VII

Upper Canada (Ontario): The Administration of Justice, 1784-1850

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UPPER CANADA WAS FORMED from the western section of the province of Quebec by an imperial statute, the *Canada Act* or *Constitutional Act*, 1791.[1] Executive government was embodied in an imperial officer, the lieutenant-governor, and the act established a legislature consisting of an appointive upper house, the Legislative Council, and an elective lower chamber, the House of Assembly. The powers of the legislature were not set out in detail, but their exercise was subject to imperial supervision. By withholding his assent from legislation, the lieutenant-governor could reserve it for imperial review, and even laws which had received his assent and gone into effect might be disallowed by the imperial authorities within two years of enactment. The lieutenant-governor's title implied subordination to the governor-general at Quebec, but he reported directly to Whitehall and was independent of Quebec virtually from the start.[2]

At the moment of creation, the new province already had a judicial system and a rudimentary local government. It was divided into four districts, each administered by a local magistracy composed of officers called justices of the peace (JPs). In their collective capacity as a Court of General Quarter Sessions of the Peace, the JPs in each district enjoyed a wide-ranging criminal jurisdiction. The most serious offences, mainly capital felonies, were reserved for courts of oyer and terminer and general gaol delivery, which were held from time to time by a justice of the Court of King's Bench of Quebec under commission from the governor-general. Each district also had a Court of Common Pleas with an unlimited civil jurisdiction, subject to appeal to the Quebec Court of Appeals in cases involving £10 or more. In the district of Hesse, the Court of Common Pleas consisted of a single judge, a lawyer; in the other districts it comprised three lay magistrates.[3]

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1 (U.K.), 31 George III, c. 31. On the history of Upper Canada, see G.M. Craig, *Upper Canada: The Formative Years, 1784–1841* (Toronto: McClelland and Stewart, 1963).

2 See generally, E.A. Cruikshank, ed., *The Correspondence of Lieut. Governor John Graves Simcoe*, 5 vols. (Toronto: Ontario Historical Society, 1923–31); S.R. Mealing, "John Graves Simcoe," in *Dictionary of Canadian Biography*, vol. VII (Toronto: University of Toronto Press, 1983) [hereinafter DCB].

3 M.A. Banks, "The Evolution of the Ontario Courts, 1788–1981" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. II (Toronto: University of Toronto Press, 1983) 492 at 497–500. On local government in Upper Canada, see J.H. Aitchison, "The Development of Local Government in Upper Canada, 1783–1850" (Ph.D. Thesis, University of Toronto, 1953).

Except for the cutting off of territory from the superior courts at Montreal and Quebec, then, the creation of Upper Canada had little immediate effect on the administration of justice. The same was true of the province's subsequent transformations. In 1841 the *Canada Act* or *Act of Union*, 1840,[4] reunited the sundered halves of old Quebec under a single legislature as the Province of Canada. However, the juridical establishments of the two sections, formally known as Canada East and West, remained completely separate throughout the union, each retaining its own attorney-general and solicitor-general, its courts and judiciary, and indeed its own laws, though the united legislature could make laws for either section and for the province as a whole. Thus when Upper Canada, thereafter to be called Ontario, resumed its separate existence as a province of the Dominion of Canada under the *British North America Act*, 1867,[5] its laws, courts and judges were ready made.

I. Establishing a Provincial Judicature, 1792–94

After the formation of Upper Canada, the administration of criminal justice continued virtually unchanged, but the administration of civil justice underwent far-reaching reforms. These reforms were in fact a leading reason for creating the province. Quebec was subject to the English criminal law, but it retained the *Coutume de Paris*, the French civil code that had prevailed since 1664. That code was alien to most inhabitants of the sundered region, mostly Loyalist refugees from the United States, and its strangeness, together with the composition and procedure of the civil courts, sapped public confidence in the administration of justice. Seigneurial land tenure under the *Coutume de Paris* was fundamentally objectionable to a population that was used to English common law tenure in fee simple. In the districts of Luneburg, Mecklenburg and Nassau, the prominence of merchants among the lay judiciary inevitably fostered the suspicion that the courts were biased towards commercial interests, especially since trial by jury was available only in cases between merchants. That suspicion could only have been sharpened by the inevitable inconsistency of inexperienced lay judges.[6] Accordingly, the first statute of the new provincial legislature established the law of England, with certain exceptions, as the rule for decision in all matters relating to property and civil rights. The second extended trial by jury, already the rule in criminal proceedings, to all civil causes.[7]

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4 (U.K.), 3 & 4 Victoria, c. 35.

5 (U.K.), 30 & 31 Victoria, c. 3. Since enactment of the *Constitution Act*, 1982, lawyers and political scientists have taken to calling its precursor "*The Constitution Act*, 1867." Historians will not do so.

6 Banks, *supra* note 3 at 498–9; Craig, *supra* note 1 at 9–12; W.N.T. Wylie, "Instruments of Commerce and Authority: The Civil Courts in Upper Canada, 1789–1812" in Flaherty, ed., *supra* note 3 at 8–13; B.G. Wilson, *The Enterprises of Robert Hamilton: A Study of Wealth and Influence in Early Upper Canada, 1776–1812* (Ottawa: Carleton University Press, 1983) at 53–7; H.M. Neatby, *The Administration of Justice under the Quebec Act* (Minneapolis: University of Minnesota Press, 1937) at 208–12. Ironically, in the region of old settlement the merchants were in favour of trial by jury and its limits reflected the predominance of anti-commercial sentiment.

7 1792 (U.C.), 32 George III, cc. 1, 2.

Between 1792 and 1794 the discredited courts of common pleas were superseded by an entirely new judicial system on the English model. Each district was carved into divisions, within each of which a court of requests composed of two or more JPs tried cases of petty debt by summary procedure. A district court, presided over by one or more judges, was formed to try causes not exceeding £15 value with the aid of a jury. A provincial court of probate, with surrogate courts in each district, administered wills and intestate estates. The edifice was crowned in 1794 with a court of king's bench, composed of three judges, which was to exercise a jurisdiction in criminal and civil matters similar to that of the English courts of King's Bench, Common Pleas, and Exchequer. Judges of this court, acting individually, were to hold civil courts of assize and *nisi prius* in each district at stated times. In practice they were combined with the criminal courts of oyer and terminer and general gaol delivery, the whole session being called "the assizes."

Courts of assize and *nisi prius* had unlimited jurisdiction, but their decisions were subject to appeal to the full Court of King's Bench at the provincial capital, York (later Toronto). This court was in the main the province's court of final decision, though its decisions could be appealed to the lieutenant-governor in council in matters of £100 or more, and thence to the Privy Council in England in matters of £500 or more. The Court of Appeal sat rarely, and in practice the chief justice of the province presided.

The keynote of the new judicial system was the authority of English example. The law of England, as subsequently amended by the provincial legislature, was to be the rule for decisions in all matters, criminal and civil. Several courts bore the names of analogous English tribunals: King's Bench, Oyer and Terminer, General Gaol Delivery, Assize and *Nisi Prius*, Quarter Sessions, Court of Requests. A host of legal and judicial officers also had English namesakes. This nomenclature reflected the determination of the first lieutenant-governor, John Graves Simcoe, to make Upper Canada's society and institutions as much like those of the mother country as colonial conditions allowed.[8]

Simcoe's policy was perceptively criticised by the Loyalist merchant Richard Cartwright. Condemning the centralisation and cumbersome procedure of the King's Bench as unsuited to a sparsely populated frontier colony, Cartwright asserted "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." As a judge of the Common Pleas, however, Cartwright was a discredited witness, and the House of Assembly could hardly be restrained from passing the *Judicature Act* in a single day.[9] Thus popular discontent served Simcoe's social policy in this, just as dislike of the *Coutume de Paris* allowed him to import, as part of the civil law of England, the aristocratic principle of male primogeniture, a rule of inheritance designed to promote the conservation of large estates. In the 1820s both primogeni-

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[8] Craig, *supra* note 1 at 20–41; but see S.R. Mealing, "The Enthusiasms of John Graves Simcoe," in J.K. Johnson, ed., *Historical Essays on Upper Canada* (Toronto: McClelland and Stewart, 1975), 302 at 311–13.

[9] Cruikshank, ed., *supra* note 2, vol. II at 268; *ibid.*, vol. III at 3, 110–11.

ture and the expense of civil justice would become major political grievances in their turn.[10]

II. The Law Society of Upper Canada, 1797

Creation of the court of King's Bench served Simcoe's purposes in more ways than one. In Cartwright's opinion, government ought to be conducted "in a manner the least tedious and embarrassing to the public, rather than for conferring splendour and emolument upon individuals." King's Bench procedure, however, was a cornucopia of "glorious uncertainties ... holding out wealth and distinction to the man of law, but poverty and distress to the unfortunate client."[11]

Cartwright understood that establishment of the legal profession, like other elements of Simcoe's legal policy, was meant to nurture an essentially English political order. In 1785 the government of Quebec had introduced a five-year apprenticeship and an entrance exam as prerequisites for admission to the provincial bar; but uncertainty and informality had marked the administration of justice in the courts of common pleas, nurturing a class of unqualified advocates inimical to Simcoe's ideal. A mature system of law and the complicated procedure of the King's Bench would undermine the practice of these self-appointed advocates and foster a learned profession as a bulwark of Simcoe's new order. As a temporary expedient, an act of 1794 authorised the lieutenant-governor to license up to sixteen British subjects to act as attorneys in the province, and in 1803 he was empowered to license six more.[12] A more permanent measure was the establishment of the Law Society of Upper Canada in 1797 as the organ of a self-governing profession, empowered both to set qualifications for admission and to decide if applicants met those qualifications.[13]

In this as in other respects, the anglicising aspirations of Simcoe and his leading legal advisers produced not an English so much as a distinctively Upper Canadian order. Although separate training régimes were installed for solicitors and barristers, the legislature declined to establish an English-style separation between the two branches of practice. Similarly, although the *Law Society Act*, in emulation of the rules of the English inns of court, required only that aspiring barristers spend five years on the Society's books before taking the bar exam, the Society itself soon turned this formal prerequisite into a five-year apprenticeship. No doubt the shortage of clerical skills in a frontier colony encouraged the Society to turn aspirant lawyers into unpaid (indeed, into paying) clerks, but the practice was not unknown in the American colonies from which several of the Society's charter members had fled.

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10 P. Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature, 1791–1899* (Toronto: University of Toronto Press, 1986) at 75–80; Craig, *supra* note 1 at 207–8.

11 Cruikshank, ed., *supra* note 2 at 268, 270 (italics in original).

12 1794 (U.C.), 34 George III, c. 4; 1803 (U.C.), 43 George III, c. 3. The 1794 legislation was not effected by means of the *Judicature Act*, as stated by some writers.

