

10-1-1990

While Equity Slumbered: Creditor Advantage, A Capitalist Land Market, and Upper Canada's Missing Court

John C. Weaver

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>



Part of the [Legal History Commons](#)

Article



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

Citation Information

Weaver, John C.. "While Equity Slumbered: Creditor Advantage, A Capitalist Land Market, and Upper Canada's Missing Court." *Osgoode Hall Law Journal* 28.4 (1990) : 871-914.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol28/iss4/6>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

While Equity Slumbered: Creditor Advantage, A Capitalist Land Market, and Upper Canada's Missing Court

Abstract

Until 1837, Upper Canada had no Court of Chancery. This omission forced stop-gap measures which in the area of mortgages produced a muddle. The confusion introduced into the land market led to protracted controversies among politicians and jurists during the 1820s and 1830s. The many complex principles and motives raised by the lack of an equitable jurisdiction generated much legislative controversy and experimentation. John Beverley Robinson often was central to vital discussions where he revealed both his intelligence and social biases favouring gentlemen of capital. Extremely complicated issues have deflected attention from the central issue: whether the colony needed equity, whether it needed to follow English law. The episodes show that Upper Canadians of many political outlooks were not at all convinced that their society should embrace English law. Moreover, the neglect of equity and opposition to it should not be treated just as a demonstration of frontier circumstances. Social attitudes, personal motives, political circumstances, and disputes about colonial independence from English models and Crown influence greatly affected the law. The law as abstraction and the law as social product clashed quite early in the life of this society.

Keywords

Equity--History--19th century; Law--History--19th century; Ontario

Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

WHILE EQUITY SLUMBERED: CREDITOR ADVANTAGE, A CAPITALIST LAND MARKET, AND UPPER CANADA'S MISSING COURT^o

BY JOHN C. WEAVER*

Until 1837, Upper Canada had no Court of Chancery. This omission forced stop-gap measures which in the area of mortgages produced a muddle. The confusion introduced into the land market led to protracted controversies among politicians and jurists during the 1820s and 1830s. The many complex principles and motives raised by the lack of an equitable jurisdiction generated much legislative controversy and experimentation. John Beverley Robinson often was central to vital discussions where he revealed both his intelligence and social biases favouring gentlemen of capital. Extremely complicated issues have deflected attention from the central issue: whether the colony needed equity, whether it needed to follow English law. The episodes show that Upper Canadians of many political outlooks were not at all convinced that their society should embrace English law. Moreover, the neglect of equity and opposition to it should not be treated just as a demonstration of frontier circumstances. Social attitudes, personal motives, political circumstances, and disputes about colonial independence from English models and Crown influence greatly affected the law. The law as abstraction and the law as social product clashed quite early in the life of this society.

© Copyright, 1990, John C. Weaver.

* John C. Weaver is Chair and Professor of History at McMaster University and editor of the *Urban History Review*. The current article arose from work with geographer Michael Doucet on a history of land, capital, and shelter in North America. He is looking now at the history of mortgage lending with a long term comparative study of Australia, Canada, New Zealand, and the United States.

I. CREDITOR ADVANTAGE AND COLONIAL EXCEPTIONALISM	875
II. JOHN BEVERLEY ROBINSON'S DISAPPROVAL OF EQUITY	881
III. JOHN BEVERLEY ROBINSON AS THE MORTGAGEE'S FRIEND	893
IV. THE AWAKENING OF EQUITY, 1832 - 1837	899
V. CONCLUSIONS	910

It could be said that Upper Canadian civil and criminal law, which has sustained for many years practices significantly distinct from English law, expressed consideration for the environment.¹ True, as an abridgement, this characterization suffers because it distorts historical processes. By commission, but also by omission, colonial jurisprudence developed independently, propelled by members of an administrative and juridical elite who believed that they might fashion a new constitution convenient to propertied interests with which they were sympathetic. It was not just environment – the sum of wilderness and a small public purse – that affected the character of criminal and civil law. Social structure, ideologies, and personalities must be taken into consideration.

In analyzing the development of colonial uniqueness, this paper magnifies only a sliver of civil law; namely, the well-known omission of an equity court in Upper Canada until 1837, some significant consequences of that omission, and the circumstances of its introduction.

It has been assumed that there had been insufficient landed wealth or economic development in the colony to justify the establishment of a jurisdiction which had a poor reputation in England where it was thought to be expensive and slow. In fact,

¹ D.H. Flaherty, "Writing Canadian Legal History: An Introduction" in D.H. Flaherty, ed., *Essays in the History of Canadian Law* vol.1 (Toronto: Osgoode Society, 1981) 3 at 15.

there is no documentation to explain why the early governments of Upper Canada failed to create the court. From time to time, the home government considered the need for an equity court and colonial judges and administrators heard complaints about the inconvenience of the missing jurisdiction. On one occasion, in 1807, the home government secured an opinion from an authority at the Temple to the effect that equity had entered the colony in 1792 as part of the general introduction of English law. Yet, no court was created. However, a series of alternative provisions did follow, many of which have been spelled out recently by Elizabeth Brown.²

The assumption that Upper Canadians wisely refrained from introducing a widely criticized jurisdiction to their jurisprudence, and that the alternatives might have sufficed, would constitute whig history. Not all Upper Canadians felt the colony could get along without a court of equity. Brown has noted that legislative substitutions met some needs, but her study did not grapple with the areas of problematic legislation for which an equitable jurisdiction readily would have provided. Equity, though it had little practical substance in the colony, clearly slumbered, and this odd state precluded any complete sense of settlement of the issue. Moreover, when the government of Upper Canada finally created a court, it instituted an important element for the satisfactory functioning of the mortgage market, and answered a need felt by more and more Upper Canadians during the maturation of the economy in the 1830s. John Godfrey Spragge – later an equity judge – speaking about the court, explained: "[T]he want of an equitable jurisdiction was very much felt ... it was from no love of a Court of Chancery that it was introduced, but in spite of many and strong prejudices."³ It is the struggle hidden between the lines of this comment which provides the substance of this paper.

It has always been assumed that the reformers were one of the parties most strongly prejudiced against equity. However, the politics of equity were far more complicated. In 1825, that sharp-

² E. Brown, "Equitable Jurisdiction and the Court of Chancery in Upper Canada" (1983) 27 *Osgoode Hall L.J.* 275 at 278-88.

