



# Articles

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## ADAM THOM

ROY ST. GEORGE STUBBS\*

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As the first Recorder of Rupert's Land, Adam Thom must be accorded the distinction of being "the father of the Bench and Bar of Western Canada."<sup>1</sup> To appreciate his pioneer work as the first judicial officer, who had been trained in the law, to exercise authority in the vast area from which the province of Manitoba was carved in 1870, some knowledge of the background against which his appointment was made seems essential.

On May 2, 1670, King Charles granted to the Governor and Company of Adventurers of England trading into Hudson Bay, (Prince Rupert and seventeen highly-placed or affluent associates), a Royal Charter making them "true and absolute Lordes and Proprietors" over the area drained by waters flowing into Hudson Bay.<sup>2</sup> This area, "one of our Plantations or colonies in America," to be called Rupert's Land, has been estimated at one million four hundred and eighty-six thousand square miles.<sup>3</sup> Over this vast territory, the Hudson's Bay Company was given a monopoly of "the sole and exclusive Trade and Commerce." Ancillary to its trading privileges, the Company had jurisdiction "to judge all persons belonging to the Governor and Company, or that shall live under them, in all cases, whether civil or criminal, according to the laws of this Kingdom and execute justice accordingly."<sup>4</sup>

The charter provided for the appointment of a Governor and Committee at head office in London to control policy and to supervise the general direction of the company; and of governors and councils in Rupert's Land who were empowered to enforce law and order, by penalties and punishments, not repugnant to the laws of England. If an offence was committed in any part of Rupert's Land where there was no governor and

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1. These are Archer Martin's words. See editorial in (1890) 1 *Western Law Times*, p. 43.
2. The text of the Hudson's Bay Company's Charter is published in *Charters, Statutes, Orders-in-Council, etc., relating to the Hudson's Bay Company*, (1957), pp. 3-21.
3. Douglas MacKay, *The Honourable Company*, 1949 edition, p. 39.
4. For information on the early enforcement of law in Rupert's Land, see the following articles:
  - (a) C. C. McCaul, "Precursors of the Bench and Bar," (1925) 3 *Canadian Bar Review*, p. 25.
  - (b) Hon. Horace Harvey, "The Early Administration of Justice in the North West", (1934) 1 *Alberta Law Quarterly*, p. 1.
  - (c) Professor Frederick Read, "Early History of the Manitoba Courts", (1937) 10 *Manitoba Bar News*, p. 451.
  - (d) Hon. E. K. Williams, "Aspects of the Legal History of Manitoba", *Proceedings of the Historical and Scientific Society of Manitoba* (1947-1948) Series III, Number 4, p. 48.
  - (e) Professor D. C. Williams, "The Dawn of Law on the Prairies," (1962) 27 *Saskatchewan Bar Review* 126.

council, the chief factor of the district had authority to send the offender to England for trial.

Needless to say, King Charles did not consult the Indian population of Rupert's Land before he assigned their lands to his favorites. It was the old story, when civilization with a capital "C" is on the march. A sensitive conscience which weighs its every decision in the scales of right or wrong is no asset to those who carry the blessings of civilization to primitive races.

The good old rule  
Sufficeth them, the simple plan,  
That they should take, who have the power,  
And they should keep who can.

Company officials made no attempt to exercise jurisdiction over the Indians, except when they committed offences against the Company or its employees. Sir George Simpson, Governor of Rupert's Land for the Hudson's Bay Company from 1821 to 1860, "a composite of fur trader, merchant prince, Machiavelli and statesman,"<sup>5</sup> made clear the Company's attitude in this regard in his evidence before the Select Committee of the Imperial House of Commons on the Hudson's Bay Company which sat in 1857, under the chairmanship of Hon. Henry Labouchere, Colonial Secretary: "They are under our jurisdiction," he explained, "when crimes were committed upon whites, but not when committed upon each other: we do not meddle with their wars."<sup>6</sup>

For several generations those who guided the affairs of the Hudson's Bay Company were content to sit down on the shores of Hudson Bay and wait for the Indians to come to them to trade. Finally, they had to bestir themselves to meet the competition of aggressive fur traders from Montreal, who sought out the Indians in their own settlements. To meet the rivalry of traders who paid no regard to its monopoly, the Hudson's Bay Company established a series of trading posts in the interior. The problem of law enforcement was thus greatly increased, and it became evident that the existing machinery was inadequate. Until 1803, serious offenders (and witnesses for prosecution and defence) were sent by company ship to England. This procedure was costly, and manifestly unfair, especially to witnesses who might be sent beyond the seas for a year, or even two.

In an attempt to ease this burden of expense and delay, the British Parliament, in 1803, passed the Canada Jurisdiction Act. This short act provided, in part, as follows:

Offences committed within any of the Indian Territories, etc., shall be tried in the same manner as if committed within the provinces of Lower or Upper Canada. The governor of Lower Canada may empower persons to act as justices for the Indian territories, etc., for committing offenders until conveyed to Canada for trial, etc.<sup>7</sup>

5. MacKay, *op. cit.*, p. 178.

6. *Report from the Select Committee of the House of Commons on Hudson's Bay Company.*

7. 43 George III, c. 138. See *Statutes at Large*, Vol. 44, p. 916.

In view of the Hudson's Bay Company's Charter, doubts were soon entertained as to whether the provisions of this act extended to Rupert's Land. Lord Selkirk, having in mind the founding of a colony in Red River, obtained an opinion from Sir Samuel Romilly, then the acknowledged leader of the Chancery Bar of England, that the Canada Jurisdiction Act gave no jurisdiction to the Courts of Lower and Upper Canada to deal with offences committed within the territory of the Hudson's Bay Company.<sup>8</sup> Despite this uncertainty, the Courts of Lower and Upper Canada did exercise jurisdiction over offences committed in Rupert's Land. Rivalry between the Hudson's Bay Company and the North West Company, its most aggressive competitor, came to a head on June 19, 1816, when a party of Metis under the command of Cuthbert Grant, killed Governor Robert Semple, Lord Selkirk's representative in Red River, and twenty of his men at Seven Oaks.<sup>9</sup> Paul Brown and Francis Boucher, two of Grant's Metis henchmen, were tried for the murder of Semple, and acquitted of the charge, at York in October, 1818, before a court presided over by Chief Justice Powell.<sup>10</sup> This was but one of the cases, arising directly from the rivalry in the fur trade, which were tried in the Courts of Lower and Upper Canada.

After Seven Oaks, a Royal Commission was appointed to look into affairs in Rupert's Land. Its report was presented to Parliament in 1819. Two years later, "An Act for regulating the Fur Trade and establishing a Criminal and Civil Jurisdiction within certain parts of North America" was passed.<sup>11</sup>

I attempt a brief summary of the pertinent provisions of this important Act:

1. All fur trading companies, including the Hudson's Bay Company, were to enter into security for the due execution of all legal processes, whether criminal or civil; and for the production and delivery into safe custody for purposes of trial of all persons in their employ or acting under their authority who were charged with a criminal offence.

2. The provisions of the Canada Jurisdiction Act were deemed and construed to extend and to be in full force through all the territories heretofore granted to the Company of Adventurers of England trading into Hudson's Bay.

3. The Courts of Upper Canada were to have the same civil and criminal jurisdiction within the Indian territories as was vested in these courts within the limits of the province.

4. Justices of the Peace were appointed to determine causes in the Indian territories.

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8. This opinion, signed by Romilly and four other counsel, is published in Bryce's biography of Selkirk, in *The Makers of Canada*, Vol. 8, 1910 edition, p. 144.

9. For a short account of the Massacre of Seven Oaks, see A. C. Garrioch, *First Furrows*, (1923), p. 36 et seq.

10. David B. Read, *Lives of the Judges*, (1888), p. 89.

11. 1 and 2 George IV, c. 66. See *Statutes at Large*, Vol. 61, p. 225.

5. Any duly appointed Justice of the Peace was authorized and empowered "to sit and hold Courts of Record for the Trial of Criminal Offences and Misdemeanors, and also of Civil Causes . . . ," but he could not try any offender upon any charge for a felony made the subject of capital punishment, or deal with any civil action in which the cause of such action exceeded in value the sum of two hundred pounds. Such cases were to be remitted for trial to the Courts of Upper Canada.