13 *Law Society Act*, 1797 (U.C.), 37 George III, c. 13; G.B. Baker, "Legal Education in Upper Canada, 1785–1889: The Law Society as Educator" in Flaherty, ed., *supra* note 3, 49 at 58–67.

Within a generation, however, the very notion of a professional monopoly of legal practice began to give ground in the United States before the onset of Jacksonian democracy. In Upper Canada, by contrast, the qualifications for legal practice were made more and more rigorous. In 1819 the Society made admission contingent on passing an entrance exam. Term-keeping rules introduced in 1828 obliged aspiring lawyers to spend nearly two years of their apprenticeships attending court at the capital while boarding at Osgoode Hall, the Society's newly built headquarters. The 1830s brought the addition of classes, lectures, and club meetings for the practice of professional exercises, attendance at which was mandatory for law students living in or near Toronto. These requirements, by bringing together students from every part of the province, fostered a sense of collegiality and enhanced the cohesiveness of the profession.[14]

Together with English law and King's Bench procedure, the founding of the Law Society and the imposition of progressively more rigorous qualifications for entry helped the legal profession to a social pre-eminence beyond its status in the United States or even elsewhere in British North America. To be sure, its prestige owed something to what economists call "initial advantage": in the old American colonies, lawyers had been relative late-comers to societies dominated by merchant or clerical élites, and the surviving British colonies also possessed a stronger mercantile element than the backwoods or frontier province of Upper Canada. But the Upper Canadian profession also benefited from a deliberate and sustained process of élite-building. John Strachan, leading ideologist of the administrative oligarchy, declared in 1826 that, in the absence of a legally privileged and wealthy aristocracy, lawyers must inevitably play a pre-eminent role in politics.

> It is, therefore, of the utmost importance that they should be collected together ... become acquainted with each other, and familiar, acquire similar views and modes of thinking, and be taught from precept and example to love and venerate our parent state.[15]

William Warren Baldwin and his son Robert, leading lights of the Law Society and leading critics of the oligarchy, agreed. Their advocacy of responsible government from 1828 on was spurred by shock at the laxity of John Beverley Robinson and other leaders of this élite in upholding the rule of law, supposedly a fundamental principle of British political liberty, in the face of challenges to their political authority.[16]

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14 *Ibid.* at 51–2, 67–119.

15 Quoted in *ibid.* at 55; see also at 51–2.

16 *Ibid.* at 53; G.B. Baker, "The Juvenile Advocate Society, 1821–1826: Self-Proclaimed Schoolroom for Upper Canada's Governing Class" in *Historical Papers, 1985* (Ottawa: Canadian Historical Association, 1986) 74; G.B. Baker, "'So Elegant a Web': Providential Order and the Rule of Secular Law in Early Nineteenth-Century Upper Canada" (1988) 38 University of Toronto Law Journal 184; P. Romney, "Very Late Loyalist Fantasies: Nostalgic Tory 'History' and the Rule of Law in Upper Canada" in W.W. Pue and B. Wright, ed., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 119 at 133–4; P. Romney, "From the Types Riot to the Rebellion: Élite Ideology, Anti-Legal Sentiment, Political Violence, and the Rule of Law in Upper Canada" (1987) 79 Ontario History 113.

III. The Problem of English Authority

A. Constitutional Issues

It is no surprise that the attempt to impose aristocratic institutions on a society of agrarian smallholders, many of them schooled in the rhetoric of political liberty, should have led to political unrest and a crisis of confidence in the administration of justice. The discrepancy between British and Upper Canadian societies made it impossible to reproduce those institutions exactly; and the formal and functional deviation of Upper Canadian institutions from their metropolitan models evoked the charge that the colony possessed a travesty of the British constitution, rather than the "transcript" promised by Simcoe. The authority of British example became contested territory. What should have been a source of certainty became polluted by ambiguity.[17] Uncertainty, combined with wide judicial discretion and widespread suspicion of judicial bias, sapped public confidence in the administration of justice, as it had in the old courts of common pleas. Upper Canada was a politically polarised colony. The judiciary as a whole, from the JPs up to the chief justice, was generally identified with the government and in any case subject to dismissal at the will of the executive. This combination of circumstances evoked the suspicion that the administrative élite valued its political pre-eminence above the rule of law.

Uncertainty manifested itself in several forms. Many English laws were so unsuited to Upper Canada that they were rarely enforced, yet their reception afforded scope for discriminatory and repressive prosecution. In 1823 William Baldwin tried to carry a bill declaring that the law of England, as applied to Upper Canada, did not include statutes such as the English game laws, which imposed stringent penalties for poaching. Baldwin's scheme was thwarted by government spokesmen, led by Attorney-General John Beverley Robinson, who argued that the legislature should consider and repeal any such laws individually.[18]

In this instance the authority of English law was questioned. Another case pitted the authority of English law and practice against each other. In England the attorney-general had little to do with criminal prosecutions, which were normally instituted by private parties, usually as victims, often employing counsel of their choice. In Upper Canada, by contrast, the attorney-general enjoyed by custom a monopoly of prosecutions at the assizes, though in practice he shared it with the solicitor-general, for he could not attend every assize himself. In the 1820s, several cases of violence or administrative high-handedness against opponents of the government passed unprosecuted, owing to the victims' doubts as to the law officers' impartiality. Some victims sought redress by civil action, only to see one or other of the law officers retained for the defence. This prompted the House of Assembly in 1828 to question the lawfulness of the law officers' monopoly. Robinson maintained that under English law the attorney-general might intervene in any case he chose. A

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17 P. Romney, "From the Rule of Law to Responsible Government: Ontario Political Culture and the Roots of Canadian Statism" in *Historical Papers, 1988* (Ottawa: Canadian Historical Association, 1989) 86 at 105–8.

18 Romney, *supra* note 10 at 202–4.

complainant might retain counsel of his choice to conduct the prosecution only if the attorney-general declined to act.[19]

Another source of uncertainty was the application of English nomenclature to provincial offices and institutions. In 1826, for instance, Robinson and the solicitor-general disagreed as to whether a particular office, the clerkship of assize, was in substance similar to its English namesake or different from it; two years later he and a judge disagreed over a similar question affecting the Court of King's Bench.[20] These disputes were trivial in themselves (though the latter arose in connection with a major political scandal, the suspension of Judge Willis), but the underlying principle was of crucial constitutional importance. The case for colonial responsible government, as articulated in the 1820s and 1830s, depended on the idea that the provincial parliament resembled the imperial parliament at Westminster, not merely in form but in being sovereign within its jurisdiction.[21]

The disputes over the status of the legislature and the attorney-general's monopoly of prosecutions pitted constitutional principle against formal legality. Proponents of provincial sovereignty maintained that representation in a sovereign legislature was part and parcel of the rights of British subjects; opponents of the idea invoked Blackstone's doctrine that sovereignty within the British empire was vested solely in the "king in parliament" at Westminster. Similarly, critics of the attorney-general's monopoly rebutted his law-based defence of it by asserting that British practice was essential to the rule of law.[22]

Another dispute concerned trial by jury. Under English law the sheriff had *carte blanche* in selecting jury panels; but in England the sheriff, though appointed by the crown, was a gentleman of the county, whose interest was identical to that of the political class within his shrievalty. In Upper Canada the sheriff's status as a government official enrolled him in a local administrative élite to which, in some parts of the colony, most electors by the 1820s were strongly opposed. He was, moreover, the officer responsible for seizing and selling property forfeited under judgment of debt. Given the jury's importance in popular opinion as a defence against both political persecution and what agrarian smallholders, in the main a debtor class, saw as unjust dispossession for debt, the sheriff's role in jury selection aroused a political hostility in Upper Canada which in England it did not. In the comparatively well-settled Niagara District in particular, suspicions of "jury-packing" by the sheriff were rife both before and after the War of 1812. Thus an institution which could be,

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19 *Ibid.* at 122–39; Romney, *supra* note 16; D. Hay and F. Snyder, "Using the Criminal Law, 1750–1850: Policing, Private Prosecution, and the State" in D. Hay and F. Snyder, eds., *Policing and Prosecution in Britain, 1750–1850* (Oxford: Clarendon Press, 1989) at 3.

20 Romney, *supra* note 10 at 52–5, 126–8, 147.

21 See generally Romney, *supra* note 17.

22 *Ibid.* at 105–10; P. Romney, "The Nature and Scope of Provincial Autonomy: Sir Oliver Mowat, the Quebec Resolutions, and the Construction of the British North America Act" (1992) 25 Canadian Journal of Political Science 3 at 8–11; P. Romney, "Acts, Pacts and Garrisons: Compact Theories in Canadian Constitutional Thought", paper presented to the Canadian Historical Association, June 1993 at 24–7.

and was, defended as unimpeachably lawful came under attack for allegedly being a travesty of what, according to the precepts of the rule of law, it should have been.[23]

By the late 1820s, discontent at the supposed discrepancy between the promise of British liberty and the reality of authoritarian government found expression in the demand for responsible government. Led by the Baldwins among others, reformers asserted that British institutions were not enough unless administered, as in Britain, by ministers responsible to the elected legislature. The imperial authorities rejected this demand but responded with modest concessions, some of which addressed legal grievances. Judges of the King's Bench, hitherto dismissible at pleasure, were now to hold office during good behaviour and were thus rendered "independent" of the crown, though the crown still appointed them. The Colonial Secretary also desired the Legislative Council to stop thwarting the Assembly's efforts to repeal the *Sedition Act* of 1804. This highly repressive statute, supposedly passed to meet a wartime emergency, had attracted public notoriety when used in 1818–19 to imprison and then banish the political agitator Robert Gourlay.[24]

The independence of the judiciary figured in the Whig constitutional tradition as a cornerstone of political liberty, and the repeal of the *Sedition Act* relieved the statute book of a measure which showed utter contempt for civil rights and constitutional process. Yet concessions of this sort were little more than cosmetic. Political dissatisfaction with the administration of justice was closely related to discontent with the colony's authoritarian constitution, and in particular with the circumscribed powers of the House of Assembly. The constitutional shortcomings of the legal system remained a matter of public concern until the advent of responsible government in the 1840s.

B. Creditors and Debtors

Two of the most contentious questions that arose from the problem of English authority had to do with relations between creditor and debtor. The first concerned the seizure and sale of lands in execution of judgments for debt, an imperial statute of 1732 introduced as a remedy against colonial debtors.[25] The adoption of English law in Upper Canada raised doubts that this remedy was still available in the colony. On the one hand it was argued that the legislature, in adopting the civil law of England, had virtually repealed the English statute as it applied to Upper Canada, and on the other that the provincial legislature had no power to repeal an imperial statute directly relating to the colony. In 1799, in a split decision, the Court of King's Bench ruled that the statute of 1732 was still in force, and two years later the legislature enacted a measure to facilitate its implementation. Being controversial

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23 P. Romney, "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture" (1989) 7 Law and History Review 121 at 130–8; D. Hay, "The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century" in J.S. Cockburn and T.A. Green, eds., *Twelve Good Men and True: The Criminal Trial Jury, 1216–1800* (Princeton: Princeton University Press, 1988).