³ Quoted in J.D. Falconbridge, "Law and Equity in Upper Canada" (1914) 63 *U. Pa. L. Rev. & Am. L. Reg.* 1 at 14-15. I am indebted to Philip Sworden for this citation.

tongued opponent of privilege, William Lyon Mackenzie, strongly urged fellow reformer John Rolph to petition the Crown to establish chancery: "Full well he knows the extreme deficiency of our law system, and how it is to cause injustice instead of justice."⁴ Later, Mackenzie backed away from this stance and, in exile after the rebellion, he became a determined enemy of chancery.⁵ During the 1820s and 1830s, Mackenzie's aberrant demand aside, the reformers wanted certain equitable benefits without the cost of the Court's establishment. In Upper Canada, where much remained fluid and where there were struggles for power and privilege at every turn, equity was not an issue settled by consensus nor by men taking consistent stands. Additionally, it will surprise no student of Upper Canadian history to learn that the equity controversies that flared up from time to time focused on the relationship between debtor and creditor interests.

While the importance of equity is manifest when it is defined, its connection with debtor and creditor relations requires an explanation. Equity was a strain of English law serving to supplement and remedy limitations in common law. Equity evolved from the practice of petitioning the Crown for a remedy unavailable through the precise and confining mesh of common law. As petitions were dealt with through the office of the Lord Chancellor, the Court of Chancery grew to handle petitions and assess the merits of the petitioners' cases. Appellants who sought relief from a fraud, for example, or specific performance of a contract that seemed unfair could look for an action in chancery. Its omission from the colony's constitution was a serious affair.

⁴ W.L. Mackenzie, *Colonial Advocate* (27 March 1825) 2. I am indebted to George Sheppard for this citation.

⁵ The claim that Mackenzie consistently opposed chancery appeared most recently in J.M. Ferron, "The Masters" (1988) 22 L. Soc. Gaz. 323 at 324. For his opposition, see L. Gates, *After the Rebellion: The Later Years of William Lyon Mackenzie* (Toronto: Dundurn Press, 1988) 175, 182-83.

I. CREDITOR ADVANTAGE AND COLONIAL EXCEPTIONALISM

We must now try to specify the injustices and identify the prejudiced parties. For that, we turn to the beginnings of the colony. The first Upper Canadian statute, 32 Geo. 3, c. 1, declared that henceforth, "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same." This statement may have excluded equity. The plural term "laws" could have been construed narrowly to mean the common law and statutes. Possibly, the colonial government sought to bar the English processes that protected the poor and petty proprietors. This first statute, it should be added, excluded the English poor laws and bankruptcy laws. The explicit elimination of the poor laws suggests a desire to be rid of old country obligations. Further, having banished equity by a narrow definition of the juridical elements being brought into the colony, doubts are raised about the statute. After all, if the poor laws were specifically omitted, then failure to omit equity implies an introduction of it into Upper Canada. Indeed, this was the position taken by the home government in 1807. Many nervous mortgagees made the same assumption. The question of what constituted the law was not answered forthrightly at the beginning, but there can be little doubt that equity must have been a part of the colony's laws.

The next major act affecting the civil law signals more clearly that the colony's legislators wished to rationalize the law. The 1794 *Act* establishing the judiciary, 34 Geo. 3, c. 3, created only a Chief Justice and two *puisne* judges of a Court of King's Bench. No sources explain the omission of an equitable jurisdiction. It may have been believed that a few thousand settlers and Amerindians did not require and could not afford an equitable jurisdiction. If this were so, it is essential to add that neglect due to expediency created a situation in mortgage law that favoured creditors. The omission was not neutral, and to establish that fact, we must introduce the concept of the equity of the right of redemption.

English law protected debtors against the loss of their land for the failure to pay an ordinary debt through chancery. Where an estate in land had been pledged as security, the situation had

become far more involved. But here too, an important safeguard worked for debtors. Essentially, a pledge of land for a debt was a manipulation of common law known as a mortgage. A debtor, the mortgagor, conveyed his land to the mortgagee outright in fee simple. However, he also retained by a covenant the right to resecure the land if the conditions of the covenant were satisfied. Common law courts appraised these transactions strictly and unsympathetically as far as the mortgagor was concerned. If the performance of the conditions in the covenant for reconveyance were not complied with exactly as spelled out, then the mortgagor lost those lands affected by the agreement. To miss repayment even by one day was to lose all.

In the mid-fifteenth century, the Chancellor began to intervene to protect mortgagors in scandalous cases. By about 1625, chancery had come to grant relief against forfeiture of land as a matter of course. Any requirement of particular hardship or extenuating circumstances had been dropped. "The protection accorded to mortgagors was viewed as one aspect of a general policy of providing relief against penalties and forfeitures, and protecting persons from the unconscionable enforcement of legal rights."⁶ That phrase "unconscionable enforcement of legal rights" is important. In the eighteenth century, the right to redeem was elevated to an estate in land. Mortgagors and their heirs, regardless of common law actions, had a perpetual right to redeem their land by paying off the debt. The general theory accepted in chancery proposed that a mortgage merely served as security for a loan, whatever its outward form as a conveyance. Chancery greatly constricted the mortgagee's rights. "In no branch of the law is the sanctity of agreement less regarded."⁷ It is vitally important to keep these principles and attributes of equity in mind, because they clarify what several prominent Upper-Canadian jurists *probably* had disliked about an equitable jurisdiction for their colony.

In England, the interference of equity was also resented by some, and there was an attempt made in 1653 to limit the right to

⁶ A.W.B. Simpson, *A History of the Land Law*, 2d ed. (Oxford: Clarendon Press, 1986) at 244.

⁷ *Ibid.* at 246.

redeem to a period of one year after the forfeiture of the land at common law. The ordinance did not survive the Restoration. However, in a turnabout, mortgagees began to appeal to Chancery to set limits on the right to redeem which otherwise were perpetual. In effect, the chancery courts allowed mortgagees to bring an action to foreclose the mortgagor's right to redeem. After a successful action, the Courts would give notice to the mortgagor that, if he did not exercise his right to redeem within a fixed period set by the Court, he would find this right forever foreclosed. By the early nineteenth century, this period was accepted as six months from the date of the hearing of the case. Nevertheless, the mortgagor retained a perpetual right to redeem unless the mortgagee took steps to force the issue.⁸ Without a court of chancery, mortgagors could not exercise their right of the equity of redemption, and mortgagees could not foreclose.

However, by 1809, mortgagees had access to measures that seemingly eliminated redemption altogether and yet gave them the means to seize lands. By the early eighteenth century, a judgment creditor could attempt to get satisfaction for a debt in arrears through three writs. *Fieri facias* attached the debtor's chattels, and *levari facias* his crops. *Elegit* gave the judgment creditors the right to use half the debtors' lands until the debt had been satisfied. Mortgages were an entirely separate form of obligation and will be discussed shortly. None of the three writs seized and transferred title to a landed estate. This limitation was set aside in the colonies in 1732 by *An act for the more easy recovery of debts in his Majesty's plantations and colonies in America*.⁹ Land became subject to seizure by a writ of *fieri facias*. The 1732 *Act* applied to Quebec after France had ceded it to England. Then, the *Act* would have applied to Upper Canada too, as a part of old Quebec, except that in 1792 the colony introduced the law of England relative to property and civil rights.¹⁰

⁸ *Ibid.* at 241-47.