In 1821, under pressure from the Imperial government, the two great rivals in the fur trade were amalgamated. The North West Company merged its identity in that of the Hudson's Bay Company. In the reorganization that followed the amalgamation, Rupert's Land was divided into four districts, called Departments. Each Department was to have its own Governor and Council. The District of Assiniboia, which extended for a radius of fifty miles from the junction of the Red and Assiniboine Rivers, was in the Northern Department. The Governor and Council of this Department held its first meeting on August 22, 1822. The District of Assiniboia, in which most of the white and mixed population of Rupert's Land was congregated, was to have its own Governor and Council to deal with local affairs. The Governor and any two of his Council were empowered to administer law within the District. General Courts, to deal with both civil and criminal cases, were established. These courts, which were in fact assemblies of the Governor and his Council, had administrative as well as judicial functions.

In 1835, Lord Selkirk's heirs resold to the Hudson's Bay Company the land which he had acquired from the Company for his Red River Settlement. In that year the population of the colony was 3,679 persons,<sup>12</sup> many of whom were settlers who had cast their lines permanently in Assiniboia. Their needs required a more efficient system of law enforcement.

To that purpose, Assiniboia was divided into four judicial districts, each with its own court over which a Magistrate or Justice of the Peace was to preside. These courts could deal with only minor cases. More serious matters were to be heard by a General Quarterly Court, which consisted of the Governor and Council.

In 1839, the Governor and Committee in London made further improvements in the judicial system. To meet a long-felt need for a company official with legal training, the office of Recorder of Rupert's Land was established. The Recorder's duties were to preside over the General Quarterly Court and to serve as a member of the Council of Assiniboia. When he sat as a judge, in civil cases involving claims of more than £10, and in all criminal cases, a jury was to sit with him to determine questions of fact. His jurisdiction did not extend to capital cases, which were to be sent to Upper Canada for trial, and his jurisdiction in civil matters was limited to £200.

On March 20, 1839, Adam Thom was appointed Recorder. By

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12. E. H. Oliver, *The Canadian North West; Its Early Development and Legislative Records*, (1914), p. 267.

reason of his appointment, he became the first person trained in the law to settle in Red River.

Adam Thom was born at Brechin, Forfarshire, Scotland, on August 31, 1802. In his later years, he was fond of telling his friends that his first memory was of the celebrations which followed Lord Nelson's victory at Trafalgar, on October 21, 1805. He maintained that the defective eyesight from which he suffered most of his life was due to the bright lights to which his young eyes had been subjected during these celebrations.

He entered King's College, Aberdeen, in 1819, from which he was graduated five years later with the degree of M.A. His devotion to his studies, and his quick, if not original, mind, enabled him to win several prizes in Greek, Latin and Natural Philosophy. While at King's College, he became intimate with John McCallum, whose path was to cross his later in Rupert's Land, where McCallum founded a school for the sons of Hudson's Bay employees, which, with the passage of the years, became St. John's College in Winnipeg.<sup>13</sup>

Thom taught school for a short time in northern Scotland. In 1825, he went to London to seek a career in that Mecca of the ambitious Scot. The colonies were then a magnet drawing energetic young men who could not find opportunities equal to their talents in Great Britain. In 1832, Thom, despairing of finding room for himself at the top in London, decided to emigrate to Canada. He sailed for Montreal in the fall of that year on the ship *Rosalind*.

In Montreal, he determined to try his fortunes with his pen. He established and edited a paper called *The Settler*, which had a short life. He had a gift for forceful—if not always direct and to the point—expression. Strength was the main ingredient of his style as a writer. His pen had little subtlety. In controversy, he was a master of vigorous, often violent language. Two years after his arrival in Canada, he published a pamphlet, *Letter to the Right Hon. E. G. Stanley, Secretary of State for the Colonies, by an Emigrant*. The next year two pamphlets came from his pen: the first, *Remarks on the Convention, and the Petition of the Constitutionalists*, by Anti-Bureaucrat; and the second, *Review of the Report made in 1828 by the Canada Committee of the House of Commons*.

From 1836 until 1838, he was editor of the *Montreal Herald*. During the agitation for responsible government in Lower Canada which culminated in the Papineau rebellion of 1837, his paper was the leading spokesman for the British party in Montreal.

Adam Thom was a lifelong member of the Establishment. Dr. George Bryce said of him:

His mental bias was evidently that of a radical, while his social disposition led him to be somewhat subservient to prevailing ideas and customs. In method he was radical; in fact, he was conservative.<sup>14</sup>

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13. Paper delivered by Dr. George Bryce, before the Historical and Scientific Society of Manitoba, on May 4th, 1890, Transaction 40.

14. *Ibid.*

These are the generous words of one who stood too close to him. The fact is that Thom was branded with the hallmark of the reactionary before he left his cradle. When the Reformers of Lower Canada talked of reform, he was convinced that they were crying for revolution. He rushed into the arena to engage in violent battle with Papineau. In 1836, under the name of Camillus, he wrote a series of articles which he called "Anti-Gallic Letters" addressed to the Earl of Gosford, Governor-in-Chief of the Canadas, which, in E. E. Rich's words, "denounced the doctrine of French nationality and (did) much to bring on the rebellion of 1837."<sup>15</sup>

While engaged in active journalism, Thom began to read law in Montreal with James Charles Grant. Because of his degree from Aberdeen, his time under articles was shortened to one year, and he was called to the Bar of Lower Canada on May 23, 1837.<sup>16</sup>

On May 29, 1838, Lord Durham arrived in Canada to fulfil his appointed mission as peacemaker, and to attempt "the task of bringing British institutions up to date."<sup>17</sup> "Thom was suspicious of the Durham mission," says Professor E. H. Oliver:

and from the beginning severely criticised Lord Durham's policy. His outstanding ability and the wide influence of his paper made Thom a dangerous antagonist, and Durham annexed his support. He was accordingly appointed one of the assistant commissioners of enquiry into the municipal institutions of Lower Canada.<sup>18</sup>

When Lord Durham returned to England late in 1838, he took Thom with him as one of his secretaries. Within definite limits, Thom's knowledge of conditions in Canada made him a valuable assistant. He had a large part in the preparation of Lord Durham's Report, "the great document which", as Professor T. M. S. Carless once said, "may well be regarded as the foundation stone of the modern Commonwealth of Nations."<sup>19</sup> Indeed, a writer in the London *Law Times* of March 1, 1890, in a short obituary notice, stated: "Mr. Thom was understood to be the chief author of this report."<sup>20</sup> Thom's influence is certainly reflected in Durham's attitude to French Canada.

Speaking of the situation which he found when he arrived in Lower Canada, Durham said in his Report:

I expected to find a contest between a government and a people; I found two nations warring in the bosom of a single state: I found a struggle, not of principles, but of races; and I perceived that it would be idle to attempt any amelioration of laws or institutions until we could first succeed in terminating the deadly animosity that now separates the inhabitants of Lower Canada into the hostile divisions of French and English.<sup>21</sup>

15. *Hudson's Bay Company 1763 - 1870*, Vol. 2, p. 535.

16. Robert Leveque, Q.C., Secretary-Treasurer of the Bar of Quebec, has confirmed this date in a letter to the present writer.

17. This line is from a television play, (published in 1961), *Success of a Mission*, which gives a brief but illuminating glimpse of Adam Thom.

18. *Op. cit.*, p. 63.

19. *Canada, A Story of Challenge*, (1953), p. 192.

20. (1890) 88 *Law Times*, p. 317.

21. *Lord Durham's Report*, edited by Gerald M. Craig, has been published (1963) in Carleton Library (see pages 22 and 146).

What remedy did Durham have to offer as a cure for this pathological social condition? He recommended that:

it must henceforth be the first and steady purpose of the British government to establish an English population, with English laws and language, in this Province (of Lower Canada) and to trust its government to none but a decidedly English legislature.

If these words were Durham's own, the sentiment they expressed was certainly Thom's. As Professor Chester W. New says in his biography of Lord Durham, "(Durham) paid too great a price for Adam Thom."<sup>22</sup> Unfortunately the full price of Durham's reliance upon Thom's judgment has not yet been paid.

