like banks, canals, the post office,
telegraph companies, ferries, railways, insurance companies and others that
were critical to the development of the province. For Robinson, unlike
American judges, protecting and nurturing these capitalist instruments
from the bench was more important than promoting competition among
them. He did not fear monopoly. Unlike American judges, Robinson had a
fear that competition would be harmful rather than beneficial to the
province. In his view, competition would reduce the profits of operating
capitalist structures so much that no one would want to establish anything.
If there were unrestricted competition, then, as he said in the Kerby case,
the "power to extort would succeed, and there would never be certainty if
the thing were left to regulate itself."

There was also more involved in protecting capitalist instruments in the province. For Robinson, there was a reciprocal duty implied for these capitalist instruments. If he was protecting them from the bench, they in turn had to strictly fulfill all their corporate charter obligations to develop the province. Veering away from their given corporate powers was dangerous, in Robinson's view, because they could endanger the public interest by engaging in imprudent transactions which might ruin them. If a bank, said Robinson in *Lyman v. The Bank of Upper Canada*, "squandered" money in an action "foreign to their charter" then "thousands" could be involved in the loss as holders of the bills. Thus, he continually stressed to these corporate enterprises that they adhere closely to their charters. Indeed, all of Robinson's corporate decisions emphasized this. It is remarkable that he never deviated from this judicial viewpoint throughout his long tenure as Chief Justice.

This remarkable consistency and predictability shown throughout his judgments was Robinson's personal form of instrumentalism. He always tried to provide capitalists and businessmen with consistent, predictable, albeit conservative decisions. A major assumption made in the thesis is that businessmen would be able to rely on his decisions and to govern themselves accordingly. If Robinson saw any inconsistencies developing in the law as, for example, the relaxation of the use of a corporate seal, he
spoke on the record that it was up to the legislature to address this. The subtlety of this distinction resided perhaps, in his feeling that it was better for his court to remain consistent and reliable for business purposes rather than be the legal body making new changes to the law. He often exhorted businessmen to behave in accepted ways and gave hints from the bench on points of business practice. His decisions were often in accordance with general business practices operating in the province, and in particular along the St. Lawrence. This was his way of facilitating business judicially.

Robinson differed from American judges. He helped the province develop by providing judgments which generally facilitated corporate interests. However, these were not given for the same reasons as were being declared by American judges. Thus in sum, legal history requires careful attention to the peculiarities of a country and society to understand how a particular court functioned. Insights drawn from the study of one jurisdiction, are not fully or easily traversed into another.
ENDNOTES

1. 3 Cai. R. 307, 314 (N.Y. 1805)


3. (1808) 4 Mass. 156. Said Chief Justice Parsons at 161: "any rule of law, tending unnecessarily to repress this circulation is therefore against public policy."

4. 7 Johns. 227 (N.Y. 1810). Quoted in Horwitz, supra, note 2 at 54.

5. Ibid., at 237.

6. 15 Mass. 164 (1818). Quoted in Horwitz, supra, note 2 at 57.

7. 9 Wheat. 1 (U.S. 1824).

8. 11 Pet. 420 (U.S. 1837). Quoted in Horwitz, supra, note 2 at 130.

9. 1 Cranch. 137 (U.S. 1803).

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