⁹ (U.K.), 5 Geo. 2, c. 7.

¹⁰ W.R. Riddell, "Fi Fa' Lands in Upper Canada" (1929) 7 Can. Bar Rev. 448 at 448-51.

Of course, the law of England did not permit the seizure of land by *feri facias*. In the confusion as to which law applied, the half-century old colonial practice of having the sheriff seize and sell lands was disputed. In 1798, the Court of King's Bench for Upper Canada could not decide whether a motion for *feri facias* could be issued for land. Only two judges had been present and they disagreed. The next year, with three on the bench, the court upheld that a *feri facias* could issue for goods, chattels, lands, and tenements. An Act of 1803, 43 Geo. 3, c. 1, controlled the use of the *feri facias* writ on lands, but the legality of the practice remained in question until upheld by a Privy Council decision in 1809.¹¹ One of the reasons that the English judges (Allcock and Thorpe) who came to the colony were perturbed about the absence of chancery, and raised the matter with the colonial office, was that the *feri facias* method for securing land had not been confirmed. As well, Thorpe did not approve of it, for he could not see how such a writ could apply to land held in freehold.¹²

Although a short account of a complicated matter, two assertions are relevant to the chancery question. First, Upper Canadian creditors had sought to work in a new world tradition of law that had upset the protection granted to English creditors. Second, creditors had acquired a preference for the *feri facias* and managed to get it firmly installed by 1809. These observations will help to clarify why an absence of a court of chancery essentially failed to hobble creditors, for their counsel knew well how to work the common law and its colonial variants to get the most out of a system of law that excluded equity. But the complicated tale does not end here. Careful barristers working for nervous mortgagees eventually took precautions assuming that equity slumbered and could awake at any time to wreak havoc on the land market.

The peculiar condition of Upper Canadian civil law imposed no real hardship on mortgagees after 1809. It truly disadvantaged mortgagors. In the strictest sense, these terms did not quite apply in every case, because what vendors got from buyers was not always

¹¹ *Ibid.* at 451.

¹² Letter from Allcock to Sir George Shee (14 March 1806) reprinted in *Report on Canadian Archives* [1892], xiv.

a true mortgage but a bond – an instrument under which the debtor agreed to pay a stated sum on or before a specified day. If the conditions of the bond were not met, the creditor could use a *feri facias* to secure lands. Thus, in these circumstances in Upper Canada, mortgagees could enforce a good possessory title to the mortgagor's land by an action of ejectment. If the mortgagor failed to come forward with the principal, interest, and costs, the mortgagee would get possession and practically the same result at law as if he had foreclosed in equity. Some protection was granted the mortgagor, though arguably not as much as he would have had with an equitable jurisdiction. In the estimation of Falconbridge, "the possible difference [was] that he [the mortgagee] got a speedier remedy than he would have got in equity"¹³ – an advantage to mortgagees in these circumstances. Other mortgagees had lent money on the security of land and they used the same procedures for recovery. It is not clear to me that both types of mortgagees were in the same situation, but in either case mortgagors were at a disadvantage as they could not exercise the right of redemption. Clearly, if a true mortgage had been negotiated, the ejectment process retained one worrisome problem for the mortgagee. Some mortgagees felt that all of English law extended to the colony despite the lack of a court for equity. Therefore, all that was required to bring equity into operation was a court which would permit dispossessed mortgagors to reclaim their former estates by exercising the then perpetual right of the equity of redemption.

For mortgagees, the puzzle was to find a means to pre-empt any right of redemption or, in other words, a way to foreclose. The trick was to do this without admitting that mortgagors had a latent right to redeem. Not surprisingly, they found a solution by recourse to the colonial creditor's friend, the *fi fa*. Basically, a mortgagee treated the equity of redemption as an estate in land, and had the court issue a writ of *feri facias* for a sheriff's sale of the land *and* the equity of redemption. The sale of the latter had no foundation in law because the equity of redemption could not be dealt with by

¹³ J.D. Falconbridge, *The Law of Mortgages of Land* (Toronto: Canada Law Book Company, 1942) 58.

a common law action.¹⁴ However, should equity have been stirred to life, the procedure could have been used as evidence to strengthen a mortgagee's claim to an absolute title. More immediately, the compliance of court officers in executing writs, legally valid or not, was intimidating.

It is being too gentle on mortgagees to describe their conduct as neutrally as did Falconbridge in 1914. Falconbridge portrayed the mortgagees as "perplexed ... to give [their] title[s] the sanction of some judicial proceeding."¹⁵ True, they had a problem, but it arose from the convenience of two colonial expedients devised to speed and secure recovery. They were perplexed only to erase all risk and attain a position greatly superior to that condoned under English law. If mortgagees were perplexed it was merely because, like most people, they wanted to have their cake and eat it too. The point of the law, as completed by equity, was to prevent this if such ambition tread upon the weal of petty proprietors. The failure to establish a court of chancery provided a convenience to men of landed capital; the men who held large estates and partitioned them for farmers or town dwellers. It cannot be proven that at first this advantage was planned, any more than it can be proven that equity was kept out because of its poor repute in England. However, from sources from the 1820s, exclusion by design henceforth becomes a likelihood, and one of the central figures in the exclusion was John Beverley Robinson.

By the time that Robinson occupied positions from which he could influence the anomalous equity situation – first as Attorney General (1818–1829) and then as Chief Justice (1829–1862) – expediency was in the saddle. It was vain to insist, as he would, that equity had no substance. The expedient of treating the putative equity of redemption as real property gave equity a *de facto* standing; the 1792 *Act* likely had given it a *de jure* basis. Despite these inconvenient facts, Robinson would deny that equity had a trace in the legal life of the colony. Among other things, he would allege that if equity were accorded any weight it would harm men

¹⁴ R.W. Turner, *The Equity of Redemption: Its Nature and Connection with Equitable Estates Generally* (Cambridge: Cambridge University Press, 1931) at 161.

¹⁵ Falconbridge, *supra*, note 13 at 59.

who had entered into agreements under the assumption that equitable forms were not in the colony. Later we will see that such men were not so unaware of equity, and that Robinson had personal and "ideological" motives for resisting the jurisdiction.