While working with Lord Durham in England, Adam Thom became friendly with Sir George Simpson, Governor-in-Chief of the Hudson's Bay Company. They were drawn to each other from their first meeting. When Thom's engagement with Durham was finished, Simpson offered him the position of Recorder of Rupert's Land, at the handsome salary of £700 sterling a year.

There is little doubt that Simpson had carefully hand-picked his man. What first brought Thom to his notice was Thom's fiery advocacy of the cause of the British party in Lower Canada. Simpson saw eye to eye with Thom on the French problem. His knighthood was given to him, in 1841, in part, for his activities as a loyalist during the affair of 1837.<sup>23</sup> A suspicion persists that Simpson may have thought that Thom was just the man to put the French Canadians of the West in their place.

Thom did not take long to make up his mind to accept Simpson's offer. He left England and, travelling by way of New York, reached Red River in the spring of 1839.

What were Thom's qualifications for his new post? It is not easy to balance the account. He had had virtually no experience in the practise of law. Indeed, he could not have had more than a nodding acquaintance with the broad general principles of law. But, given his temperament and training, one fact was certain: if he did not know his new job, he would soon learn it. If he should fail, it would not be for want of ability or application. On the credit side, he had youth in his favor. He was but 37 years of age. He had a robust constitution, a decided asset in Fort Garry in 1839; great physical and moral courage, and a vigorous mind which had been subjected to the full rigour of a Scottish education and to a stern self-discipline. On the debit side, there must be set a temper not always manageable, and a tendency to see no point of view but his own. In addition, he took himself deadily in earnest and, though he had a rough sort of wit, he had no sense of humor. His declared attitude to French Canadians was not a recommendation for a judge in Red River in 1839. As

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22. *Lord Durham*, (1929), p. 420.

23. *McKay*, *op. cit.*, p. 213.

Professor W. L. Morton nicely put it, his very presence was "a standing invitation to trouble in a colony more than half French."<sup>24</sup>

Not a handsome man, Adam Thom yet presented a striking appearance. He was tall and walked with a slight stoop. Solidly built, his large head was set firmly upon broad, powerful, shoulders. His square chin, generous mouth, and prominent nose suggested a man firm in his own convictions. Stern eyes looked out from beneath heavy brows. On the judgment seat, he must have seemed to those who appeared before him a substantial embodiment of judicial authority.

In assessing Thom's work as a judge, one fact must always be kept in mind. He was a faithful servant of the Hudson's Bay Company. His first loyalty was given always to the Company; never to the colony. He fell in line with Governor Simpson's policy "to keep (the settlement) cramped and confined within the monopoly of the Hudson's Bay Company."<sup>25</sup>

Bryce, in his *History of Manitoba*, makes the point well:

(Thom) was an impassioned advocate of the highest claims of the Hudson's Bay Company. Indeed, he regarded himself as the first to discover—and certainly the first to enforce at Red River—the concessions made by the easy-going old Charles II, which had lain dormant for nearly two centuries.<sup>26</sup>

It must not be thought that Thom, in pursuing this course, was doing violence to his own better self in the interests of the Company that signed his pay cheque. Such a course was quite in keeping with the approach which he, as a determined champion of the strict letter of the law, always took to any legal problem. As a lawyer, he belonged in the ranks of the "t" crossing and "i" dotting fraternity who sometimes throw away the kernel of the law and carefully hoard the husk.

On his arrival in Red River, Adam Thom took a house in Lower Fort Garry. Here he lived with his second wife, Anne Blackford, whom he married in 1839, and a son, Adam Bissett Thom, who was born to them in August, 1843, until the arrival in Red River of the 6th Royal Regiment in 1846. When Lower Fort Garry was requisitioned for the troops, he moved to a house some three miles south of the Fort, which he occupied for a year. In 1847, he purchased a house built by Chief Factor Charles, where he lived with his family (a second child was born of his marriage, a girl, who died in infancy), for the remainder of his stay in Red River. After he left the settlement, this house became the residence of the Bishop of Rupert's Land and was known as Bishop's Court.

Anne Thom does not seem to have made much impression on the community. She lived largely in the shadow of her husband, as Mrs. Adam Thom, wife of the Recorder. In one of her letters, Mrs. Letitia Hargrave

24. *Eden Colville's Letters, 1848-1855*, (1956), p. ix.

25. A. S. Morton, *Sir George Simpson*, (1944), p. 119.

26. (1906), p. 132.



has a brief reference to her. Writing to her mother on April 10, 1843, Mrs. Hargrave gives her this scrap of news:

Mrs. Thom at Red River fought with her Scotch servant and turned her off. The girl laid her case before the magistrates who unanimously espoused her cause and settled that Thom should pay her up to the end of the engagement with expenses home. She compromised however on his resisting altho' the magistrates gave a power to seize his effects and she took only what was due for past service. Thom is Recorder of the Settlement and must know the law—The magistrates were indignant at her compromising.<sup>27</sup>

The General Quarterly Court of Assiniboa met four times yearly—in February, May, August and November. Professor E. H. Oliver, who risked his eyes in reading the original records of the Court, estimated that Recorder Thom attended twenty-two sessions of the Court.<sup>28</sup> He made the further estimate, again from painstaking research, that Thom attended twenty-five meetings of the Council of Assiniboa.<sup>29</sup>

The volume of work on the Court's calendar was not great. Though some aspects of life in the Red River Settlement were less than admirable, the community was, by and large, law-abiding. Sir George Simpson, in his evidence before the Select Committee (1857), reported that during his thirty-seven years as Governor of Rupert's Land, there had been only nineteen cases of major crime.<sup>30</sup> Factors contributing to this happy condition of affairs were the innate sense of honor of the Indians, the influence of the Roman Catholic Church, and the stern upbringing and uncompromising moral sense of the settlers from Scotland.

What manner of cases was the General Quarterly Court called upon to decide? Professor Oliver is the person best qualified to answer this question:

The records of the General Quarterly Court reveal the social habits of the people and indicate the names of those upon whom the responsibility for law and order in the community most heavily fell. The relations with domestic help, the occasional boisterous times at weddings, the crying out of lost oxen at the church doors, regulations of the buffalo hunt, drinking habits, all stand discovered in the records of the court. The cases tried cover every species of offence—adultery, libel, theft, escape from custody, assault, murder, leaving hole in the ice, supplying Indians and halfbreeds with beer and whisky, deserting employer's service, worrying of lambs by dog, attempted rape, trespassing, cutting down and carrying off wood, setting fire to the plains, seduction, breach of promise, violation of trade, restrictions in furs, defamatory conspiracy, perjury, appeals from Petty Courts, concealing birth of child, breach of contract, opening packages *en route* from York Factory, selling spirits on Sunday, breach of revenue laws, attempting abortion.<sup>31</sup>

Adam Thom took the most liberal and extended view of his jurisdiction as Recorder. In one criminal case, at least, he exceeded his jurisdiction. He presided at the trial of a Salteaux Indian, Capinesseweet by name, charged with the murder of a Sioux and a fellow Salteaux. The

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27. *Letters of Letitia Hargrave*, edited by Margaret Arnett MacLeod, p. 146.

28. *Op. cit.*, p. 80.

29. *Op. cit.*, p. 64.

30. *Report from Select Committee*.

31. *Op. cit.*, p. 80.

alleged offence took place on August 31, 1845, and the trial four days later. The accused Indian was convicted and publicly hanged on September 6, upon a gallows specially erected for the occasion. It was the first hanging to take place in Red River.<sup>32</sup>

In a letter to her mother, Mrs. Dugald Mactavish, dated November 30, 1845, Mrs. Letitia Hargrave throws an interesting light on this case:

There have been disturbances at Red River. Some Sioux and Saulteaux met at Fort Garry, when one of the latter took his gun and shot down a Sioux and killed by mistake one of his own people. The murderer was seized and hanged but the Indians threaten to shoot Mr. Thom the recorder and the hangman, if they can find out who officiated in that capacity, but he wore a mask. Mr. Christie was very anxious when he last wrote. Mon. Bellcour, a catholic priest, labored so successfully with the condemned that he got him to say his punishment was just, but that would not pacify them. The wretch got quite powerless and had to be assisted upon the scaffold. They would rather have sentenced him to be shot but as John MacGill would say, that would not be law, and Mr. Thom will sanction no departure from the strict letter of it.<sup>33</sup>

The case of the Indian who was hanged in Red River with indecent haste was investigated by the Select Committee (1857). John McLaughlin, a resident of Red River at the time, was examined before this Committee. Part of his evidence as reported in the published Report of the Committee follows:

5025. Do you know that the Company are bound under an Act of Parliament to send all cases of capital punishment to be tried in Canada?