24 Craig, *supra* note 1 at 93–100, 205–6; B. Wright, "Sedition in Upper Canada: Contested Legality" (1992) 29 Labour / Le Travail 7 at 31–8.

25 (U.K.), 5 George II, c. 7.

however—the bill passed the Assembly only by the Speaker's casting vote—the act was reserved for imperial review. It did not come into effect until 1803.

By that time the balance of opinion in the King's Bench had changed. The court refused to issue the appropriate writs until 1809, when the ruling of 1799 was upheld by the imperial Privy Council. Thereafter the "sheriff's sale"—the auctioning of property seized by the sheriff under "*fi. fa.*" (i.e., the writ of *fieri facias*, issued by the King's Bench to execute judgment of debt)—became an important remedy against defaulting debtors.[26] In fact, in a colony covered with a network of small local élites, the Privy Council decision set the stage for a scene which in 1825 a leading lawyer alleged was all too common: the collusive auction, where the sheriff exposed a judgment debtor's assets for sale before a small group of bidders who acquired them far below market value.[27]

The second area of uncertainty in relations between creditor and debtor arose from the lack of a court of equity. The civil law of England, as adopted in 1792, consisted of two main departments: common law and equity. Equity had originated in the practice of petitioning the crown for relief in cases where the common law offered no protection against manifest injustice. It embraced such matters as protection of the rights of infants and the mentally incompetent, the unravelling of obscure or contradictory wills, the administration of intestate estates, and the specific performance of contracts (i.e., by making the guilty party carry out the terms of the bargain, while the common law only punished the failure to perform by assessing monetary damages). Equity in England had its own court, the Court of Chancery, with its own judges, the Lord Chancellor and the Master of the Rolls; but the provincial *Judicature Act* of 1794 had set up only one superior court, the Court of King's Bench, and endowed it with only a common law jurisdiction. A major department of English justice could not be enforced in Upper Canada for lack of a competent tribunal.

The want of an equitable jurisdiction compromised the administration of mortgages in particular. A mortgage was a means of committing property, especially real estate, as security for a loan. While remaining in possession of the security, the borrower transferred legal title to the lender on condition that the transfer should be void when the borrower repaid the loan. If the borrower defaulted, the lender could acquire possession of the security by means of the common law action of ejectment. In equity, however, the ejected borrower and his heirs retained the right to redeem the forfeited property by discharging the debt. The creditor could terminate this "equity of redemption" only by suing in Chancery to foreclose it. Thus the lack of an equitable jurisdiction hurt creditor and debtor alike. The ejected debtor could not exercise his equity of redemption, yet the creditor's title to the security was compromised by inability to foreclose that equity.[28]

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26 Wylie, *supra* note 6 at 25–8.

27 Francis Collins, *A Faithful Report of the Trial and Acquittal of Robert Randall, Esq.* (York, U.C. [Toronto]: Canadian Freeman, 1825) at 22–3.

28 J.D. Falconbridge, "Law and Equity in Upper Canada" (1914) 63 University of Pennsylvania Law Review 1 at 6–7.

In 1798 the attorney-general drew up a bill to establish an equitable jurisdiction but did not present it to the legislature. Nevertheless, his action inaugurated a decade of efforts to remedy the omission. In 1799 Henry Allcock of the Court of King's Bench raised the matter with the Colonial Office, which accordingly authorised the new lieutenant-governor, Peter Hunter, to act as Chancellor of Upper Canada. Despite repeated applications by merchants wishing to foreclose, Hunter did nothing, explaining that he could not act without the aid of a competent equity lawyer and necessary administrative officers. What he actually lacked was the means to pay such officers: Allcock was willing to preside in a court of equity, but not for nothing, and the subordinate staff would also need paying.

Hunter wanted Allcock, while retaining his judgeship in the King's Bench, to be appointed Master of the Rolls with a staff of eight and a "liberal salary." The Colonial Office, holding Hunter to his instructions, authorised him only to draw up a table of fees for equity business. Hunter submitted a table late in 1802, but two years later he still awaited a reply from Whitehall. The Colonial Office finally agreed to a court in which Allcock would sit with the lieutenant-governor, but before anything could be done Allcock became chief justice of Lower Canada and Hunter died. In 1807 Hunter's successor was authorised to implement the scheme worked out by Allcock, but without result. Thereafter, the issue lay dormant for twenty years.[29]

The slackening of interest in an equitable jurisdiction was probably due to the belated implementation of common law process against lands in 1809. Sale and seizure of lands under *fi. fa.* was not a complete substitute for mortgage, but it did mean that mortgage was no longer the only means by which an individual's realty could be made liable for debts. And while the introduction of common law process against lands did nothing in itself to resolve the uncertainties affecting mortgaged estates, mortgagees could exploit it by suing for the debt and taking out a writ directing the sheriff to seize and sell the mortgagor's interest.[30]

This procedure was ritual; it was theatre. What it achieved in law might well be nothing: the mortgage having lapsed, the mortgagor had no legal interest, and his equitable interest—the equity of redemption—could not be reached by common law process.[31] In practice, however, the procedure was calculated to do two things. It might persuade the mortgagor that he had lost any enforceable interest in the property. Secondly, it would show that the mortgagee had done all he could to cure any defect in his title. Remember that we are talking about uncertainty. As eminent a lawyer as John Beverley Robinson was willing to argue that the equity of redemption required could not exist in the absence of an equitable jurisdiction, and that mortgages concluded in its absence were not encumbered thereby. Even if this view was mistaken, the legislature, if ever it established a full equitable jurisdiction, might well exempt existing mortgages from its operation.[32]

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29 Romney, *supra* note 10 at 76–7.

30 *Ibid.* at 77–8; J.C. Weaver, "While Equity Slumbered: Creditor Advantage, a Capitalist Land Market, and Upper Canada's Missing Court" (1990) 28 Osgoode Hall Law Journal 871 at 877–80.

31 Falconbridge, *supra* note 28 at 7–8.

32 Weaver, *supra* note 30 at 888–9, 893–8.

The years 1827–8 saw another bungled attempt to establish such a jurisdiction. An equity expert, John Walpole Willis, came out from England as a judge of the King's Bench, but expecting soon to receive a commission to preside in equity. While he was en route, the imperial law officers decided that an equitable jurisdiction could be established only by provincial statute. Such a course was bound to be controversial, given the notoriously dilatory and expensive procedure of the English Court of Chancery, and only Willis pushed strongly for creation of an English-style court. His colleagues and the provincial law officers, all of whom he had quickly alienated, preferred a more limited equitable jurisdiction which might be administered either in its own court or in the King's Bench. The bill failed and Willis blamed Attorney-General Robinson for introducing it too late in the session. There is good reason to doubt Robinson's enthusiasm, but by 1828 he no longer had the influence to carry a controversial measure through the House of Assembly. Soon afterwards Willis was suspended for supporting the opposition in its attack on the administration of justice in the colony.[33]

The legislature at last instituted an equitable jurisdiction in 1837. Despite the earlier doubts as to the suitability of an English-style Court of Chancery, with its ponderous procedure and time-consuming exchange of written pleadings, the colony received just such a court, with a single vice-chancellor (nominally the deputy of the lieutenant-governor as chancellor) presiding. The problem of the equity of redemption was handled by granting the new court broad discretion to decide applications for the redemption of forfeited estates on their merits.

In conferring a broad jurisdiction and recognising the equity of redemption as applicable to old mortgages, the legislature may seem to have rejected Robinson's views, but the appearance is misleading. The clause conferring discretion originated in the Legislative Council, of which Robinson, now chief justice, was an influential member. Together with another clause of the same provenance, it made any decision of the vice-chancellor appealable to the Court of Appeal which for that purpose was to include all the common law judges. Though assigned in the first instance to a distinct court and judge, the administration of equity in general, and of the equity of redemption in particular, would in practice be subject to the considerable influence of John Beverley Robinson.[34]

IV. The Judicial System before Confederation

After 1837 the judicial system remained essentially unchanged until the 1870s, but it was frequently modified to serve a community rapidly growing in population,

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33 *Ibid.* at 882–93; Romney, *supra* note 10 at 129–30, 141–6. A recent denial that Robinson was to blame for the bill's failure should be taken with a pinch of salt. The author does not cite Weaver and shows little grasp of the issues: see Leo A. Johnson, "John Walpole Willis's Judicial Career in Upper Canada, 1827–28: The Research Impact of Computerized Documentation on a Non-controversial Theme" (1993) 85 Ontario History at 141.

34 *An Act to Establish a Court of Chancery*, 1836–7 (U.C.), 7 William IV, c. 2; Banks, *supra* note 3 at 505–6; Weaver, *supra* note 30 at 899–909; Upper Canada, House of Assembly, Journals (1 March 1837); E. Brown, "Equitable Jurisdiction and the Court of Chancery in Upper Canada" (1983) 21 Osgoode Hall Law Journal 275 at 286–8.

wealth and the complexity of its economic relations. The main changes in the superior courts were those achieved by the *Judicature Acts* of 1849,[35] projects of the Reform government that had come to power a year previously. In 1837 the complement of the King's Bench (belatedly renamed Queen's Bench in 1839, after the accession of Victoria) was increased from three to five. *The Judicature Acts* reduced it to three and created a second superior common law court, the Court of Common Pleas, with an identical complement and jurisdiction. The Chancery bench was increased to three, a chancellor and two vice-chancellors, and its procedure streamlined by the introduction of oral pleadings and examination of parties. The Court of Appeal was to comprise the judges of all three courts and, in causes worth £1000 or more, its decision would be appealable to the Judicial Committee of the Privy Council in England.[36]

The main object of these reforms was to expedite judicial business and to increase the efficiency and prestige of the Court of Chancery. Controversial even before its inception, Chancery had done nothing to redeem itself in a dozen years of operation. The vice-chancellor, Robert Sympson Jameson, was by all accounts an unimaginative, if conscientious judge; but a worse problem was the court's exceedingly cumbersome procedure, a replica of the discredited English system. Interminable written exchanges between parties, and the need to refer contested matters of fact to a jury in a separate action at common law, afforded almost infinite opportunity for delay and greatly increased the cost of equity litigation. Apart from these drawbacks, the court was unpopular because it sat without a jury and only at Toronto. The same was true of the Queen's Bench, of course, but at least cases in that court were heard in the first instance by a judge and jury at the local assizes. Chancery, by contrast, was entirely divorced from local sentiment.[37]

Apart from a concern to improve judicial efficiency, the reforms of 1849 betrayed an intention on the part of their principal author, William Hume Blake, to limit John Beverley Robinson's influence on the administration of justice. The *Chancery Act* of 1837 had made the vice-chancellor a member of the Court of Error and Appeal but had also provided, as we have seen, that the common law judges should all be members of the court for the purpose of hearing appeals from Chancery. In effect, these provisions meant that Chancery decisions were subject to revision by the common law judges while there was no effective appeal from the Court of Queen's Bench. Blake, a leading equity practitioner, found this state of affairs unpalatable.[38] Under the new system the Court of Appeal would not be dominated by the judges of the Queen's Bench, and the common law judges could less easily overrule three unanimous equity judges than a single vice-chancellor.