II. JOHN BEVERLEY ROBINSON'S DISAPPROVAL OF EQUITY

In 1818, the colony had a new Lieutenant-Governor, Peregrine Maitland, and a new Attorney-General, John Beverley Robinson. Almost from the beginning of their association, they dealt with the matter of chancery, but they did so tepidly. Maitland seems to have been the more actively concerned. On 12 May 1828, Robinson wrote an account of his involvement with the chancery issue as he recalled it. He believed that it had engaged Maitland's attention for many years, but that his own involvement had begun in 1822. Robinson thought that he might have been instructed by Maitland to discuss the Court with the Colonial Office during his mission to secure more revenue from the duties collected by Lower Canada. On that occasion, Robinson found himself busy working against a projected union of the two colonies. He claimed that he could not recall whether he had raised the subject of equity.¹⁶

Robinson returned to London in 1825, instructed by Maitland to discuss government concerns. The topics covered the great political issues of the day: the clergy reserves, alien naturalization, trade with the United States, and revenue. One instruction dealt with an area of chancery. Maitland wished to know whether he could alter letters patent fraudulently obtained; in other words, act to remedy the common law.¹⁷ He may have gone further in his verbal instructions, for Robinson recollected that he was to mention the chancery issue if the occasion were to arise.¹⁸ Patrick Brode,

¹⁶ Letter from J.B. Robinson to Maitland (12 May 1828) CO 42 (microfilm copy at the Archives of Ontario), vol. 385 at 234-44.

¹⁷ Letter from Maitland to Robinson, Memoranda (22 April 1825) CO 42, vol. 375 at 109-14.

¹⁸ Letter from Robinson to Maitland (12 May 1828) CO 42, vol. 385 at 234-44.

Robinson's biographer, ascribed to him a more active role, but supplied no documentation. "In 1825, during his discussions with Bathurst, Robinson again raised the issue of the province's desperate need for a chancery court."¹⁹ The account strikes me as misleading, for it represents Robinson as the persistent advocate of something which he opposed from time to time. The Attorney-General was himself modest in his 1828 report, more so than his biographer. He thought he might have spoken to the Colonial Secretary.

If, as we can demonstrate on later occasions, Robinson disapproved of major features of equity, then he was in a position to deftly undermine it. A member of the assembly since 1821, he knew that most members from all factions favoured applying revenues to internal improvements and that the reformers were critical of expenditures on official salaries. While Robinson may have been unclear about whether chancery had been discussed with him at the Colonial Office, he had made inquiries about the salary necessary to attract a barrister to Canada to set up a Court of Chancery, and returned with the figure of £2000 per annum. In his 1828 recapitulation, Robinson noted that the legislature of 1826 had pledged to look into an equitable jurisdiction. It had done nothing, he surmised, because it found the costs, which he had supplied, too great. There is nothing to suggest that Robinson was rueful about the outcome.²⁰

The assembly's parsimony provoked the judiciary. Believing themselves overburdened, the judges forwarded a memorial to the Colonial Office in July 1826. Noting the Lower-Canadian bench had eleven judges, they appealed for an augmentation of the Upper-Canadian establishment.²¹ Robinson's discussions of 1825 and this request of 1826 conceivably had moved London toward a resolution. However, instead of a successful conclusion, the matter of the Upper-Canadian courts collapsed into a notorious muddle. On 9 April 1827, Lord Bathurst, the Colonial Secretary, sent Maitland a

¹⁹ P. Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto: Osgoode Society, 1984) at 149.

²⁰ *Ibid.*

²¹ The Memorial of the Chief Justice and the Judges of His Majesty's Court of King's Bench in Said Province, CO 42, volume 378 at 10-12.

dispatch dealing with the memorial, approving the appointment of an additional judge and wondering about "an enlargement of their jurisdiction":

I understand that at present there is no Tribunal in the Country discharging the functions of a Court of Equity, and that there is consequently a failure of justice in those numerous and most important cases which belong exclusively to courts of that nature.²²

Bathurst advised that a separate court was not required. One of the judges of King's Bench could assume the duties under the title of Master of the Rolls or Vice-Chancellor. Further, he authorized the allocation of sufficient Crown revenue to support the addition of a judge, and advised that if such revenue cut into other projects, these should be postponed. His remark would have had the potential to stir a hornets' nest for he was ordering the colony's priorities in a way that was sure to antagonize the reformers in the assembly if it had to legislate a new court. But would the prickly legislators have to be brought into the picture? In closing, Bathurst alluded to a constitutional matter that seemed innocent enough. He was not sure what was required to appoint a new judge.

I am not indeed aware, that anything further would be requisite than the usual warrant under the Sign Manual to appoint another Judge, and I may probably be able to shortly communicate to you, that such an appointment has been made. But you will consult the Law Officers of the Crown in the Province, respecting the necessity of obtaining an Act of the Legislature, or of issuing Letters Patent under the Great Seal in order to render the proposed increase to the number of Judges legal and effectual.²³

Within a week, Bathurst was out of office.

The constitutional sensitivity expressed as an afterthought was not misplaced, but the new Colonial Secretary, Lord Goderich, appears to have neglected it when pressed for an appointment by a persistent "place seeker" and equity authority. John Walpole Willis, who pestered Goderich, was led to believe that he would receive a commission for an Equity judgeship in Upper Canada. He also assumed that his salary would begin on 14 July, the day he accepted

²² Letter from Lord Bathurst to Maitland (9 April 1827) reprinted in A. Doughty & N. Story, eds, *Documents Relating to the Constitutional History of Canada*, vol. 3 (Ottawa: King's Printer, 1935) at 367-68.

²³ *Ibid.*

the undertaking from the Colonial Office. Worried that the season for crossing the Atlantic with a family was fast closing, Willis insisted on departing before the question of how he would be appointed as an Equity judge had been settled. He departed with an appointment as a *puisne* judge of the Court of King's Bench and believed that he soon would have a Chancery patent as well.²⁴

Goderich's letter of introduction, addressed to Maitland, did spell out larger plans made for Willis.

It has been in contemplation to make provision for the administration in Upper Canada of that part of the Law of England which in this Country is administered as the Court of Chancery, and it is intended to commit that jurisdiction to Mr. Willis who has practised for several years in the Courts of Equity.²⁵

Goderich alluded to some difficulties that had "delayed the execution of this purpose." The loose ends of the constitutional matters had not been tied up. Within a year, the haste, laxity, and home government's insistence on certain details had stirred up a mighty imbroglio. Willis was to be denied an Equity commission. A genius in a fury, he easily unpacked the skeletons in the colony's judicial closet.

Willis was sworn in as *puisne* judge of the Court of the King's Bench on 11 October 1827. Under the impression that an equitable jurisdiction would be established soon, he set about to draft a plan for a full court. Anyone alert to the assembly's outlook on costs for official positions would have acted more modestly than Willis. Willis interpreted his promised commission as implying a separate court. His draft proposal for a court, dated 24 October 1827, must have gone to Maitland and it seems likely that the arrogant Willis would have circulated his ideas further. There is no proof of his having aired his designs for a court around the little colonial capital, but it is entirely possible that both his memorandum on chancery and another on the establishment of Canadian Baronets made the rounds during November and December. If they had,

²⁴ Letter from W.D. Willis, Minister of Trinity Church Bath, to W. Huskisson (6 May 1828) CO 42, vol. 386 at 311-12; letter from J.W. Willis to Goderich (12 July 1827) CO 42, vol. 382 at 333.