Yes, I am aware that they are bound in the sum of £5,000, I think.

5027. How is it, then, that the colonists resident on the spot did not remonstrate against this execution?

It is impossible for them to remonstrate there; they are too much under the control of the Company; the Company would stop the supplies.

5028. Was this man tried by a jury?

He was tried by a jury, without any defence.

5029. There is no doubt that he shot the man?

The principal witness, Sayer, had first of all given in charge another Indian; certainly, if the man had had counsel it might have been different.

Quite apart from the Court's want of jurisdiction to pass sentence of death, it may well be that the first execution in Red River was a wanton miscarriage of justice.

As for the people of Red River remonstrating against the illegal execution of the Indian, if Alexander Ross can be accepted as their spokesman, their feelings in the matter ran the other way. Ross, who had no doubt of the Indian's guilt, wrote in his *Red River Settlement*:

Long before this affair took place, the Indians had become insolent and overbearing; the peace and safety of the whites loudly called for some check on their growing audacity, and a fairer opportunity than now offered could never occur. Had we through a false sympathy overlooked this insult, our leniency would have been attributed to nothing but fear; and thus would have increased their assurance, and our danger.<sup>34</sup>

32. Alexander Ross, *The Red River Settlement*, (first published 1856), 1957 edition, p. 332.

33. *Letters*, p. 211.

34. *Op. cit.*, p. 332.

Thom's most important constitutional case was one in which he sturdily defended the jurisdiction of his court. James Calder had been brought to Red River to be tried on a charge of murder, alleged to have been committed in Peace River District.

The case came on for hearing on August 18, 1848, before a court composed of Alexander Christie, Governor of Assiniboia, Adam Thom, Recorder of Rupert's Land, John Bunn, Councillor of Assiniboia, and Alexander Ross, Sheriff of Assiniboia. The Recorder opened the proceedings by reading a carefully prepared opinion.<sup>35</sup> Did the Court have jurisdiction to try Calder? This was the question. In what Archer Martin has referred to as the "first written judgment ever delivered in the Courts of the Country that has come down to us,"<sup>36</sup> Thom gave his answer to this question.

Beginning with generalities, in which he seemed to delight: "I need not remind you that I have uniformly embraced every opportunity of binding myself down in the absence of most of the extraneous guarantees of judicial impartiality, by the enunciation of every general principle that can be brought to bear on any particular issue—", he went on to develop the theme that under the Royal Charter, Peace River was "embraced within the limits of the Company's chartered right of exclusive trade," and "the chartered privilege of trading carried with it the right of judicature."

When he dealt with the question as to whether Calder should be sent to Upper Canada for trial, there shone through his judgment a sturdy sense of justice, and if his reasoning was not sound in law, it certainly had the support of logic.

"But the jurisdiction of Canada," said Thom, in his broad Aberdonian accent, which Bryce assures us did not become greatly softened by his years in Red River,

even if valid in point of law, is utterly repugnant to justice and humanity. Let us follow a prosecution through its various stages. To quote the very words of the law, as embodied in the two correlative statutes, "Any person or persons guilty", *guilty* being a slovenly substitute for *accused*, "of any crime or offence" may without the intervention of a single magistrate or the guarantee of a single affidavit, be dragged to Canada, from the farthest wilds of the North-West "by any person or persons whatever." During the journey the reputed offender, if he is really to be prevented from escaping, must be subjected to the most severe restraint, in as much as to say nothing of the temptations and facilities of the American settlement of Sault Ste. Marie, the hardy denizen of the wilderness may elude his keepers in almost every encampment and on almost every portage. After a period of coercion ranging from six to eighteen months, according to the locality of the crime, and the season of the year, the prisoner of "any person or persons whatever" is brought, probably for the first time, within the cognisance of law. If he is then discharged, the oppression of the system needs no comment of mine. But if he is formally committed for trial, he must pass several months in gaol before steps can be taken for the summoning of witnesses, and before he can be confronted with the witnesses for the prosecution, or have the benefit of those for the defense, he must, under the most favorable circumstances, lie two years longer in the prisons of what may to him be a foreign land.<sup>37</sup>

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35. (1891) 2 *Western Law Times Reports* 1.

36. (1891) 2 *Western Law Times* 24.

37. (1891) 2 *Western Law Times Reports* 10.

Thom's judgment in the case of Calder was a creditable performance. In 1888, Mr. Justice Killam of the Court of Queen's Bench for Manitoba, in the case of *Sinclair v. Mulligan*,<sup>38</sup> considered this judgment and endorsed Thom's view that the court over which Thom presided derived its authority solely from the Hudson's Bay Company under the Company's original charter and that the laws in force in Rupert's Land were the laws which existed in England at the date of the charter of the Hudson's Bay Company, May 2, 1670. On an appeal to the Manitoba Court of Appeal, Mr. Justice Killam's judgment was affirmed.<sup>39</sup>

Under its charter, the Hudson's Bay Company had no power to legislate, and it claimed none. When he appeared before the Select Committee, Sir George Simpson was asked, "Have you any legislative power?" "No!" was his reply. Later, this question was put to him, "You cannot make laws in the territory?" To which he replied, "We can make laws as far as regards the management of our own affairs, which is the only case in which we have occasion to make laws."

The Local Laws of the District of Assiniboia were consolidated and codified on three occasions:<sup>40</sup> in 1841 and 1852, during Recorder Thom's regime, and in 1862, after he had left the District. The first two codes were largely Thom's work, and the third code, somewhat more elaborate than the first two, carried on within the framework laid down by him. In these emphatic words, Ross tells us of the part Thom had in framing the Local Laws of Assiniboia.

It was the Recorder that penned them; it was the Recorder that argued them through the council in a masterly manner; it was the Recorder that interpreted them, so as to make their inevitable generalities fit particular cases. In these respects he may be said to have always had his own way—less would not satisfy him; and this often raised up difficulties between himself and his colleagues. People said he possessed the gift of twisting and untwisting his interpretations, so as always to fit his own cause.<sup>41</sup>

A word must be said about Ross' attitude to Thom. Ross was a well-read man, with a sound, practical sense. His judgments on men and events were generally sound. His book on Red River, a delight to read, is a minor classic in its field. But he seems to have resented Thom from the day he arrived in Red River. He saw no necessity for a Recorder with legal qualifications. "In place of the simple honesty," he writes, "which marked our proceedings hitherto (bringing such a man into the colony) has a tendency to substitute the quibbles and technicalities of law, which few but lawyers themselves comprehend."<sup>42</sup> Ross had an overdose of the layman's impatience with the formalities of the law. Commonsense, in his opinion, was all that was needed in the administration of law in a pioneer community. This commodity varies from person to person, and

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38. (1886) 3 M.R. 481.

39. (1888) 5 M.R. 17.

40. The Laws of Assiniboia are published in Consolidated Statutes of Manitoba, 1880.

41. *Op. cit.*, p. 383.

42. *Op. cit.*, p. 223.

he did not stop to ask whose commonsense should be the measure of the laws in Rupert's Land.

Thom, on the other hand, was a strict legalist. As Professor Arthur S. Morton says, "(Thom) viewed things solely from the legal point of view, or, as he would put it, from the point of view of the law of the land, namely the Charter."<sup>43</sup>

Between the two men there was a fundamental antagonism. Ross never overlooked an opportunity of being critical of Thom. For example, in a letter to Chief Factor Donald Ross on August 7, 1850, he wrote:

The social and political machinery of the colony has got out of order; there are troubles with our governor (Major Caldwell) and lawsuits among ourselves. Matheson put a verandah on Judge Thom's house and wanted to charge the judge £23 sterling. The judge demurred. A lawsuit was instituted, Mr. Thom pleading his own case. After stamping, ramping and lecturing some two hours, insulting the magistrates and turning the jury out of the box, then putting on his hat and walking out of the court *sans ceremonie*, Thom came in refreshed with a few minutes outside and paid Matheson £25.<sup>44</sup>

Giving full consideration to the latitude which must be allowed to a man in his private correspondence, the picture Ross gives of Thom in this letter is surely somewhat overdrawn.