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35 S. Prov. C. 1849, 12 Victoria, cc. 63, 64.

36 Banks, *supra* note 3 at 507–8, 511–13.

37 Brown, *supra* note 34 at 288–95; J.D. Blackwell, "William Hume Blake and the Judicature Acts of 1849: The Process of Legal Reform at Mid-Century in Upper Canada" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. I (Toronto: University of Toronto Press, 1981) 132 at 136–46.

38 *Ibid.* at 147–9.

While the Court of Chancery was strengthened as an institution, it remained weak in public esteem. Its improvement did little to diminish the prejudice of common lawyers like Robinson; but in the short term a greater political handicap was the animosity of traditional Reform voters, many of whom disliked lawyers and detested government patronage. These years saw attempts by radical Reformers to abolish the monopoly of both the legal and the medical professions.[39] Chancery remained rooted at Toronto, and none of the costly inefficiencies inherent in separate jurisdictions had been cured. Coming only a year after the state of New York had entirely merged the two jurisdictions, Blake's augmentation of the equity establishment gave colour to the charge that he had promoted the legislation in order to become chancellor, which he did in 1850. In 1851 a resolution to abolish Chancery was supported by the great majority of Upper Canadian MPPs. Robert Baldwin felt obliged to resign as attorney-general, though the motion was defeated with Lower Canadian support.[40]

Several measures were later adopted to diminish the court's unpopularity. In 1853 the county, formerly district, judges acquired equitable jurisdiction in various matters, subject to appeal to Chancery and to monetary limits ranging from £50 to £200, according to the nature of the matter in litigation. An attempt was made to enact a measure, modelled on current English proposals, to mitigate the inherent inefficiency of the split between equity and common law. The *Common Law Procedure Act*, 1856,[41] modelled on the eponymous English measure of 1854, empowered Chancery to decide factual disputes without recourse to common law courts but accorded the latter certain equitable powers. In 1857 Chancery judges began to go on circuit like their common law colleagues.[42]

The attack on Chancery having failed, the judicial establishment formed by the *Judicature Acts* lasted until 1874 with only minor changes. In 1857 the government was empowered to appoint retired judges of the superior courts to the Court of Error and Appeal. In 1861 the office of presiding judge of the Court of Error and Appeal was created, to which the government might appoint any retired superior court judge. This office, which outranked the chief justice of Upper Canada, was created so that Chief Justice Robinson could resign his arduous office without retiring from the bench.[43]

Lower down the judicial scale, the chief innovations before Confederation were those affecting district judges, known after 1849 as county judges and their courts as county courts. In 1841 the district judge became a JP *ex officio* and henceforth presided in that capacity at quarter sessions. Another act of that year replaced courts of requests with a new tribunal, the division courts, and provided that the district judge was to preside in the several division courts within his jurisdiction. In the 1840s

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39 Romney, *supra* note 10 at 75–6, 188–92; W.R. Riddell, *The Bar of the Province of Upper Canada, or Ontario* (Toronto: Macmillan Company of Canada, 1928) at 96.

40 Blackwell, *supra* note 37 at 159–63.

41 S. Prov. C. 1856, 19 Victoria, c. 43.

42 Banks, *supra* note 3 at 514–15, 516; Brown, *supra* note 34 at 296–303.

43 Banks, *supra* note 3 at 515.

and '50s the monetary jurisdiction of the district, or county, courts was increased on several occasions, and in 1853 their judges, as noted above, received a limited equitable jurisdiction. In accord with these expanded responsibilities, after 1841 the office was restricted to members of the bar. An *Act* of 1845 made five years' practice a prerequisite for appointment and redefined the office as a full-time job by prohibiting incumbents from professional practice.[44]

One noteworthy aspect of judicial reform in the 1840s and '50s was the extension of provision for appeal. Like the old courts of requests, division courts exercised final jurisdiction; but the act of 1845 authorised appeal on a point of law from district courts to the Court of Queen's Bench. On the criminal side, the summary jurisdiction of the justice of the peace was made appealable to a jury at quarter sessions in 1850. A year later the limited common law remedy of the writ of error was supplemented when the trial judge at quarter sessions or assizes acquired discretion, in the event of a conviction, to reserve a case for consideration on a point of law by one of the superior common law courts, which could set aside an unlawful conviction. A statute of 1857 provided for a new trial on appeal from a conviction, either on a question of law or a point of fact, with subsequent appeal to the Court of Appeal if the conviction was affirmed.[45]

V. Professionalisation of the Legal System

A. Institutional Reforms

The new qualifications and duties attached to district judgeships formed a large first step towards the reduction of lay influence on the administration of justice. In 1841 one might have encountered lay judges, acting without professional colleagues, in courts of requests, the district courts and quarter sessions, or as JPs exercising summary powers. After 1841 the only judicial office to which a layman might be appointed was that of JP. Apart from these, the only lay judges were the elective judiciary of the municipal corporations that began to be established in the 1830s. In cities the mayor and aldermen, acting with a jury, formed the mayor's court or city quarter sessions, as they had for centuries in London and other English cities. As JPs they exercised summary jurisdiction in the police court, as did the elected police commissioners of the so-called police villages. In Toronto this system lasted until 1851, when the recorder's court superseded the mayor's court and a salaried official, the police magistrate, was appointed to preside in the police court. The recorder had to be a lawyer but the police magistrate, who exercised a JP's jurisdiction, did not.[46]

The *County Attorneys Act*, 1857, was a second major step in the same direction. It provided for appointment in each county of a crown attorney to prepare the crown's

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44 *Ibid.* at 509–10, 511.

45 *Ibid.* at 510, 514; Romney, *supra* note 10 at 283.

46 The history of these municipal courts is nicely sketched in P. Craven, "Law and Ideology: The Toronto Police Court, 1850-1880" in Flaherty, ed., *supra* note 37, 248 at 251–65. See also P. Romney, "Rebel as Magistrate: William Lyon Mackenzie and His Enemies" in J. Phillips, S. Lewthwaite and T. Loo, eds., *Essays in the History of Canadian Law*, vol. V (Toronto: University of Toronto Press, 1994).

cases for the local assizes and supervise prosecutions at quarter sessions. Until the advent of this office, preparation of assize cases had devolved upon a local magistracy still largely composed of laymen, aided by a clerk of the peace (the chief administrative officer of quarter sessions) who might also be a layman. Under the *Act* of 1857, the county attorney was henceforth to be clerk of the peace. As for prosecutions at quarter sessions, these were often subject to no professional influence whatever. Unlike the assizes, where the attorney-general conducted prosecutions himself or by deputy, the English system of private prosecution prevailed. If the prosecutor did not retain an attorney to conduct the case, the district judge, as chairman of the court, might have to examine witnesses himself, a function increasingly perceived as incompatible with the ideal of judicial impartiality. Quarter sessions was also a common venue for malicious prosecutions, and the county attorney's supervision of prosecutions was meant to insulate the legal system from the pursuit of private grudges.[47]

The drive to professionalise the administration of justice also resulted in a reduction of the jury's role. Until the 1850s, the prestige of trial by jury as a bastion of political liberty placed it virtually beyond criticism in Upper Canada. Its restriction was unthinkable: on the contrary, when the division court superseded the court of requests in 1841, the option of trial by jury penetrated an arena previously limited to summary proceedings; and in 1850, as noted above, the JP's summary jurisdiction was made appealable to a jury at quarter sessions. In 1850, too, Robert Baldwin carried a comprehensive jury law which ended the sheriff's control over the selection of jury panels. In a reform long demanded by radical critics of the administration of justice, the selection of jurors was assigned to a committee composed of elected municipal officials.[48]

Scarcely had responsible government come to Canada, however, than the jury came under attack as costly and inefficient. "Trial by jury ... if not compatible with the safe, speedy, and economical administration of justice, ought not to be bolstered up and preserved solely because of its antiquity," declared the *Upper Canada Law Journal* in 1858.[49] That same year the legislature increased the juror's property qualification and subjected the jurors' roll, prepared by the local officials, to vetting by a committee which included lay members but was designed to be dominated by the county judge and county attorney. An *Act* of 1863 removed most of the lay members. In 1879, a new *Jurors Act* further increased the property qualification by imposing a province-wide standard. Previously a man's eligibility had been determined by his rank on the township assessment list, and the qualification might be much lower in one place than another. In poorer parts of the province, uniformity disqualified many formerly eligible inhabitants.[50]

These measures were designed to shed the sort of juror considered most likely, whether from prejudice or inability to grasp the issues, to produce a verdict contrary

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47 Romney, *supra* note 10, at 125–6, 214–22.