²⁵ Letter from Lord Goderich to Maitland (19 July 1827) reprinted in *Documents Relating to the Constitutional History of Canada*, vol. 3, *supra*, note 22 at 369.

then the twin opposition to a court – from Robinson and from the reform group in the assembly – is quite explicable. To the Canadian-born jurists in a small society, Willis's grand schemes would have piqued jealousy and suspicion. To reformers, his plans would have embodied the evil of men of the long robes seeking to elevate themselves at public expense. After the court scheme had been defeated in March 1828, the dynamics changed and the reformers employed Willis's knowledge and anger to expose the judicial sins of the judiciary.

Willis intended that a Canadian court of chancery would replicate fully the forms evolved in England. It would have afforded relief in cases of accident and mistake, and in matters of account including mortgage transactions. It also would have dealt with fraud, specific performance of agreements, the execution of trusts, and the protection of the property of infants. The care of estates of "idiots and lunatics" had been a specially delegated authority from the Crown and it too would have been introduced. Most duties would have been rare in the lightly settled colony, but mortgages were an area of considerable potential business. Prime business activities, the selling of land and the finance of sales, generated many disputes.

To conduct chancery work, Willis proposed English-style offices. To start with, he wanted "a suitable provision for the Judge and a proper place for performing the duties of the office."²⁶ He emphasized that the handling of monies belonging to suitors of the court, a matter of "delicacy and importance," required the services of an accountant general whose office should be connected with no others. Willis also required a Master in Chancery who would take depositions. The English Court of Chancery took written statements and ordinarily did not take *viva voce* evidence. Willis claimed that a proper court needed a Registrar "whose business it [would] be to attend the Court and enter minutes of proceedings and deliver out the orders and decrees." To file "as of Record all proceedings of the Court," Willis felt that his establishment required a Clerk of the Crown in Chancery. The judge, of course, had to have a Secretary to receive petitions and documents. To ensure decorum and order,

²⁶Memorandum by John Walpole Willis, 24 October 1827, Upper Canada Sundries (microfilm copy in Archives of Ontario), 46944 - 47.

Willis recommended the appointment of a Deputy Sergeant-at-Arms or Tipstaff and Usher. He conceded that the latter positions might be combined. All of the above, he allowed, "will be sufficient for the foundation of the Court." Willis never had an opportunity to press this model with the advantage of a Crown commission. He had drafted the memorandum on October 24; on December 25, he learned that the English Crown law officers had agreed that an Upper Canadian Court of Chancery required colonial legislation. Not surprisingly, when the Lieutenant-Governor canvassed his law officers and Judges of King's Bench for their views on such legislation, Willis recommended a second separate Court establishment.²⁷ To the ambitious Robinson, the younger man posed a multiple threat. He might have his own Court with offices and status; his wife was the daughter of an aristocrat; he had the training and erudition to embarrass others and he was proposing a new social ranking.

The dispatch that Maitland received from the Colonial Office – advising that the Crown should not commission Willis, but rather that the colony should proceed by legislation – provoked a constitutional issue. The opinions of the English Crown Law Officers were outlined by the new Colonial Secretary, William Huskisson, in a dispatch of 25 November 1827 and they made things very complicated. The officers had doubted whether the Crown could create a new Judge in Equity for the colony, without the intervention of Parliament or the colonial legislature. Lord Goderich had made the point that equity was to have been Willis' jurisdiction, but the officers took direct exception.

The Law Officers of the Crown have further suggested whether instead of erecting a distinct and independent Tribunal, it might not be expedient to invest the existing Common Law Court with so much of an equitable jurisdiction as upon due consideration may be thought useful or necessary to the Province, and they observe that this jurisdiction might be exercised as in the Court of Exchequer in England, in the same Tribunal, and by the same judges who administer the common law.²⁸

²⁷ Essay on the Creation of Canadian Baronets by Judge Willis [1827], Upper Canada Sundries, 47558-60.

²⁸ Letter from Huskisson to Maitland (25 November 1827) reprinted in *Documents Relating to the Constitutional History of Canada*, vol. 3, *supra*, note 22 at 370. Letter from J. Scarlett and N.C. Tindal to Huskisson (25 September 1827) CO 42, vol. 382 at 72-74.

Huskisson's dispatch had more to say. He advised Maitland to get the opinions of the Attorney and Solicitor-Generals, and the judges of Upper Canada on how best to establish an equitable jurisdiction. When establishing a new tribunal or imparting new powers to an existing tribunal, the colonial government was instructed to frame the act so as to involve the Crown and accomplish the purposes of the Act. "For the principle that all Courts are Courts of the King, and that justice is to be dispensed only by Officers commissioned by the King for that purpose, cannot be too fully recognized, or too strictly enforced."²⁹ This instruction to involve the Crown raised the hackles of the reform dominated assembly. Ultimately, the question of judges' tenure and accountability sidetracked the effort to legislate a Court in 1828.

Maitland complied with directions and called upon the Crown's law officers, the Attorney-General and Solicitor-General, as well as the three judges of King's Bench, including Willis, to comment formally on the chancery issue. The official letters, drafted in early February, came in time to prepare the government for the forthcoming parliamentary session. Willis' report stressed the necessity of, and legal precedents for, a separation of equity and common law; he did not elaborate here upon details for the court's establishment. Solicitor-General H.J. Boulton likewise favoured a court of chancery apart from the Courts of common law, but his was an equivocal advocacy. If the state of the colony did not require the distinctive mechanism, then Boulton would have been satisfied with a Court of King's Bench whose members were granted specific equitable powers. Judge Levis P. Sherwood and Chief Justice William Campbell flatly recommended that all judges in the Court of King's Bench should also be judges in equity. They took issue with Willis' argument for a separation of equity and common law, and they alleged that the two branches of English justice were not founded upon discordant or incompatible principles. "Equity is

²⁹ Letter from Huskisson to Maitland (25 November 1827), *supra*, note 28.

the soul and spirit of all laws."³⁰ In seeking to undermine Willis, they had either made the case for the law embracing equity or had demonstrated their shallow comprehension of what equity involved.