Joseph James Hargrave, another early historian of Manitoba, presents Thom in a more friendly light. "I cannot close this cursory glance at the official career of this pioneer of the law in Red River Settlement," he wrote, in his book *Red River*, published in 1871,

without stating that, at the close of his long and often unquiet sojourn of fifteen years in this singularly situated place, he left behind him the reputation of great ability and of kindly hospitality in his private relations, among those of his acquaintances best able to appreciate the former, and who had shared in the latter.<sup>45</sup>

Donald Gunn and C. R. Tuttle, in their *History of Manitoba*, published in 1880, are neither as severe as Ross nor as kindly as Hargrave in their judgment of Thom:

As Recorder of Rupert's Land no objection was raised, but as a judge to deal with cases, many of which were between the settlers and the Company themselves, it was felt that justice was more likely to be obtained from someone who was not a paid servant of the Company . . . In other respects, Judge Thom, the gentleman appointed, was of standing and ability quite equal to the position which he filled.<sup>46</sup>

Thom's duties as Recorder and member of the Council did not engage his full energies. His pen was not idle during his stay in Red River.

In 1841, Sir George Simpson set out from London on a trip around the world. In nineteen months of travel, he journeyed over the continents of Europe, Asia and North America, and crossed the Pacific and Atlantic oceans. In 1847, he published two stout volumes (some nine hundred

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43. *Op. cit.*, p. 196.

44. This letter was published in *The Winnipeg Free Press* for June 21, 1930.

45. P. 90.

46. P. 298.

pages in length), under the title *Journey Round the World*. Speaking of this book, Douglas MacKay says:

Only here and there is the true Simpson style discernible, and it is generally conceded to be a rather flagrant example of Victorian "ghost writing" attributed to Adam Thom . . . The style varies from florid to turgid, and the whole effort reflects the self-made merchant playing to the current fashion of travel books by gentlemen.<sup>47</sup>

According to Bryce, internal evidence as well as local report on the Red River clearly indicated that the author of Simpson's book was Judge Thom.<sup>48</sup>

When he appeared before the Select Committee in 1857, Simpson did not appear to have too great a knowledge of the contents of his book. In his evidence, he claimed that Rupert's Land could not support a large population because of the "poverty of the soil", the want of an adequate supply of fuel, and the fact that even in the heart of summer "frozen earth" could be reached by digging eighteen inches into the soil. His book was quoted against him. He was asked for an explanation of this fulsome passage:

Nor are the banks (of the Rainy River) less favourable to agriculture than the waters themselves to navigation, resembling in some measure those of the Thames near Richmond. From the very brink of the river there rises a gentle slope of greensward, crowned in many places with a plentiful growth of birch, poplar, beech, elm, and oak.

Here was a predicament! Sir George could not disown a book which bore his name on its title page. Neither could he endorse the sentiments which Thom had put down on paper in his name. He did the best he could, giving a lame explanation, which left him open to the charge that he was deliberately shading his evidence to give the impression that Rupert's Land was not fit for colonization.<sup>49</sup>

Simpson's book was not the only work which engaged Thom's pen during his stay in Red River. In 1844, he published, in London, a pamphlet entitled *The Claims to the Oregon Territory Considered*; and four years later, a more ambitious work, *The Chronology of Prophecy*, which was the harvest of long hours spent in Biblical research. Theology appears to have been a favorite study with him. When the Bishop of Montreal visited Red River in 1844, he reported that Thom "was deeply engaged latterly in Biblical studies." Thom carried on these studies in Hebrew, his knowledge of which was largely self-taught.

When Adam Thom served as Recorder of Rupert's Land, Red River was an intimate pioneer settlement, isolated from the world beyond its immediate horizon. It exhibited many of the worst features of such settlements. Living in a small, closely confined community, its inhabitants could find no hiding place from each other. "Red River was a village,"

47. *Op. cit.*, p. 213.

48. *The Makers of Canada*, biography of Sir George Simpson, Vol. 8, 1910 edition, p. 249.

49. *Ibid.*, p. 275.

says Professor W. L. Morton, "rife with gossip and slander, in which every man, whatever his rank, was intimately known and censoriously judged."<sup>50</sup> To have given general satisfaction as a judge in such a community would have been an impossibility. Over the years, Thom came in for much criticism and abuse: some of it well-deserved, some of it based on misunderstanding, and some of it because as a good servant of the Company he was an ideal target for the general resentment felt against the Company (he once said himself that "it is not against Mr. Thom, but against the Company, that the ultimate aim is directed.")<sup>51</sup>

When he had been ten years in the community, a trial took place which was to provide his nemesis. Hon. E. K. Williams has referred to this case, *The Honourable Hudson's Bay Company v. Pierre Guilleaume Sayer*, as probably the most remarkable case ever tried in the District of Assiniboia.<sup>52</sup> Events which reached their climax at the Sayer trial had been brewing steadily over a period of years. During the early years of the settlement in Red River, the Company turned a blind eye to private trading in furs with the Indians. As population increased and private trading became more active, Company officials decided that it was time to look to the Company's monopoly.

The two largest independent traders were Andrew McDermot and James Sinclair. In an effort to curb their activities, Chief Factor Duncan Finlayson, in 1843, refused to renew freighting contracts which they held from the Company. This step did not have the desired effect. It made McDermot and Sinclair openly defiant of the Company. When a trading post was established at Pembina in 1844, a new and profitable market was opened to the free-traders. Governor Christie of Assiniboia decided it was time to take strong measures. He gave orders that no settler could import goods in Company ships (which were the only ships available) unless he signed a declaration that he was not directly or indirectly engaged in trafficking in furs. Taking a bolder step, he ordered that all letters leaving the colony must bear the sender's name on the outside, and, if the sender was engaged in fur trading, his letters would not go out in the Company mail (the only mail leaving the colony). What did Thom think of these repressive measures? "Mr. Thom's view," says Alexander Begg, in his *History of the North-West*, ". . . was that the chartered privileges of the Company, and the fact that they supplied the means by which the letters were conveyed, and the merchandise imported, gave them the right to fix the terms upon which the facilities of postage and freight were afforded."<sup>53</sup> Loyalty to the strict letter of the law could not be carried much further.

Sir George Simpson was behind these measures but, shrewd politician that he was, he saw to it that they were put forward in Christie's name.

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50. *Op. cit.*, p. liii.

51. Quoted by John S. Galbraith, *The Hudson's Bay Company as an Imperial Factor, 1881-1869*, (1957), p. 330.

52. *Supra*, note 4(d).

53. (1894), Vol. 1., p. 257.

He contributed an idea of his own. He called upon Thom to redraft the Company's form of land grant to make it clear that all land was held from the Company and that a grant could be revoked if its holder engaged in free trading.

The Métis and the halfbreeds sent separate petitions of their grievances to London, where they were pigeonholed by officials indifferent to the complaints of distant colonists. Tension in the colony mounted. It came to a head when Chief Factor John Ballenden arrested Pierre Guillaume Sayer, of Grantown, and three other Métis, as they were about to set off on a trading mission to Lake Manitoba.

Sayer was brought to trial before the General Quarterly Court on May 17, 1849.<sup>54</sup> On the bench were Major Caldwell, Governor of Assiniboia, Adam Thom, Recorder, Alexander Ross, John Bunn and Cuthbert Grant, Councillors of Assiniboia and Justices of the Peace.