48 Romney, *supra* note 23 at 130–8.

49 Quoted *ibid.* at 138.

50 *Ibid.* at 138–9; S.O. 1858, c. 22; S.O. 1863, c. 8; S.O. 1879, c. 14.

to law in civil causes. If jury reform had gone no further, one could hardly speak of it as a process of professionalisation: as designed, that is, to promote a professional rather than class hegemony over the administration of justice. Other laws, however, reduced the role of the jury as a whole in the judicial system. The *Law Reform Act*, 1868,[51] eliminated trial by jury in all civil causes unless demanded by at least one party or ordered by the judge. It thereby introduced one of the few innovations which the *Common Law Procedure Act* had not copied from its English namesake of 1854. The *Administration of Justice Act*, 1873,[52] went further, subjecting the civil litigant's right to a jury trial to judicial discretion in all matters but the few concerning persons rather than property: libel, slander, adultery, seduction, malicious prosecution, malicious arrest and false imprisonment.[53]

By cutting sittings of the general sessions of the peace from four a year to two, the *Law Reform Act* also reduced access to trial by jury in criminal causes. Since the earliest years of the province, any prisoner not accused of a capital offence or some high misdemeanour had had access to trial by his peers at least five times a year: in addition to quarter sessions, every local jurisdiction had at least one assize a year, and since the 1840s two assizes. Now chances for trial by jury were cut from six a year to four: the two assizes and the semi-annual general sessions. Such a change could only encourage criminal defendants to opt for "speedy" summary trial in the county judge's criminal court, an institution established by the *Law Reform Act* in combination with a federal statute of 1869. The combined legislation was required by the fact that the *British North America Act*, 1867, had assigned criminal law and procedure to Ottawa, while leaving the creation of new courts to the provinces; but the whole measure was carried by the attorney-general for Ontario, John Sandfield Macdonald, who belonged to both legislatures. In 1875 the "speedy trial" concept was extended by allowing persons accused of crimes falling within the purview of general sessions to opt for summary trial in the police court.[54]

With passage of the *British North America Act*, 1867, the criminal trial jury becomes a federal question and leaves the purview of this chapter. Under the federal aegis, however, the trend described here continued with an attack on the grand jury, the body which determined, upon examining the case for the prosecution, whether a criminal case should proceed to trial. In English lore the grand jury, much like the *petit* or trial jury, figured as a bulwark of individual liberty. In Upper Canada, however, the domination of assize grand juries by the district magistrates caused them to be perceived as an arm of the state. After Confederation the grand jury was increasingly attacked as redundant. No longer needed to secure individual liberty (it was said), it allegedly duplicated a function more effectively performed by the police magistrate or county attorney. It was also criticised as an élite institution, which sometimes shielded the wealthy wrongdoer while visiting impartial justice on the

51 S.O. 1868, c. 6.

52 S.O. 1873, c. 8.

53 Romney, *supra* note 23 at 139; see also Graham Parker, "Trial by Jury in Canada" (1987) 8 Journal of Legal History at 178.

54 Romney, *supra* note 23 at 139; Romney, *supra* note 10 at 124–5, 180–1; Banks, *supra*, note 3 at 521–2; Craven, *supra* note 46 at 280–1.

poor. Supporters defended it in traditional terms as a safeguard against oppressive prosecution. Though political liberty now prevailed in Canada, they said, it was still dangerous to confide the power to prosecute exclusively to officials paid to enforce the law.[55]

Such sentiments sufficed to preserve the grand jury, but in 1892 trial by jury underwent a radical reform which passed almost unnoticed. Traditionally the jury's verdict of not guilty was final, and the appeals procedure introduced in the 1850s had affected only cases resulting in conviction. The first federal Criminal Code, however, provided under certain circumstances for crown appeal against an acquittal, and the provincial court of appeal was empowered to order a new trial in the court of record.[56] In 1923 this provision was abolished, apparently by oversight, during a piecemeal revision of the Code, but in 1930 it was restored and taken further. The Court of Appeal was empowered to reverse the acquittal and return the defendant to the lower court for sentencing without another trial.[57]

B. The Politics of Professionalisation

The decline of lay participation in the administration of justice dated mainly from the 1840s, but it continued a trend from Upper Canada's early days. In the 1790s the legislature had favoured professional over lay advocacy by introducing English law and King's Bench procedure and by establishing an autonomous legal profession. In subsequent decades, the Law Society of Upper Canada had made the conditions of professional apprenticeship more and more rigorous, enhancing the claims of the profession to expertise in the science of law. Now, with legislative approval, they invoked that expertise to claim a wider authority over the administration of justice.

But while the extension of professional authority continued, the tactics of professional aggrandisement had changed. It had been founded on the importation from England of what Richard Cartwright had decried as "glorious uncertainties ... holding out wealth and distinction to the man of law, but poverty and distress to the unfortunate client." Now it was pursued in the name of efficiency, what the *Upper Canada Law Journal* called "the safe, speedy, and economical administration of justice." Nor was this confined to promoting efficiency within an unduly complex system by reducing the lay role. The ideal of efficiency also produced statute revision and the simplification of legal procedure. A consolidation of the statutes of United Canada, and one of the statute law pertaining specifically to Upper Canada, was published in 1859, the work of a commission appointed three years earlier. In Ontario, under Oliver Mowat's premiership, revision of the statutes became a decennial affair, new consolidations being published in 1877, 1887 and 1897. Between 1873 and 1881, Mowat also carried through a major simplification of legal procedure.[58]

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55 Romney, *supra* note 10 at 298–309; J.A. Kains, *How Say You? A Review of the Movement for Abolishing the Grand Jury System in Canada* (St. Thomas, Ont.: The Journal, 1893).

56 S.C. 1892, c. 29, ss. 43–6; Romney, *supra* note 23 at 140–1.

57 V.M. Del Buono, "The Right to Appeal in Indictable Cases: A Legislative History" (1978) 16 Alberta Law Review 446 at 452–4, 458–62.

58 Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University

To some extent, this simplifying trend emulated foreign or overseas example, above all as inspired by the English philosopher Jeremy Bentham. He had attacked the common law for its irrationality and complexity, recommending its revision into a logical, comprehensive code of substantive and procedural law. This prescription achieved its greatest political triumph in 1848, when New York State adopted a comprehensive code of civil procedure. In Ontario, codification had a powerful champion behind the scenes in county judge James Robert Gowan, founder of the *Upper Canada Law Journal*.[59]

In view of the populist appeal of codification, the enthusiasm of Gowan, a pillar of the profession, needs explaining. To some extent it reflected the Victorian passion for modernity, but it also represented a reaction to the changed position of the legal profession in the era of responsible government. The advent of domestic self-rule, coinciding with adoption of the *Field Code* in New York State, led in Upper Canada to an upsurge of populist enthusiasm for law reform and even, as noted earlier, to an attack on the monopoly of the bar. Responsible government rendered privileged corporations like the bar as accountable to public opinion as was the government itself. If the profession took the lead in law reform, it might be better able to control the process. But beyond tactical considerations, lawyers needed an ideological justification for their corporate privileges. By modernising the legal system, they embraced the scientific ideal of professionalism—the ideal of a self-recruiting élite nurturing and administering a specialised but exact body of knowledge for the public good.[60]

For all that, professionalisation fell far short of eliminating inefficiency. Although the calibre of the lay magistracy was cited throughout the nineteenth century as the chief flaw in the administration of justice,[61] another weakness was the poor quality of the profession in certain parts of the province. It was politically imperative that county judges and county attorneys reside within their jurisdiction, and some counties were not rich in legal talent.

In the judges' case, this problem was reflected in a series of legislative shifts as to tenure and jurisdiction. In 1845 they became as independent as superior court judges, but the old dependent tenure was restored a year later. In 1857 they again became independent, but a special court of impeachment was set up to hear charges of misconduct or incompetence against them. In 1868 their general incompetence persuaded Sandfield Macdonald to abolish the equitable jurisdiction they had

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of Toronto Press, 1989) at 84–9; C.R.W. Biggar, *Sir Oliver Mowat: A Biographical Sketch*, (2 vols., Toronto: Warwick Bros. and Rutter, 1905), vol. I at 248–51, 289–92, vol. II at 506. On procedural reform, see *infra* at 224-6.

59 Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973) at 129–31, 340–58. On Gowan and codification see Desmond H. Brown, "Sir James Robert Gowan" in *DCB*, vol. XIII (Toronto: University of Toronto Press, 1994).

60 Robert W. Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920" in Gerald L. Geison, ed., *Professions and Professional Ideologies in America* (Chapel Hill: University of North Carolina Press, 1983) 70 at 81–6.

61 About 1800 it evoked the first recorded proposal to appoint district attorneys; in the 1890s it was cited as a reason for not abolishing the grand jury: Romney, *supra* note 10 at 125, 214, 217, 306–7.

acquired in 1853 and to try to restore dependent tenure, but this move failed when Ottawa disallowed the provincial legislation as *ultra vires*.[62]

As for county attorneys, the problem was epitomised in a complaint of James Patton to the then attorney-general, John A. Macdonald, in 1864. A decade previously Patton had urged that the office be established; now he condemned it. A primary purpose of the office was to prepare cases for the assizes, but incumbents tended to neglect this duty unless they themselves were to prosecute. At one recent session the county attorney had not seen the documents beforehand because he had been away on private business, and during the assizes his private practice prevented him from attending to crown business. Even if the county attorney conducted the crown's legal business competently, he might be delinquent in his administrative duties: in 1863 and 1864 the government had to cover the defalcations of four such officers.[63]

One major cause of weakness in the administration of justice was political patronage. Appointment of county judges and county attorneys tended to be influenced by political considerations. Worse still, the very system was perverted to political ends. In the 1850s it had been thought that the county attorneys should both prepare and conduct assize prosecutions. After 1857, however, prosecutions continued in the main to be conducted by crown counsel—*ad hoc* appointees of the attorney-general who, by 1850, no longer had time to travel assize circuits himself. These officers arrived at the assize town ignorant of the cases they were to conduct and hence entirely dependent on preparatory work by the local authorities (after 1857, by the county attorney). This was sometimes done negligently or not at all. Yet the prestige of appointment as crown counsel was so highly prized that it was politically inexpedient to alter the system, and the quality of county attorneys was so uneven that in 1864 the chief justice of Ontario, William Henry Draper, advised against their appointment to conduct assize business under any circumstances. Indeed, Draper thought that local residents in general should not be retained to do so.

As early as 1800 a judge had dwelt on the inefficiency that must prevail where the administration of justice had to be assigned to officers selected from "a population which affords none better." He was referring to the lay justices, but in certain counties sixty years later one might have said the same of the local bar.[64]

VI. Crime, Punishment and Police

A. Crime and Punishment

Until the advent of the county judge's criminal court in 1869, the structure of the criminal justice system had altered relatively little since the province's beginning. By contrast, punishment and police underwent radical changes.

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62 Banks, *supra* note 3 at 516, 520–1.