If Willis had inflated equity, the brief by Campbell and Sherwood had conflated it. Mind you, the home government had just done the same. Goderich had spoken of a distinct jurisdiction; the Crown Law Officers wrote about a combined tribunal. Still, in the brief by the two Canadian judges, there was an over-statement about the similarity between equity and common law. Possibly, the pair was informed by learned English commentary. More probably, they scarcely could have supported a separate jurisdiction because of Willis, and, possibly they knew of his design for a full-fledged court. Whatever the shape, a new separate court meant a drain on prestige and a blow to pride. Sherwood, moreover, had another reason for not wishing to lose control of an equitable jurisdiction; his name floated in the odour of scandal. Sherwood had been co-purchaser of the Chaudière Falls mill site at a sheriff's sale in 1820. The acquisition became a celebrated instance of how the absence of an equitable jurisdiction permitted exploitation of the poor by the rich and cunning (although the victim in this case was actually a sharp operator too). Notwithstanding the character of the alleged victim, a court of chancery could have reconsidered exactly such a case. In subsequent months, Willis would tangle with the Sherwoods whom he came to detest as contemptible manipulators of the law.³¹

Robinson's brief goes a long way in substantiating the suspicion that he had an aversion to equity. It also provides a sample of his independence of mind and his brilliance. Robinson attacked the idea of a court of chancery in an argument that assumed Upper Canada to be such a distinctive society that to introduce the full measure of English law would constitute an inappropriate, in fact damaging, imposition. Besides, he felt, some chancery proceedings were continued in England "principally from a

³⁰ The reports to Maitland were printed in the journal of the assembly. See Upper Canada, House of Assembly, *Journal of the Legislative Assembly, 4th Session 9th Parliament* at 57-61.

³¹ P. Romney, *Mr Attorney: The Attorney-General for Ontario in Court, Cabinet, and Legislature 1791-1899* (Toronto: Osgoode Society, 1986). Letter from Willis to Sherwood (1 March 1828) Upper Canada Sundries, 48243-44.

necessity which the very exercise of such powers has itself contributed to create."³² In other words, if an equitable jurisdiction were not created, many of its functions would not be needed; once created, need would follow and reformation would become difficult. Were it not for the fact that Robinson's smooth reasoning ignored the possibility that equity truly existed in Upper Canada, and only its tribunal did not, he would have had a case. Instead, in later years, he insisted that equity had not entered the colony until 1834.

Robinson also claimed to want to define and confer jurisdiction rather than have to set boundaries after an equitable jurisdiction had been erected. He wrote that he preferred specific enactments. The whole machinery of the English system, he observed, had been thought by some to have been more complicated than even an advanced state like England itself had required. On the surface, Robinson argued like those reformers whose few surviving remarks about chancery prior to 1837 criticized its legendary slowness and complexity. While reformers also favoured remedies by specific enactments, they supported several in 1834 that Robinson would decry. Robinson really could not abide equity by statute, and beneath his brief there was a perception of property rights distinct from that of the reformers.

Robinson *probably* most disliked the right of the equity of redemption; this proposition will be developed later. Without this specific complaint, there are still grounds for seeing Robinson's position on property rights as being at odds with the reformers. To suggest, as he did, that English law was more complicated than necessary hints at Robinson's alignment with the eighteenth-century aristocracy's movement against the old order of law and property rights. In March, when Robinson and the reform-dominated assembly buried the opportunity to create a court of chancery, they acted for different reasons: the former, because common law standing alone met simple needs adequate for a society of decent gentlemen of land or capital; the latter, because equity attained through a court smacked of more opportunity for the administrative and juridical elite whose members glided from government to bench.

³² Letter from Robinson to Maitland (15 February 1828) reprinted in *Journal of the Legislative Assembly, 4th Session 9th Parliament, supra*, note 30 at 59.

Perhaps the lineage and the intent of chancery were enough to set Robinson's teeth on edge. However, this issue seemed to go beyond a mere vision of society. Robinson, more than the other jurists who registered doubts about the need for a court of chancery, also had career-related reasons to argue against and to defeat Willis, the brilliant, ambitious, well-connected, and arrogant interloper. He recognized a rival. In 1841, looking back to this period, Robinson admitted that an increase in the chief justice's salary had enticed him. Earlier, he might have found the bench a sacrifice, for he claimed to have had a rewarding practice. Around 1828, he evidently felt "no anxiety to be CJ."³³ After the affair had blown over and Willis had been dismissed, the Lieutenant Governor filed his report and included an allegation that Willis had set his sights on the Chief Justice's seat.³⁴ It must have occurred to Robinson that Willis – a distinguished barrister with influence in the metropolis – would have been a candidate for the position soon to open. In any event, the Attorney-General, with the support of the Solicitor-General, had been active early in 1828 cutting the ground out from under Willis. They had written to Maitland on 29 January denying the legality of having Willis take on equity cases with a commission as a *puisne* judge of King's Bench.³⁵ The 1794 *Act* establishing that Court had not allowed for an equitable jurisdiction. To have granted Willis special duties on that bench, they asserted, violated the *Act*. This opening shot over the question of how the Court of King's Bench had been organized in Upper Canada could help to explain why, in May and June of 1828, Willis would find that the practice of allowing a vacant seat on the bench had jeopardized justice in Upper Canada. Two could play the game of narrowly reading an act.³⁶

³³ Letter from J.B. Robinson to Sir G. Arthur (28 September 1841) reprinted in G.R. Saunders, ed., *The Arthur Papers, Being the Papers Mainly Confidential, Private and Demi-Official of Sir George Arthur*, vol. 3 (Toronto: Toronto Public Library and the University of Toronto Press, 1959) at 461.

³⁴ Letter from Maitland to Huskisson (6 July 1828) CO 42, vol. 385 at 194-232.

³⁵ Letter from Robinson and Bolton to Major Hillier [secretary to Maitland] (29 January 1828) CO 42, vol. 385 at 18-20.

³⁶ Letter from Willis to Maitland (30 May 1828) CO 42, volume 385 at 7-8.

Willis discovered, as the basis for a technical argument, that the practice of having but two judges on the bench violated the *Act* and produced deadlocks which permitted the miscarriage of justice. On 16 June, he addressed the court, presenting a long and tightly argued case for the illegality of many proceedings by the King's Bench since 1794. Undoubtedly, a clash between two ambitious men who could see themselves as Chief Justice inspired some of the juridical sniping that created political excitement in 1828. This interpretation of the Willis affair is firmly entrenched in the historiography. The baronetcy proposal, the draft scheme for a court establishment, and several additional observations to follow flesh out the basis for the personal animosity interpretation.

From the tone of letters written by Willis and his aristocratic wife, it is not difficult to understand how personalities poisoned a serious debate over the structure of courts which was ultimately a controversy about the make-up of the law and about property rights.³⁷ When the dispatch which denied him a Crown patent arrived, Willis turned nasty and demanding. Influence, connections, and self-promotion were blatantly expressed. On the day after he received word that he would not receive the commission, he wrote to Maitland about the matter and his brother's comments upon it. He let the Lieutenant-Governor know that his brother had been in correspondence with Mr. Stephen at the Colonial Office. James Stephen had written that "your Brother's Patent must stand still until we can persuade the worthies on the other side of the world [the government of Upper Canada] to assist us." The letter by Willis was both hectoring and condescending. He consequently concluded: "My Brother adds *the consoling reflexion* that my salary is going on."³⁸

After Maitland had removed Willis from the bench on 26 June, the judge's wife opened an aggressive campaign to get the dismissal reconsidered. She threatened to use her influence at home. During the months from March to June, Willis had

³⁷ Letter from Lady M. Willis to Maitland (n.d. probably 25 June 1828; 28 July 1828) Upper Canada Sundries.