May 17 was Ascension Day. This day had been chosen deliberately for Sayer's trial, as it was expected that the Métis would be attending their church on the other side of the Red River and would not be available to make trouble. But the Métis went to early mass. They were harangued at the church door by Louis Riel, Sr., the miller of the Seine, father of Louis Riel, the founder of the Province of Manitoba, who, in the words of a French Canadian admirer, scored "a veritable triumph". Under the spell of his eloquence, the Métis armed themselves and marched in a determined body to the Court House. Alexander Ross reports that "377 guns were counted, besides, here and there groups armed with other missiles of every description."<sup>55</sup> Above the noise and confusion of this angry crowd, "A wild Métis demanded to be let into the Court House to shoot Judge Thom on the bench."<sup>56</sup>

After some delay, in a highly charged atmosphere, the trial began. Sayer was called to answer to the charge of trading in furs in the Hudson's Bay Company's territories without a license.

He was being carefully guarded by a group of Métis, and did not answer to his name. Sheriff Ross stepped down from the bench to go to look for him. He returned without Sayer. In the accused's place, there came to the bar James Sinclair, Peter Garrioch and several others who said that they were delegates from the large party of halfbreeds who were outside the court. Sinclair, acting as spokesman, gave the Clerk of the Court a paper, in which the Métis outlined their grievances, to hand to the Governor.

Recorder Thom, who had remained calm and undismayed in the face of threats of violence, asked Sinclair in what capacity he appeared in court. "As delegates of the people," replied Sinclair. With admirable control and patience, Thom explained that they could not be received in a court of law in that capacity. He referred to the Royal Charter which gave the

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54. (1891) 2 *Western Law Times Reports* 12.

55. *Op. cit.*, p. 374.

56. MacLeod and Morton. *Cuthbert Grant of Grantown*, (1963), p. 136.



Hudson's Bay Company the exclusive right of trade, and told the so-called delegates that until this Charter was changed by an Act of Parliament any person who engaged in private trading was transgressing the law. Sinclair had come prepared for this argument. He stepped forward with a copy of *The Times* of London for August, 1848, which contained a report which stated that many eminent members of the House of Commons had grave doubts as to the validity of the Charter.

After a discussion which was leading nowhere, Thom offered a compromise. He said that the Court would permit Sinclair to represent Sayer, or that Sinclair might sit as Foreman of the Jury, with Garrioch also a member. "All that he wished was a fair and impartial trial," he assured the Métis who had invaded the court. Sinclair left the court and returned with Sayer. He elected to act as his representative.

The jurors who had been sitting on the previous case were still in the box. Sinclair objected to five of them, and to eleven others on the panel, before a jury was finally empanelled.

Chief Factor Ballenden acted as prosecutor. He appears to have played a dual role in the trial. In addition to prosecuting, he gave evidence, or made an unsworn statement to the Court. The record is not clear.

Ballenden called two witnesses. The first was Magnus Linklater, Postmaster of the Hudson's Bay Company. He testified that Sayer had brought some furs to the Company's store, and when asked if he had traded them, replied that he had traded some and others he had hunted himself. Cross-examined by Sinclair, he admitted that Sayer had not said when he had hunted the furs, whether that year, or three years, or ten years, before.

The prosecution's second witness was the accused's own son, Louison Sayer, a boy of twelve years. Ross tells us that this boy was "under the stern injunction of one parent (to tell) the whole truth, without any attempt at delay or equivocation, against the other." And he proudly asks, "In what court of England or Scotland could the moral beauty of this scene have been surpassed?"<sup>57</sup> The boy told the Court that he had been hunting with his father, who killed one red fox, that his father had been given some furs by relatives, and that he had traded some furs with halfbreeds, the medium of trade being blankets. "I saw him give a dram of spirits," he said, "to the people whom he was trading with."

According to the record, this was the only direct evidence against Sayer.

For the defence, Antoine Morin told the Court that Chief Factor Harriott had offered to give him advances if he wanted to go out to trade for furs.

A second defence witness, Alexe Goulet, in giving testimony to show general custom, said that he had bought a horse from Chief Factor Harriott

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57. *Op. cit.*, p. 382.

and told him openly that he would trade furs to pay him for it. Harriott had told him not to trade with the Indians, but said nothing about not trading with the halfbreeds. Ballenden contradicted this witness, telling the Court that he himself had told him explicitly not to trade in furs, that if he could not pay his debt by hunting furs, he would take salt from him to cover the price of the horse.

This completed the evidence, and Recorder Thom summed-up the case to the Jury.

"After some time," reads the Court record, "the jury returned with a verdict: That Pierre Guilleaum Sayer is guilty of trading furs." Donald Gunn, Foreman of the Jury, addressing Ballenden as prosecutor, recommended Sayer to mercy, as it was apparent that he and others were under the impression that they had a right to trade in furs. Ballenden did not press the advantage that the verdict of guilty had given him. He told the Court that the Company did not value the furs which had been traded, that it was the principle they had been seeking to uphold, and as the Jury had given a verdict of guilty, he willingly acceded to the recommendation for mercy, and he would not proceed with the other three cases.

As Cicero said, "Laws are silent in the midst of arms." Had any punishment been imposed on Sayer, the Métis would have stormed the Court House and released him by force. But Ballenden, in taking the course which he did, was not altogether dismayed by show of arms. He was acting quite in keeping with the Company's general policy of fair dealing. As one studies the records, he is forced to the conclusion that if Western Canada had to be in the hands of a private company, it was fortunate, indeed, in being in the hands of a company as moderate and fair, in the broad picture, as the Hudson's Bay Company, as represented by the heroic and able group of men it selected to carry out its policies in the field.

Ducharme, one of the jurors, in announcing the verdict in the Sayer case to the Métis outside the Court House, shouted, "Le Commerce est libre." This cry was soon echoing up and down the banks of the Red River. The Métis thought they had won a victory. The verdict of guilty was, to them, a mere technicality. What really counted was that Sayer was not given any punishment.

After the Sayer case, trade was indeed free. As George F. G. Stanley has said:

The Company had, in reality, lost the battle to hold its privileged position in the matter of trade. There was still the statement in the Charter, still the regulations in the book of rules, but so far as the Red River Settlement was concerned the monopoly was as meaningless as it was ineffective.<sup>58</sup>

Two weeks after the Sayer trial, Major Caldwell, Governor of Assiniboia, called the Council together "for the purpose of considering what

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58. *Louis Riel*, (1963), p. 13.

measures ought to be devised for the prevention of such unlawful assemblages of the people as occurred (during the trial) and for the restoration of the tranquillity of the Settlement."<sup>59</sup>

The Council agreed that the disturbance had arisen from the desire of the Canadian and halfbreed population to obtain the following five objects:

1. The immediate removal of Mr. Recorder Thom from the settlement.
2. The conducting of all judicial business through the medium of a judge who would address the Court in the French as well as in the English language.
3. The rescinding of the existing law respecting all imports from the United States of America.
4. The infusion into the Council of Assiniboia of a certain proportion of Canadian and halfbreed members.
5. A free trade in furs.

"The Council weighed up this mixture of animosities and ambitions," says E. E. Rich, in his *Hudson's Bay Company*, "and decided that, since Thom was perfectly competent to conduct the judicial business in French as well as in English, he should retain his office."<sup>60</sup>

The wording of the second of the five objects desired by the colonists at Red River is significant. It makes use of the word "would" and not "could" address the Court in French. It was generally understood in the colony that Thom could not speak French. For example, Alexander Ross, who sat with him day after day, on the General Quarterly Court, says categorically: "Others, again, objected to Mr. Thom on the ground that he could not speak French, which, nevertheless, was the language spoken by the majority of the population."<sup>61</sup> It appears from the minutes of the Council meeting held after the Sayer trial that Thom could speak French:

With respect to the second (object), that Mr. Thom having at the commencement of the proceedings, expressed his willingness, in future, to address the Court in both languages, in all cases involving either Canadian or halfbreed interests, such a line of procedure should be hereafter adopted.<sup>62</sup>

I have ascertained that Thom's course of studies at Aberdeen did not include French.<sup>63</sup> But he was engaged in Montreal in journalism for several years, during which time he crossed swords with the leading French Canadian journalists in heated controversy. As their sworn enemy, he must have wanted to know what they were writing about him in their newspapers. He was an accomplished Greek and Latin scholar—and he taught himself Hebrew. For a man of his intellectual activity, another language would hold no terror. And a man of his habit of mind was not likely to employ a translator to find out what new arguments his opponents were using against him. Occupational necessity must have prompted him to acquire a knowledge of French.