63 Romney, *supra* note 10 at 217, 225–6.

64 Romney, *supra* note 10 at 191, 214–21, 225–8, 230–1.

Crime became a matter of public anxiety in the 1820s. By a statute of 1800, the province had adopted the criminal law of England as it stood in September 1792.[65] The most striking feature of this body of laws was the profusion of capital offences, which had proliferated throughout the eighteenth century until there were some two hundred. This harsh code sustained the rule of the English landed interest by a haphazard yet deft mingling of terror and mercy. Upon every capital conviction, the judge would don the black cap and pronounce the sentence of death; but relatively few sentences were executed, most being respited in response to petitions on behalf of the condemned. The uncertainty of reprieve supposedly made the gallows an efficacious deterrent, while the frequency of reprieve made the yoke of terror endurable.[66]

In the late eighteenth century, this system came under attack as unjust and inefficient. It was condemned for an arbitrariness inconsistent with the rule of law and for an uncertainty, supposedly a deterrent to crime, that was perceived in reality to deter juries from convicting wrongdoers. Besides, the gallows was inherently repugnant to people who thought that punishment should not only deter but reform the criminal. Reformers argued for a system of penalties proportionate to the offence and impartially applied. But what form should those penalties take? The more minor punishments in the current repertory, such as fines or public humiliation in the stocks or the pillory, were not adaptable to major offences. Even flogging, inherently loathsome for its brutality, was soon over, however painful in the execution. The reformers' answer lay in sufficiently long terms of imprisonment under conditions that would not make them a death sentence.[67]

In Upper Canada, the rule-of-law critique surfaced in 1823 with William Baldwin's attempt to cure what he saw as the uncertainty created by the adoption of English law.[68] To him, the inherent arbitrariness of the English system was made worse by the incongruity of English law with Upper Canadian conditions. This discrepancy increased the scope for discretionary enforcement by judges and crown prosecutors. Another critic, John Willson, attacked the death penalty with the moral and practical arguments current in England. He cited new British legislation, carried by Sir Robert Peel as the first phase of a far-reaching reform, which had repealed several capital statutes and abolished pronouncement of the death sentence when it was unlikely to be executed. John Beverley Robinson resisted Willson's proposals, much as he had Baldwin's declaratory bill, by rejecting sweeping action in favour

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65 (U.C.), 40 George III, c. 1. Before that, the English criminal law as it stood in 1774 had prevailed in Upper Canada by virtue of the *Quebec Act*, 1774 (U.K.), 14 George III, c. 83, s. 11.

66 Douglas Hay, "Property, Authority and the Criminal Law" in Hay, *et al.*, eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975); J.M. Beattie, *Crime and the Courts in England, 1660–1800* (Princeton: Princeton University Press, 1986) at 400–618. And see the essay by Strange, *infra*.

67 J.M. Beattie, *Attitudes Towards Crime and Punishment in Upper Canada, 1830–1850: A Documentary Study* (Toronto: Centre of Criminology, University of Toronto, 1977) at 8–10, 15–16; R.B. Splane, *Social Welfare in Ontario, 1791–1893: A Study of Public Welfare Administration* (Toronto: University of Toronto Press, 1965) at 117–18.

68 See *supra* at 187.

of a piecemeal approach. In 1825 he did, however, carry a copy of Peel's sentencing statute.[69]

Though major crime was negligible in Upper Canada by comparison with England, penal reform posed peculiar difficulties in the colony. One was the unavailability of the penalty of transportation. Owing to the administrative impracticability of sending convicts from Upper Canada to the penal colonies in Australia, the statute of 1800 had substituted the sentence of banishment; but this only meant a ferry ride to the United States, and in any case convicts often flouted it without penalty. Another difficulty was the cost of suitable prisons. The expense of custodial facilities was a constant and harassing burden on district magistrates. The district gaols were insecure and loathsome receptacles for debtors, petty criminals, lunatics and prisoners awaiting trial. They offered little scope for segregating different categories of prisoner (male and female, juvenile and adult), or for the special modes of punishment (solitary confinement, hard labour) that modern penal philosophy considered essential to long-term reformatory incarceration. What the province needed was a penitentiary; but in 1825 the provincial government felt unable to afford one, and Attorney-General Robinson suggested employing convicts instead on military works such as the Rideau Canal. Nothing came of this idea, and scarcely two years later an MPP, Hugh Thomson, moved in the legislature for the construction of a provincial penitentiary. Thomson won his way in 1833 and another statute of that year, again modelled on Peel's reforms, abolished most of the capital offences in the province's penal code. Kingston Penitentiary opened in 1835.[70]

Thomson's success in 1833 followed several years of large-scale immigration from the United Kingdom. The effects fell unevenly on the province, but they were very obvious because immigrants tended to cluster at large construction sites, particularly the Welland Canal, and in the towns: above all the provincial capital, which grew fivefold in population during the decade before its incorporation as the city of Toronto in 1834. Upper Canada's gaols began to fill up with Irish labourers and Irish prostitutes.[71]

Kingston penitentiary was designed to implement the goals of deterrence and reform by means of institutionalised torture. Reform was to be achieved by breaking the prisoners' spirit, instilling regular work habits and employing a chaplain to jaw at them, and deterrence by making life in the penitentiary forbiddingly unpleasant. Prisoners were kept in solitary confinement but they ate and worked together in

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69 Romney, *supra* note 10 at 202–5.

70 Splane, *supra* note 67 at 119–36; Beattie, *supra* note 67 at 10–14, 16–18; U.K., Public Record Office, C.O. 42, vol. 375, at 111–12 (memo. enclosed in letter of Sir P. Maitland to Lord Bathurst, 22 April 1825); J. Weaver, "Crime, Public Order, and Repression: The Gore District in Upheaval, 1832–1851" (1986) 78 Ontario History 175; R. Baehre, "Origins of the Penitentiary System in Upper Canada" (1977) 69 Ontario History at 185; J.J. Bellomo, "Upper Canadian Attitudes Towards Crime and Punishment (1832–1851)" (1972) 64 Ontario History 11; and Smandych, infra at 248.

71 Weaver, *supra* note 70; M.S. Cross, "The Shiners' War: Social Violence in the Ottawa Valley in the 1830's" (1973) 54 Canadian Historical Review 1; R. Bleasdale, "Class Conflict on the Canals of Upper Canada in the 1840s" (1981) 7 Labour/Le Travailleur 9; P. Romney, "A Struggle for Authority: Toronto Society and Politics in 1834" in V.L. Russell, ed., *Forging a Consensus: Historical Essays on Toronto* (Toronto: University of Toronto Press, 1984) at 9.

"silent association," forbidden to talk to, or even look at, each other. Transgression of these rules earned the lash. The result was a brutalising régime which bore especially hard on those least apt to the self-discipline required to avoid physical punishment: juveniles, the mentally unstable and the feeble-minded. Accordingly, a royal commission of 1848–49 recommended an end to flogging, save as a last resort, and the establishment of separate institutions for the confinement of juveniles and the care of insane prisoners. In 1859 a boys' reformatory was opened at Penetanguishene.[72]

Under the *British North America Act*, 1867, the penitentiary became a federal, and other prisons a provincial, responsibility. Within the province's purview, post-Confederation innovations continued to focus on deterrence and reform, and on segregating the different categories of prisoners as a means to that end. Conditions in the district gaols had improved by the 1860s, but they still offered little scope for segregation and lacked facilities for enforcing sentences of hard labour. In 1874 the Central Prison opened in Toronto to accommodate convicts sentenced to terms of hard labour too short to qualify for the penitentiary. It soon acquired such a forbidding reputation that convicts pleaded for the longer term that would send them to Kingston. Four years later a reformatory for women and an attached "refuge" for girls also opened in Toronto.[73]

Towards the end of the century, the institutionalisation of young offenders fell out of favour. The province's first industrial training school for boys opened in 1887, and from 1890 offenders below the age of thirteen were consigned to these instead of to Penetanguishene. The 1890s saw the advent of industrial schools for girls. J.J. Kelso, who became Ontario's superintendent of neglected and dependent children in 1893, favoured the foster-home over institutionalisation. In 1898 he began, deliberately and unlawfully, to divert to farm foster-homes juveniles sentenced to Penetanguishene. When instructed in 1904 to disperse the reformatory's remaining inmates in preparation for its closing, he sent them all to rural or urban foster-homes rather than to the industrial schools that had been told to expect them. A year later he did the same at the Mercer Refuge, which also closed.[74]

B. Police

In eighteenth-century England, police was essentially a local function, performed by local magistrates with the aid of their appointed constables. As an officer of the quarter sessions or other courts embodying local police powers, the constable was

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72 Beattie, *supra* note 67 at 18–35; Splane, *supra* note 67 at 136–57.

73 Splane, *supra* note 67 at 157–78; P. Oliver, "'A Terror to Evil-Doers': The Central Prison and the 'Criminal Class' in Late Nineteenth-Century Ontario" in R. Hall *et al.*, eds., *Patterns of the Past: Interpreting Ontario's History* (Toronto: Dundurn Press, 1988) at 206; P. Oliver, " 'To Govern By Kindness': The First Two Decades of the Mercer Reformatory for Women" in Phillips, *et al.*, *supra* note 46, at 516; J. Berkovits, "Prisoners for Profit: Convict Labour in the Ontario Central Prison" in *ibid.* at 478.

74 Splane, *supra* note 67 at 178–93; A. Jones, "'Closing Penetanguishene Reformatory': An Attempt to De-institutionalize Treatment of Juvenile Offenders in Early Twentieth Century Ontario" (1978) 70 Ontario History 227.

charged with maintaining public order, suppressing whatever activities the law and the magistrates defined as a threat to public morality or the public revenue (selling liquor without a licence, for instance, might endanger both), and enforcing local regulations for the prevention of fire and public nuisances. He also served the magistrates by keeping order in court, guarding prisoners, and serving warrants, summonses and other processes. Territorially, the authority of the common law constable was co-terminous with the jurisdiction of the appointing magistrates.[75]

Upper Canada imported this system along with the rest of English local government. The magistrates in quarter sessions would appoint several male constables for the year, an irksome part-time duty often enforced by fines. This sufficed for a sparsely populated territory with little major crime, but large-scale immigration and urbanisation demanded more: the arrival of the Irish *en masse* turned the Upper Canadian mind not only to prisons but to police. Every year after 1835, the Toronto city council appointed a force of five or six salaried constables to serve under a high bailiff, and the same system was extended piecemeal to other urban places during the 1840s.[76]

This arrangement soon proved inadequate in its turn. Municipal authorities were reluctant to pay for an efficient police, especially when times were hard: in 1848, for instance, two of Hamilton's four permanent constables were replaced by ten part-time "special" constables, who were paid only when called to duty.[77] Worse still, in a politically polarised society, where a threatened élite was struggling to preserve its political predominance, there was a strong temptation to prostitute the police force to partisan purposes. No municipality was prosperous enough to maintain the kind of force needed to control the Orange Order on the rampage; but after the rebellion of 1837, in any case, the Toronto constabulary became virtually the legal auxiliary of the Orange Order. Where public order was defined in political terms, the efficiency of the police was affected as well as its impartiality, since the authorities tended to pay more attention to an applicant's political allegiance and popular influence than to his competence and integrity.[78]

Outside the towns, public order may have been less compromised by political considerations, but it had its own problems. This was especially true in areas with large-scale public works and a large, essentially transient labour force housed in barracks and hovels. A provincial statute of 1845 authorised the formation of a mounted police force of up to 100 men to serve in districts where such works were

75 L. Radzinowicz, *A History of the English Criminal Law and its Administration from 1750*, vol. 2 (London: Stevens, 1956) at 181–6; DeLloyd J. Guth, "The Traditional Common Law Constable, 1235–1829: From Bracton to the Fieldings to Canada" in R.C. Macleod and D. Schneiderman, eds., *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994).