³⁸ Letter from Willis to Maitland (26 December 1827) Upper Canada Sundries at 47455-57.

consorted with reform politicians, subscribed to "disreputable" journals and collected information on assorted juridical scandals that had ended favourably for the colonial elite. In Maitland's estimation, "he was not superior to the temptations which circumstances had unfortunately thrown in his way," and could be found "hanging about the lobbies and committee rooms of the House"³⁹ when parliament was in session. Even allowing for the fact that Maitland wrote these lines in justification for removing Willis, it seems likely that an embittered Willis had thrust himself into the political melée in order to strike back at his juridical enemies. The unfortunate part of this indictment is that it evades the importance of the property rights issue which also separated Robinson and Willis.

Robinson opposed Willis for many reasons. One of them was that he disliked aspects of equity. As we shall see, Robinson spoke in favour of an equitable jurisdiction in 1837, but he did so then because legislation already had awakened equity from its forty year slumber. As a brilliant lawyer with a social affinity for gentlemen of capital, Robinson appreciated the implications of equity. When studying law in England, he had heard the Master of the Rolls dispose of chancery petitions and had attended the Court of Chancery.⁴⁰ He surely discerned what a court of chancery could do to property rights in Upper Canada. Unlike Sherwood's possible fears in this regard, Robinson's stemmed not from likely self-interest or fear of further controversy, but from a social philosophy antithetical to an important dimension of equity. Specifically, he disapproved of the right of equity of redemption. As we have seen, the equity of redemption essentially granted to defaulting mortgagors a perpetual right to reclaim their real estate. So long as common law alone functioned in Upper Canada, the debtor tied by bond or the true mortgagor had no effective basis for redemption.

It is true that Robinson's disapproval of this right is not something he flatly stated in 1828. In his letter to Maitland on 15 February 1828, Robinson noted that the introduction of an equitable

³⁹ Letter from Maitland to Huskisson (6 July 1828) CO 42, vol. 385 at 84-86.

⁴⁰ Major-General C.W. Robinson, *Life of Sir John Beverley Robinson Bart., C.B., D.C.L., Chief Justice of Upper Canada* (Toronto: Morang and Co., 1904) at 81-82.

jurisdiction would affect contracts which had not anticipated such a result at the time they were drawn. This assumption has appeal but, as we shall see, it was a weak claim. Upper Canadians had been anticipating equity. Robinson cited mortgages as an example of where contract problems might arise, although he failed to elaborate. Later, in the same critique of chancery, he wrote that "our transactions are more simple in their nature, particularly as respects the disposition of estates, than in England."⁴¹ What did he have in mind when he wrote these oblique passages?

English real estate transactions were more varied than those in Upper Canada, and presumably Robinson felt a rationalized legal system was in order. However, he was not one to rationalize for the sake of rationalization; for example, he does not appear to have used his position in the assembly to simplify criminal law. It was Willis who first decried the backwardness of colonial law and pointed to recent improvements in England. Robinson later accepted modest reformation of capital punishment.

III. JOHN BEVERLEY ROBINSON AS THE MORTGAGEE'S FRIEND

What Robinson meant by simplifying the law was, specifically, the elimination of the equity of redemption. A complicated judgment by Robinson in 1846 provides clues to this interpretation. In *Simpson v. Smyth*,⁴² he offered reasons for disliking the equity of redemption and for his ironic embrace of a court of chancery to control that right. In December 1810, Thomas Smyth, who was seised in fee simple of lots 1 and 2 in the 4th concession of Elmsley Township, mortgaged this estate to Joseph Sewall. The mortgage came due in December 1811, but Smyth did not pay. Quite possibly the recourse to a writ of *feri facias* for the land and the equity of redemption had not yet been widely practised by lawyers in the colony and, since Sewall could not foreclose because there was no equitable jurisdiction, Smyth continued to occupy the estate.

⁴¹ *Supra*, note 32.

⁴² (1846) 1 E. & A. 9, 172, 2 O.S. 162.

Another probability is that the mortgagee had no interest in the wild lands and continued to hope for a cash settlement. By 1825, when the equity of redemption *feri facias* practice was surely well-known, Sewall sued and got a writ issued for a sheriff's sale. It is essential to note that the taking of Smyth's land and "interests" could have been motivated by speculative calculations, because the Rideau Canal project had been announced and the land would become the townsite of Smiths Falls. The matter is pertinent; if true, then the justification for a *fi fa* was considerably more than the defensible purpose of recovering debt and interest.

Charles Jones bought the lands and the equity of redemption at the sheriff's sale in 1827 and sold them to James Simpson and a partner. Simpson, a canal contractor, and his partner sold the property and equity of redemption in 1832 to William Simpson for £5000. Here, then, was an unusual circumstance, for if the mortgagor's heir (a son of Smyth) could recover by payment of a modest debt he would have a windfall and the purchasers would be denied a great profit. But was that unfair if all parties knew that the *feri facias* action to acquire the equity of redemption had been dubious? And what about the taking of the land not for debt recovery but for extraordinary speculative gains? Here was something that equity was meant to redress. Smyth's heir tried to regain the estate in 1836 by common law procedure of ejectment. It failed. In November 1840, under the terms of an 1834 *Act*, he filed to redeem. In July 1841, a decision in chancery supported him. Simpson reopened the case by bringing in other purchasers of the estate. The case failed and was appealed in June 1845.⁴³ On first argument, the Court of Appeal split evenly, but upon reconsideration of Robinson's position, which denied that Smyth's heir could redeem, J.B. Macaulay reversed in favour of the plaintiffs.

The purpose of examining *Simpson v. Smyth* is to establish probable grounds for Robinson's forestalling of equity from around 1822 to 1828, and for his dazzling switch to a support of an equitable jurisdiction in 1837. One of the first questions in the case was whether or not an equity of redemption of an estate could be sold under a common law process. Was the colonial practice

⁴³ *The Upper Canada Jurist*, vol. 2 (1846-48) (Toronto: Henry Rousell, 1848) at 130-37.

legitimate? The equity of redemption was most certainly not an estate that could be attached by a common law writ, but that was what mortgagees had been doing to protect themselves while equity slumbered. Robinson correctly maintained that such conduct was an absurdity; he also remained adamant that equity simply could not have existed prior to 1834. Therefore, the mortgagor of an estate, after conveyance had become complete following a failure to perform a covenant of the mortgage contract, could have had no further interest in it and mortgagees should not have bothered themselves with a negatory practice.⁴⁴

It had not been so simple. The mortgagee's improper expedient arose from a reasonable expectation that equity waited in the wings to spring on stage. Robinson went on to declaim against the 1834 *Act* which stirred up (or, as he would allege, created) equity. He suggested that meddlesome people who "had no concern themselves in such transactions"⁴⁵ had pressed for equity so that mortgagors could move for redemption. Because these parties, he continued, really failed to understand the decency of mortgagees, they sought something superfluous to Upper Canadian conditions. In effect, Robinson claimed that an old and venerable protection for property holders who borrowed or who bought mortgaged lands could have been dispensed with since mortgagees, in Robinson's world, were categorically decent gentlemen. Robinson among them.