59. Oliver, *op. cit.*, p. 352.

60. *Hudson's Bay Company*, Vol. 2, p. 551.

61. *Op. cit.*, p. 224.

62. Oliver, *op. cit.*, p. 352.

63. By letter from W. S. Angus, M.A., LL.B., Secretary, Marischal College, Aberdeen.

Why did Thom hide this knowledge? I offer this explanation. In Dr. Arthur R. M. Lower's words, Thom was "one of (the) most reactionary Tories, a man unrestrained in his hate and contempt of French Canadians."<sup>64</sup> He had persuaded Durham, again in Dr. Lower's words: "That the greatest kindness to (the French Canadians) would be to initiate them into the blessings of English civilization by gradually making them into Englishmen."<sup>65</sup> Being so firm in his opinion, Thom may have refused deliberately to speak French. He would do his part in Anglicizing the French. "Let them speak English, and if they can't speak English, let them learn it," may have been his attitude.

Sir George Simpson visited Assiniboia in June, 1849. Immediately on his arrival at Red River, he was presented with a petition for Thom's removal as Recorder. After consulting with Thom, he advised him not to take his seat on the bench for a year, hoping that in that interval the animosity against his protégé would have subsided.

Adam Thom lost the goodwill of the French-speaking population, or what little he had ever had, after the Sayer trial. He was to lose the goodwill of a large part of the English-speaking population as a result of the case of *Foss v. Pelly*. This case, the most celebrated civil suit ever tried in the courts of Assiniboia, involved the leaders of high society in Red River.

Captain Christopher Vaughan Foss arrived in Red River as a staff officer of a regiment of pensioners. Soon he was moving in the best social circles. He became friendly with the wife of Chief Factor John Ballenden, the "first lady" of Red River.<sup>66</sup> Tongues soon began to wag that he was too friendly—much too friendly. Foss and Mrs. Ballenden consulted Thom. As a result of the advice which he gave to them, Foss commenced proceedings for defamatory conspiracy against Chief Trader Augustus Edward Pelly and his wife, and Mess Steward John Davidson and his wife. Sir George Simpson became concerned about these proceedings and, exercising his prerogative as Governor-in-Chief, held a private investigation at which Thom was present.

The trial of Foss's action opened on July 16, 1850, and continued for three days.<sup>67</sup> At the opening Foss stated that he had not entered the case for the sake of pecuniary gain, but to clear Mrs. Ballenden's reputation.

Pelly objected to the formation of the Court "as Mr. Thom was allowed to sit as a Judge in a case in which he had acted as attorney to the plaintiff." A court of seven members, presided over by Major Caldwell, Governor of Assiniboia, overruled this objection.

A parade of witnesses gave evidence for the plaintiff, establishing that the defendants had made remarks about Mrs. Ballenden's character, which, if untrue, were clearly defamatory.

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64. *Colony to Nation*, (1946), p. 246.

65. *Op. cit.*, p. 248.

66. *Letters of Letitia Hargrave*, p. cxxxiv.

67. Records of the General Quarterly Court of Assiniboia 1850, p. 181, in Provincial Archives of Manitoba.

Both Governor Caldwell and Recorder Thom gave sworn evidence as witnesses for Foss. In his evidence, Thom showed a decided bias in Mrs. Ballenden's favor. He was prepared to believe the best of her, no matter how dark appearances seemed. Speaking of sworn statements, which had been sent to Sir George Simpson, and which implicated Foss and Mrs. Ballenden, he said that "such a thing as perjury is possible as well as adultery," and "unsifted evidence could not have the slightest effect on my mind."

One witness, Rev. Cochrane, made this uncharitable observation: "Whenever a rumor of this kind is in circulation, I have always found them to turn out correct." Which, in view of later developments, proved that he took a realistic view of life in Red River.

Louis Riel, Sr. was called as a witness for the defence. Why? Unless it was for the purpose of embarrassing Thom, it is difficult to understand. "Has anyone ever spoken to you to request the halfbreeds to allow Mr. Thom to sit as Judge on the Bench in this case?", he was asked. He started to answer this question, but such a tumult and a shouting broke out in the Court that he could not be heard. When order had been restored, the question was repeated in this form: "Did anyone offer a sum of money to the halfbreeds to permit Mr. Thom to sit on the Bench?" "Never, never," cried Riel. "The noise at this time in the Court was of such a nature," proceeds the Court record, "as to bring Sheriff Ross to address the people then in the Court in a short and appropriate speech, which had the desired effect and business was resumed."

"Business was resumed"—this is a good way of putting it, for the proceedings in *Foss v. Pelly*, from beginning to end, were a sorry business. Colville did not overstate the case when he wrote, in a letter to Simpson, "Thom's conduct on the trial seems to have been as unlike a judge as anything could be."<sup>68</sup>

The record closes with these words:

The Recorder summed up the whole of the evidence at great length—and the jury retired, and after an absence of nearly four hours returned into court with the following verdict:

Guilty against the four defendants in damages as follows:

£300 against A. E. Pelly and his wife.

£100 against John Davidson and his wife.

As the law required any civil action in which the cause of such action exceeded in value the sum of two hundred pounds to be remitted for trial to the Courts of Upper Canada, this was a verdict in excess of the Court's jurisdiction.

This interesting trial did not pass the notice of Mrs. Letitia Hargrave.

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68. *Letters, op. cit.*, p. 195.

The bare bones of the record are given a little flesh by a lively letter which she wrote to her mother in August, 1850:

The Captain to the Pellys' amazement cited them to defend themselves in an action for defamation, for accusing him of having criminal intercourse with a married woman, damages each £200. The mess cook (John Davidson) an Orkney man and his wife were tried as parties at the same time . . . The cook and wife were included to prevent their appearing as witnesses. Mrs. B. was sent from her husband's house and confided to the care of Mr. Recorder Thom, who was judge in the case and in whose family she remained till the proceedings were over. Foss came boldly out. Mrs. B. appeared in court as a witness, and harangued the public, accusing Pelly of having a pique at her because she had rejected "his advances" the previous winter, he being then one of her husband's clerks. Pelly declares that she is wrong, and that she, not he, had made "the advances" . . . Mr. Thom charged Mrs. Cochrane, the clergyman's wife and Mrs. Black with perjury because they had given evidence that they had seen Mrs. B. and Captain Foss behaving in a very free style to one another. Poor Miss Anderson was worried with metaphysical questions by said Thom who addressed the jury, informing them that although Mrs. B. might not have so much starch in her face she had as much virtue in her heart as any exotic (meaning not halfbreed) that she was the choicest specimen of native modesty and grace.<sup>69</sup>

Nor did the case of *Foss v. Pelly* escape the notice of the Select Committee (1857). Lieut. Col., formerly Major, W. Caldwell was examined as follows:

5447. Did he (Thom) act on that occasion as advocate? . . . I am afraid that he acted both as advocate and judge. (And the worthy Colonel could have added: as witness as well.)

5453. When you say that Mr. Thom acted as judge and as advocate in this case, do you mean that he actually pleaded formally as an advocate, and afterwards gave judgment? . . . No.

5454. Or do you mean that, as the judge, he showed the feelings of an advocate? . . . I mean to say, that when Sir George Simpson came and inquired into this matter, he and Mr. Thom being present, they inquired from the different witnesses of those who were accused what their statements were, and Mr. Thom heard them.

5455. Out of court? . . . Out of court, privately, before Sir George Simpson.

So great had been Caldwell's disapproval of the verdict in *Foss v. Pelly* that he had written a strong letter to the Governor and Committee protesting against Thom's conduct. The Governor and Committee had been long-suffering. When complaints were made about Thom as a result of the Sayer trial, they "supported Thom, emphasizing the independence of the judiciary, as a principle, and the honesty of Thom as a fact."<sup>70</sup> But *Foss v. Pelly* was too much for them. A General Court of the Company was summoned to relieve him of office. "But the Governor and Committee," says Professor W. L. Morton,

would not yield completely to the pressure of the Métis, and in so doing deprive the Council and Court of all legal advice. They therefore ordered Colville to inform Thom that he had been dismissed as Recorder, but had been made Clerk of the Court. It was their hope that in this capacity Thom would no longer be offensive to the Métis, and that his legal knowledge would still be available to the court. The hope was promptly dashed. Colville took the precaution of informing Riel of the change in Thom's status, only to be informed that the Métis would not suffer Thom to appear in court in any capacity. As a result Colville had to ask Thom not to appear in court in the future.<sup>71</sup>

69. *Letters, op. cit.*, p. 255.