76 W.C. Keele, *A Brief View of the Township Laws ... with a Treatise on the Law and Office of Constable* (Toronto: W.J. Coates, 1835); N. Rogers, "Serving Toronto the Good: The Development of the City Police Force, 1834–1884" in Russell, ed., *supra* note 71 at 116–17; Weaver, *supra* note 70 at 187–8.

77 Weaver, *supra* note 70 at 188.

78 Rogers, *supra* note 76 at 118–20; G.S. Kealey, "Orangemen and the Corporation: The Politics of the Class During the Union of the Canadas" in Russell, ed., *supra* note 71 at 41.

in progress. Originally limited to two years, the measure became a fixture and was extended to private construction sites in 1851 after unrest among labourers on the Great Western Railway west of Hamilton.[79]

With the establishment of responsible government, partisans of the old order lost much of their incentive to curry favour with the mob and a major obstacle to innovation disappeared. Municipal politicians might still be tempted to treat police appointments as political patronage, but a police force which shared the prejudices of the common people began to seem a liability. Two riots in Toronto in 1855, in which the constabulary showed complicity with the rioters, dramatised the desirability of removing police from municipal control and isolating the constabulary from the populace to be policed.[80]

Two models for such a force had been implemented in Britain by Sir Robert Peel in the 1820s. One was London's metropolitan police force, a body of permanent officers regulated by appointed commissioners; the other was the Irish constabulary, a quasi-military force controlled by the central government. After the Toronto riots the mayor advocated the former, but a royal commission which included Sir Allan MacNab, the province's premier and foremost gentleman soldier, had already reported in favour of the latter. A London-style common law constabulary might meet the ordinary needs of municipalities that could afford one, but it was quite unsuited to urban emergencies such as the rioting provoked in Montreal in 1849 by enactment of the *Rebellion Losses Act*, or to rural emergencies like the so-called *guerre des éteignoirs*, the violent resistance to the establishment of a modern public school system which flared in Lower Canada in 1850–1. Even in Upper Canada such emergencies might arise. In December 1855, a charivari in the strongly Orange township of Albion, northwest of Toronto, went on for a week or more for want of a police force strong enough to stop it. There were from thirty to sixty rioters, and a home-made cannon had blasted a hole in the wall of the victim's store.[81]

In 1856 MacNab's ministry brought in a bill to establish a paramilitary police force, the members of which would be authorised to act throughout the province. It was to be stationed in the nine largest cities of Upper and Lower Canada, largely at the cost of city taxpayers. In these cities the municipal police force was to be abolished. Other municipalities might request a permanent detachment, if willing to pay for it, and detachments might be sent anywhere to restore order at the request of any superior court judge, county judge, or sheriff, or any mayor acting in conjunction with two municipal councillors or JPs. Where a force was stationed at public works, the contractor had to pay.

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79 Romney, *supra* note 10 at 234; Bleasdale, *supra* note 71 at 33–9. S. Lewthwaite, "Violence, Law, and Community in Rural Upper Canada" in Phillips, *et al.*, eds., *supra* note 46, illustrates another difficulty of rural law enforcement.

80 Rogers, *supra* note 76 at 120–1; B. Dyster, "Captain Bob and the Noble Ward: Neighbourhood and Provincial Politics in Nineteenth-Century Toronto" in Russell, ed., *supra* note 71 at 87.

81 Romney, *supra* note 10 at 234–7; M.S. Cross, " 'The Laws Are Like Cobwebs': Popular Resistance to Authority in Mid-Nineteenth-Century British North America" in J.A. Yogis, ed., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) at 103.

MacNab's ambitious scheme was swamped by the protests of municipal councils. One focus of criticism was the perceived threat to civil liberties from a police force that was "almost a standing army"; another was the extension of governmental patronage entailed in the power to appoint members of that force. There was also a practical objection. The new system was meant among other things to segregate the police force from local influences. The end was not criticised, but the means was condemned as likely to prevent policemen from learning about the localities they were to police.[82]

Thwarted in its efforts to bring in an Irish-style constabulary, the government turned to the 1829 English metropolitan model. The *Municipal Act* of 1858 transferred control of city police forces from the city councils to boards consisting of the mayor, police magistrate and recorder. These boards were authorised to stipulate a minimum strength for the force, and the councils retained only the power to fix a reasonable rate of pay. In 1867, after a dispute between the Toronto city council and its police commissioners over the police chief's salary, this power too passed to the commissioners. The more regimented system introduced under the new order also caused friction between the commissioners and their constables: in 1872 the Toronto board had to dismiss the whole force after its members voted no confidence in the chief of police, and efforts to impose a more stringent discipline in Hamilton a decade later had similar consequences.[83]

Outside the cities, the main focus of provincial police policy was the province's frontiers. In 1864 a small detective force was set up to combat the activities of American agents, both for the Union and the Confederacy. After the U.S. Civil War it turned to surveillance of the Fenian Brotherhood, an organisation of Irish Catholics which threatened to invade Canada from the United States. The frontier disturbances and the perennial problems of rural police kept the notion of an Irish-style constabulary alive, and in 1869 John Sandfield Macdonald's provincial ministry brought in a bill similar to that of 1856. This too fell victim to public opinion.[84]

The beginning, two years later, of the Liberals' 34-year tenure of provincial government put an end to large-scale policing initiatives. Two acts of 1874 authorised the government to appoint constables in order to supplement municipal police on the Niagara frontier and establish a police on the frontier of northern settlement. In 1892 the act of 1845 providing for a provincial police at large public or private works was extended to the northern mining frontier. In the interior of the province, police remained a municipal service and in rural areas a somewhat ill-organised one. Protracted lawlessness near London, culminating in 1880 in the murder of members of the notorious Donnelly family, prompted the government to inquire into the adequacy of the rural police but led to no changes: until 1896 county councils were not even obliged to appoint a chief constable. An act of 1877 empowered the

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82 Rogers, *supra* note 76 at 120–3; Romney, *supra* note 10 at 237.

83 Rogers, *supra* note 76 at 123–37; Romney, *supra* note 10 at 237–8; J.C. Weaver, "Trends and Questions in New Historical Accounts of Policing" (1990–1) 19 Urban History Review 79 at 81.

84 Romney, *supra* note 10 at 238–9; D.D. Higley, *O.P.P.: The History of the Ontario Provincial Police Force* (Toronto: Queen's Printer, 1986) at 30–1; D. and L. Gibson, "Who Was Gilbert McMicken, and Why Should Historians Care?" [unpublished].

government to appoint constables with province-wide authority, but—probably from motives of economy—the power seems to have been used only to appoint one or two detectives to aid local forces. Needing in 1891 to break up a gang based at the junction of three counties in the Niagara Peninsula, the government acted not by appointing an extra provincial constable but by arranging for a constable from one county to be deputised to act in the other two. The Ontario Provincial Police was not formed until 1909.[85]

VII. Reform of the Judiciary, 1873-81: The Politics of Fusion

Though rejected at mid-century, the idea of merging the courts of common law and equity never faded from view. In a milieu where trial by jury could be criticised as inefficient, the inefficiencies arising from a bifurcated legal system did not escape notice. In England a royal commission recommended fusion for its courts in 1869. Two years later the evident intention of the British government to act on this advice prompted demands for reform in Ontario, and Sandfield Macdonald set up a provincial commission.

It is doubly significant that the movement for fusion was led by William Hume Blake's son Edward, a dominant figure at the equity bar and almost equally so in Reform politics.[86] By this time the chief obstacle to change in Ontario was probably the vested interest and *amour propre* of the common law bar. Proceedings in Chancery might still be more costly and protracted, and might lack in public opinion the sanctity of trial by jury, but they arguably got closer to the substantive legal merits of the case. The *Common Law Procedure Act* of 1856 had hardly touched the so-called forms of action, a myriad of precisely named writs, mediaeval in origin, which defined what actions the law remedied. These arcane technicalities could cause a case with substantive merit to fail merely from being initiated by the wrong writ. Justice was further hampered by a litigant's inability to examine opposing parties under oath, which helped wrongdoers to hide their misdeeds. Such anomalies could hardly survive fusion. However, the great majority of the provincial bar, especially lawyers residing outside Toronto, who were often influential in local politics, consisted of common law practitioners.[87] The existing procedure had powerful defenders in lawyers who had made an art of exploiting its technicalities, and especially in those who knew little or no equity and did not care to learn.

Blake's initiative also highlighted the party-political aspect of fusion. Despite Chancery's unpopularity with Reform voters, the equity bar was dominated by Reformers, so much so that John A. Macdonald complained in 1869 of the difficulty of finding a Conservative qualified for the Chancery bench.[88] The common law bar

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85 Romney, *supra* note 10 at 239; Higley, *supra* note 84 at 27–71; Ontario, Legislative Assembly, Sessional Papers (1884) #91; *The* [Toronto] *Globe*, 15 March 1884, at 4; Archives of Ontario, RG4 (Ministry of the Attorney General), series 26 (Deputy AG's letterbooks), vol. 50 at 551.

86 At the time of writing, there is no scholarly biography of Blake; but see J. Schull, *Edward Blake* (Toronto: Macmillan of Canada, 1975–6), and M.A. Banks, *Edward Blake, Irish Nationalist: A Canadian Statesman in Irish Politics, 1892–1907* (Toronto: University of Toronto Press, 1957).

87 Brown, *supra* note 34 at 303–5; Baker, *supra* note 13 at 81–2, 104.

88 National Archives of Canada, MG26, A (Sir John A. Macdonald Papers), vol. 13, at 425, 486–7

may not have been equally dominated by Conservatives, but the editorial board of the *Canada Law Journal* was a hive of Conservative common lawyers and the *Journal* itself distinctly lukewarm to fusion. The provincial commissioners, who included Judge Gowan, the *Journal's* founder, began to draft a code of procedure which deferred to the susceptibilities of the country lawyers; but Sandfield Macdonald's Conservative-dominated coalition ministry was ousted by the Reformers under Blake, and the commission was abolished before it could complete its work. According to the new attorney-general, equity practitioner Adam Crooks, the report of the English commission made the provincial investigation redundant. It was time to act.[89]

Before the new government could do so, however, Blake gave way as premier, and Crooks as attorney-general, to Oliver Mowat. In itself the change signalled no threat to policy: Mowat had quit the Chancery bench to become premier and was widely known as "an Equity fanatic," according to Chief Justice Draper.[90] He was also, however, a canny politician with a shaky majority. To the chagrin of other equity fanatics, the government shelved total fusion in favour of half-measures. The *Administration of Justice Act*, 1873,[91] expanded the equitable jurisdiction of the superior common law courts and provided that actions brought in the wrong court (i.e., suits in equity which proved to turn on a point of law, and vice versa) might be transferred to the proper jurisdiction without cost. The *Act* further simplified Chancery procedure and made two major procedural innovations that accorded with the expanded equitable jurisdiction of the common law courts: it permitted parties in actions at law to examine adversaries under oath, and subjected the right to trial by jury in most cases to judicial discretion. The second change reflected Mowat's predilection as an equity lawyer for withholding equitable issues from a jury. The legislation favoured substantial justice by providing that no action was to fail through any defect of form.[92]

A year later Mowat reformed the Court of Error and Appeal. The *Administration of Justice Act*, 1874,[93] provided for three additional judges, who were to sit with the president of the court to form a bench of four. The judges of Queen's Bench, Common Pleas and Chancery remained *ex officio* members of the appellate court but were not to sit unless needed to make a quorum. The new appellate judges were empowered to sit in any lower court, as the president could already under an act of 1871. Judges might no longer sit in appeal of cases they had heard in the court below. The new judges were to take their fair share of business on the assize and Chancery circuits

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(Macdonald to J.H. Cameron, 15 November 1869, and to W. McDougall, 20 November 1869). This is striking evidence of Reform's dependence on élite spokesmen.

89 Romney, *supra* note 10 at 286–90; P. Romney, "John Wellington Gwynne" in DCB, *supra* note 59 at 426–9. The commission's code was drafted by Gwynne and James R. Gowan.

90 P. Romney, "Sir Oliver Mowat" in DCB, *supra* note 59 at 729.

91 Cited *supra* at note 52.

92 Brown, *supra* note 34 at 305–7; Biggar, *supra* note 58 at vol. I, 197–9, 225–9.

93 S.O. 1874, c. 7.

and of another important duty recently imposed on the judiciary: the adjudication of election disputes.[94]

By their success, these measures paved the way for complete fusion. The *Ontario Judicature Act*, 1881,[95] consolidated Queen's Bench, Common Pleas and Chancery into a single High Court of Justice, which itself constituted a division of the Supreme Court of Judicature, the other being the Court of Error and Appeal. Perhaps because the *British North America Act*, 1867, vested the appointment of judges in the federal government, the old courts retained a fictitious existence as separate divisions of the new High Court. The fiction did not prevent the judges themselves from demanding and receiving new commissions before they would act under the new legislation; but in 1883 the Supreme Court of Canada held that the Queen's Bench, Common Pleas and Chancery divisions were in law continuous with the old courts of the same name.[96] From 1881 on, however, they all possessed an identical jurisdiction and functioned under identical rules of practice and procedure, purged of the arcana until then surviving in common law procedure. In accord with the principle of the *Act*, equitable jurisdiction was extended to the county and division courts. In 1880 decisions of the division court had for the first time been made appealable on a question of law, a provision befitting the court's expanded jurisdiction, which the same act set at $60 or $200 according to the matter in litigation.[97]

VIII. Politics, Society, and the Administration of Justice

The administration of justice in nineteenth-century Ontario cannot be understood in isolation from the social and political history of the province. Upper Canada was founded in order to facilitate the adoption of English civil law in place of the *Coutume de Paris*; its judicial institutions were intended to nurture an English political and social order. In the 1820s the privileged place of the legal profession in that order, and its members' perceived failure to justify their privileges by "assisting their fellow subjects and supporting the constitution," became primary topics of political controversy. William and Robert Baldwin campaigned for colonial responsible government partly because they could not trust leaders of the profession to uphold the rule of law. Their more pragmatic kinsman, Robert Baldwin Sullivan, moved to allay public resentment by eliminating certain gross but secondary manifestations of professional privilege: above all, a fee system which made certain legal offices far more lucrative than their duties warranted.[98] Too deep-rooted to be permanently allayed by such reforms, public hostility found expression at mid-century in efforts to abolish the very foundation of professional privilege: the collective monopoly of legal services.

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94 Banks, *supra* note 3 at 519–20.

95 S.O. 1881, c. 5.

96 *Mitchell* v. *Cameron* (1883), 8 S.C.R. 126.

97 Banks, *supra* note 3 at 522, 523–5; Brown, *supra* note 34 at 305–14. [Editors' Note: dollars and the decimal system became statutory standards here in 1858, in Nova Scotia 1871 and British Columbia 1881, but British currency still circulated in pounds/shillings/pence].

98 Romney, *supra* note 10 at 178–79.

Even when fairness in the legal system ceased to be a matter of political controversy, its cost remained a cause of complaint. One target was official salaries; the attorney-general's was cut three times between 1844 and 1852, sinking from £1200 to £900, and the solicitor-general's fell in proportion. Another target was the Court of Chancery, which came under political attack as late as 1875. The concentration of legal appointments in the hands of the central government, and their use as political patronage, remained a lively grievance into the 1890s.[99] Such grievances, energetically exploited by Conservatives in order to embarrass Reform governments, were rooted in an endemic populist hostility to things legal.

The profession's political pre-eminence, which John Strachan had predicted in the 1820s, only sharpened that hostility. Even then lawyers had been leading spokesmen for both the government and its critics. Responsible government made no difference. From the beginning of cabinet government in 1841 until 1894, every recognised head of both the Upper Canadian Tory party and its Liberal-Conservative successor was a lawyer; after a brief hiatus in 1894–95, another lawyer took over. The Reformers were less dominated by lawyers: neither Francis Hincks, provincial premier from 1851–54, nor George Brown, who was pre-eminent in Reform politics from 1854 to 1867, belonged to the profession, and after Confederation the party supplied a non-lawyer prime minister in Alexander Mackenzie (1873–8). Even in Brown's heyday, however, the chief alternative Reform leader was the lawyer John Sandfield Macdonald, and the Liberal premiers from 1871 to 1899 were lawyers too.

In view of the profession's political influence, neither the professionalisation of the administration of justice nor the concentration of legal patronage in the hands of the provincial government were surprising. This second process was also promoted by the province's political culture. The idea of making local offices such as county judgeships and attorneyships elective, or vesting their appointment in the county councils, could be deprecated as un-British and contrary to the spirit of responsible government. Deference to British principles required that legal patronage be vested in the crown, and fidelity to the ideal of responsible government required that it be controlled by those politically responsible for the administration of justice.[100] This political imperative, and the political predominance of the legal profession, precluded any change in the administration of justice that was unacceptable to the profession as a whole.

It is a cliché of Canadian historiography that Upper Canadian society was devoted to British forms and deferential to British example. As regards the administration of justice, the cliché mirrors contemporary observation. "Upper Canada is greatly dependent upon England in matters of law reform," observed the *Upper Canada Law Journal* in 1858. "It is the policy of our Legislature to await the working of a reform in England before hazarding an experiment here." Some contemporaries saw this policy as evidence of intellectual servility: a commentator in 1877, complaining

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99 *Ibid.* at 179–88; Biggar, *supra* note 58, vol. I, at 262, 284; S.E.D. Shortt, "Social Change and Political Crisis in Rural Ontario: The Patrons of Industry, 1889–1896" in D. Swainson, ed., *Oliver Mowat's Ontario* (Toronto: Macmillan Co. of Canada, 1972) 211 at 218.

100 John A. Macdonald used this argument in relation to county attorneys, and Oliver Mowat in relation to division court bailiffs: Romney, *supra* note 10 at 221; Romney, *supra* note 90 at 733.

of Mowat's reluctance to introduce full fusion as long as the difficulties thrown up by the English experiment remained unresolved, lamented the presumption that Ontario law reformers could "do no more than merely hunt up and copy some English statute, changing the word 'England' into 'Ontario' wherever it occurs."[101] In view of the huge volume of British immigration, and the hegemony of an official culture which extolled British institutions as the pattern of excellence, such deference to British example was hardly surprising. But to ascribe its specific manifestations to a "colonial mentality" is unilluminating, if not downright misleading. It implicitly ascribes a devotional character to postures that are more accurately described as tactical, and it wrongly imputes a consensual character to institutions that were controversial or even unpopular.

Mowat himself, for instance, was famous for refusing to accept a construction of a recent imperial statute, the *British North America Act*, which the imperial authorities, both legal and political, were unanimous in asserting.[102] When the English law officers declared that lieutenant-governors could not of their own mere motion create Queen's Counsel, he discounted their opinion on the ground that the *BNA Act* created "peculiarities which of course cannot exist in England and which by the bye English lawyers when referred to have (to say the least of it) no special competence to advise upon."[103] On this evidence it is hard to see his stand on fusion as evidence of intellectual servility. Mowat was a Reformer, of course, but in 1853, when the attorney-general of Canada West invoked English example in support of the palliative reforms which were to become law as the *Common Law Procedure Act*, it was a former Tory attorney-general who dismissed the argument as "ridiculous—there was no reason why we should not exercise our own judgment in altering our own system as we might think desirable."

Admittedly, these were the words of a Lower Canadian, William Badgley; but Upper Canadians too, conservative as well as radical, spoke in favour of abolishing Chancery at that time.[104] The conservatives may have been motivated more by opportunism than conviction, but they were clearly not restrained by intellectual servility. Nor was John Beverley Robinson, earlier still, when he opposed Judge Willis's scheme to erect an English-style Court of Chancery and opined that the equity of redemption did not exist in Upper Canada in the absence of a court of equity.[105] No: Robinson *circa* 1830, the Conservative critics of the Court of Chancery about mid-century, and Mowat in the 1870s were all doing what Upper Canadians of every political stripe had done ever since political controversy entered provincial public life: citing British authority in order to add the lustre of principle to pragmatic policy.

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101 Quoted in Romney, *supra* note 10 at 222–23, 289.

102 Romney, *supra* note 22.

103 Quoted *ibid.* at 3.

104 E. Nish, ed., *Debates of the Legislative Assembly of United Canada*, vol. 11 (Québec: Presses de l'École des hautes études commerciales, 1970) at 2852–5, 3005–22 (quotation at 3020).

105 Weaver, *supra* note 30 at 881–99.

Mowat, in fact, could have invoked British authority for proceeding at once with complete fusion, but he wanted time to reconcile Ontario common lawyers to a form of fusion which favoured equitable procedure, so he invoked it in favour of delay. Twenty years earlier one could have invoked British authority for and against the proposal to create county attorneys: in the 1850s the idea was considered and rejected in England, but the institution prevailed in Scotland and the Scottish example was cited in order to justify it in Upper Canada. About thirty years before that, Robinson had played off the Scottish example against the English in defending the attorney-general's role in criminal prosecutions.

Obviously, no one would have appealed to British authority had it carried no weight. But the Upper Canadian predisposition to defer to British example did not usually go far to explain why one legal policy was adopted and another rejected, either in the 1790s or a century later. In pursuit of understanding, the historian must always ask: *cui bono* (who benefits)? In legal policy, it was almost always the legal profession, or some influential part of it.