70. Rich, *op. cit.*, p. 552.

71. *Colville's Letters*, p. cvii.

A deed revoking Adam Thom's appointment as Recorder of Rupert's Land was sent from London to Red River on December 6, 1850. On his demotion from the bench, Thom became Clerk of the Court over which he had presided for ten years. And he was to be a Clerk only in name, for he was forbidden to attend court, when it was in session, because of the active hostility of the Métis. He also served as Clerk of the Council of Assiniboia, and, in that capacity, did attend meetings of the Council.

One valuable piece of work that Thom did while serving as Clerk of the Court was to prepare, with some assistance from Louis La Fleche and John Bunn, an extensive report on the state of the law. He presented this report to the Governor and Council of Assiniboia in May, 1851.<sup>72</sup> The whole body of existing local laws were reduced to forty-six resolutions. "In some instances," reads the report, "we have, under correction of course, regarded the law, not as it is, but as it ought to be." It was recommended that the laws of England, "as existing at such a date as would render nearly every legal publication in the Settlement a work of authority," be substituted for the laws of England as they existed on May 2, 1670. (It is of interest to note, in passing, there were law books in Red River before there were lawyers. An inventory of books in the Red River Settlement, prepared in 1822, lists three volumes of Blackstone and Tomlin's Law Dictionary.)<sup>73</sup> Unless the general law was brought more up-to-date, proceeds the report, in words which furnish a good example of Thom's formal, but forceful, style, "if Mr. Thom is to give formal opinions in writing, he must either shock the common sense of the community with antiquated absurdities in all their naked deformity, or assume to himself a responsibility, or rather an authority, which ought not to fall to the lot of any individual whatever."

An instance of the urgent need for bringing the general law up to date was cited. "On the subject, for instance, of insolvent debtors our local legislature, if it interfere at all, ought to recognize and adopt the principle that poverty, unless fraudulent, is no longer a crime."

One general provision of the suggested code of local laws had a very worthy, but most ambitious purpose, one which has concerned philosophers of the law since time immemorial: "Unless a special regulation provide to the contrary, every wrong has its remedy under the general laws of the country."

Article 44 is an interesting reflection of the social conditions of the day:

Any person who may be imprisoned in respect of any crime, or of any penalty, shall daily receive one pound of pemmican, and water at discretion; and no person may be imprisoned, or kept in prison, at the suit of any creditor, unless he shall receive, every week, in advance, a daily allowance of fourpence from such creditor.

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72. *Oliver, op. cit.*, p. 369.

73. *Oliver*. Vol. 2, p. 1291.

Sheriff Ross tells us that a daily ration of a pound of pemmican (a Spartan diet later refined to a pound of flour and half a pound of pemmican), and water at discretion, was adhered to strictly in all cases of imprisonment for crime. "We are neither rich enough nor philanthropic enough," he smugly reports, "to feed our gaolbirds with dainty fare, and the mere support of life must afford to a denison of the wilderness but poor compensation for such misfortunes as loss of liberty, privation of gossip, and prohibition of beer and tobacco."<sup>74</sup>

The local regulations proposed by the revised code dealt with a variety of subjects, including: the control of fires, animals running at large, horse taking (which offence carried a fine of one pound), the time for hay cutting, roads, the distillation of liquor without license from the Hudson's Bay Company (for which a fine of ten pounds and the forfeiture of equipment was proposed), the intoxicating of Indians, customs duties, the organization of a police force, the administration of intestate estates, marriage licenses, and the administration of justice—an ambitious programme for a pioneer community.

The Local Laws of Assiniboia as passed by the Governor and Council of Assiniboia are published in the Consolidated Statutes of Manitoba for 1880. These laws, in the final form they attained before this province entered Confederation, still bear the firm imprint of Adam Thom's clear, logical mind.

How did Thom feel about his dismissal as judge? A letter from Colville to Simpson, written in July, 1851, which suggests that his pay cheque was Thom's first concern, offers some light on this point:

Thom's plans, as far as I can judge, are to draw £700 a year from the concern as long as he can, at best until his boy Adam the second is old enough to go to school, and I believe there is no office you could give him that he would not accept, provided always that he got the same amount of pay.<sup>75</sup>

Thom might have suffered the loss of his Recordership in a better cause. In his rabid partisanship of Mrs. Ballenden, he had backed the wrong side, as this extract from a letter from Colville to Simpson, dated January 4, 1851, makes evident:

My Dear George: Mrs. Ballenden has at last, beyond the possibility of doubt, shown herself in her true colours . . . Just as the regular winter packet was departing, about a month ago, Adam Thom, with much caution, placed in my hands a copy of a letter written by Mrs. B. to Foss, commencing: "My own darling Christopher," and requesting him, as I was to be absent at the Court, to come down and pay her a visit; he was to leave after dark, and she would have a hot supper awaiting him, which, she hoped he would enjoy, and so forth. The original having been delivered, the said darling Christopher came down and remained closeted in her rooms for two days and nights . . .<sup>76</sup>

Thom stayed on in Red River, drawing his £700 yearly from the Company, for four years after his dismissal as judge. Attempts were

74. *Op. cit.*, p. 381.

75. *Letters, op. cit.*, p. 231.

76. *Letters*, p. 201.



made to get him to leave the settlement. The Métis threatened repeatedly to do him personal violence and to burn down his fine home.

Sir George Simpson used more subtle means in the endeavor to persuade Thom to resign. Simpson had been largely responsible for his being kept on as Clerk, but Thom had become an increasing embarrassment, and he wanted to be rid of him. Thom finally did turn in his resignation, "not without financial arrangements," in Professor A. S. Morton's words, "which diminished the obloquy of his enforced retreat."<sup>77</sup>

Adam Thom, his wife, and his son, Adam, Jr., took passage for England from York Factory on September 20, 1854. They sailed on the *Prince of Wales*, a Company ship. Though his life's span had still some thirty-five years to run, Thom never visited Fort Garry again. While living in England, he was always pleased to meet old friends and acquaintances from the scene of his sometimes misdirected, but, according to his own lights, always honest and well-intentioned, labors in the law.

On his return home, he settled for a time in Edinburgh. From Edinburgh, he moved to Torquay, where he lived until 1870. He then purchased No. 49 Torrington Square, in London, which was his home for the rest of his life. Here his wife died in January, 1876. His son had returned to Canada some years before, making his home in Galt, Ontario.

Thom's last years were clouded by a lawsuit. In his uncompromising way, he accused his banker of misusing his funds, which were ample because of his thrift and ability to drive a bargain. After lengthy hearings in the courts, the verdict went against him.

In 1885, he published a strange book, with a strange title, *Emmanuel, both the Germ and the Outcome of the Scriptural Alphabets, a Pentaglot Miniature*. "An investigation of the work," says Bryce, "shows that his idea is that thirty-three and thirty-four, which he in some way regards as the alternative numbers representing the length of our Saviour's life on earth, are normal units of all the great events of history." And he adds the comment that it was a pity that Thom "wasted his energies on a path so fruitless and so extravagant."<sup>78</sup> Thom had frequently discussed his religious theories with Bryce before the publication of his book, but, understandably, he could never get Bryce to respond with the slightest enthusiasm. His own enthusiasm was unbounded. "(His views) if stereotyped into natural religion at large," he wrote Dr. Bryce on December 30, 1882, "would all but necessarily shame even Charles Bradlaugh out of his atheism."<sup>79</sup>

Adam Thom died on February 21, 1890, in his eighty-eighth year. Take him for all in all, here was a man whose positive qualities—intelligence, courage, honesty—outmeasured his defects, which still were many, and he may be honored, without apology, as "the father of the Bench and Bar of Western Canada."

77. *Op. cit.*, p. 204.

78 *Supra*, note 13.

79. This letter is in the Bryce papers. Provincial Archives of Manitoba.