It would be interesting to know what had been the nature of Robinson's law practice in the 1820s, the one which he had alleged kept him in such comfort that the bench would have meant a material loss. Had Robinson, prior to 1829, been involved in the real estate market and in mortgage brokerage? Certainly by the mid-1840s if not earlier, the Chief Justice had become a money lender and a property vendor. In 1844, he had put out at least £1800 in five loans. He also had employed an agent to sell lots at Holland Landing and to collect on at least twenty-five more mortgages there.⁴⁶ In *Simpson v. Smyth*, he alleged that there were

⁴⁴ *Supra*, note 42 at 41-42.

⁴⁵ *The Upper Canada Jurist*, note 43 at 175.

⁴⁶ See assorted bonds in the Robinson papers and letters from Robinson to George Lount (18 July 1844; 4 December 1844) John Beverley Robinson Papers, Archives of Ontario.

not many cases where the mortgagee would refuse money and try to keep the estate. Partly, he averred, they would do this because of decency but also because many lands had little value and mortgagees wanted the money. In any event, mortgagees did not have to be forced to behave correctly or even generously!⁴⁷ Perhaps, Robinson had himself in mind. He cited an undocumented instance where the mortgagee had stood aside, though twenty years had passed and property values had soared, and had allowed the mortgagor to pay and reclaim the estate. The heirs of Smyth had found no such liberality. Like his arguments in *Toronto v. Bowes*,⁴⁸ Robinson basically was affirming that men of capital could be excused from the full constraints of the law, for otherwise nothing could be accomplished.⁴⁹ But he also seems to have been claiming that men of capital behaved honourably.

The next stage in Robinson's argument addressed circumstances once equity stirred. It struck him as unfair that mortgagees having spent money to secure writs of *fieri facias* for land and equity of redemption, the latter to get better terms for dealing with the mortgagor, could now be faced with the mortgagor still properly exercising the right of redemption. Mortgagees had panicked and behaved foolishly, but, he cautioned after this slap on the wrist, they should not suffer materially. Even though Simpson, and Jones before him, really had not acquired absolute title, for no one could foreclose without an equitable jurisdiction, they had spent money trying to do so. Additionally, he claimed that they had developed the lands. Robinson smiled upon those men who had acquired the lands. James Simpson was "an active zealous man, with capital at command,"⁵⁰ who had allegedly transformed wilderness into a hub of commerce. It would be a shame to deprive ambitious men of rewards for their manifold efforts.

⁴⁷ *The Upper Canada Jurist*, *supra*, note 43 at 174.

⁴⁸ (1834) 4 Gr. 489.

⁴⁹ P. Romney, "The Ten Thousand Pound Job: Political Corruption, Equitable Jurisdiction, and Public Interest in Upper Canada, 1852-6" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: Osgoode Society, 1983) 143 at 179-83.

⁵⁰ *Supra*, note 42 at 79.

Judge Macaulay took exception to the facts and the implications of Robinson's characterization of the appellants. Shrewdly, he proposed that too much of the rise in value was ascribed to the developers. "[A] great deal more is due to the Rideau Canal."⁵¹ He also dismissed Robinson's claim that mortgagees would return land willingly upon repayment of a debt. In the case before them, Smyth had lost his land in 1825 in order for others to realize a speculative profit and the buyers of lands and interests certainly would have rejected any offer of mere repayment. An implication is that Robinson was stupid – or disingenuous. Beyond Macaulay's questioning of Robinson's grip on reality, he had reservations about the powers of the Court of Chancery.

Macaulay at first believed that the Upper Canadian court could have no greater powers than the Court of Chancery in England, but he later reversed his opinion and accepted Robinson's reconstruction of events leading directly to the creation of the court. In Robinson's account, the Legislative Council had been very mindful of mortgagees' rights when it amended the *Court of Chancery Act* in 1837. The committee of the Legislative Council had manifested "a solicitude to favour or protect mortgagees, not mortgagors, and the amendment was seemingly introduced and adopted mainly with that view."⁵² The court had been empowered "under certain circumstances" to refuse redemption. The equity of redemption was not an interest in an estate, but a mere right to pursue a remedy. Consequently, those who ruled on equity "[could] not relieve [themselves] from the duty of exercising [their] best judgment upon the reasonableness of allowing redemption at all."⁵³ Robinson had not liked that "right to pursue a remedy." However, after its reality had been reinforced by statute in 1834, he deemed a Court of Chancery the best means to see to it that the right could not damage the interests of men of capital, interests which he shared.

⁵¹ *Supra*, note 42 at 103-5.

⁵² *Supra*, note 42 at 185.

⁵³ *The Upper Canada Jurist*, *supra*, note 43 at 178.

In sum, Robinson had a high opinion of men who developed landed estates. As Philip Sworden and Peter George have demonstrated, Robinson had not uniformly favoured industrial and commercial capital in his decisions. He does not fit in every instance the American model of a juridical instrumentalist.⁵⁴ Perhaps neither do American jurists. However, on the important matter of smoothing out the land market, especially to quiet titles in a period of dynamic development, Robinson darted about to assure that, vendors, lenders, and men of capital who picked up lands at sheriff's sales had protection against rights in equity.

Let us return to the winter of 1828. Robinson, as the government's voice in the assembly, was charged by the colonial executive with introducing the matter of equitable jurisdiction. From what we have seen, that was entrusting a lamb to a wolf. There are only two records of what transpired: the journal of the assembly, and Robinson's reconstruction of the events. Robinson brought in a resolution and a draft bill; he claimed to have wanted them passed in sequence or at least to have had the first one passed. It was a simple resolution that favoured the establishment of an equitable jurisdiction. He later explained to Maitland that he wanted this to pass first, before he put the bill, because he sensed that a debate on details would sidetrack the question. Robinson's premonition proved true. He showed a copy of a bill to John Rolph, the reform spokesman most concerned with finding remedies to equity issues through legislation rather than a court. As even Mackenzie had insinuated several years before, Rolph disliked a court of chancery. If Robinson had hoped to upset a court, he could have done no better than to let Rolph get his teeth into details. Only a few days before this episode, Rolph had moved, and Marshall Spring Bidwell had seconded, an address to the Lieutenant-Governor to discover who had signed Willis' letter of appointment. The reformers in the assembly were very touchy about the appointment and tenure of judges.⁵⁵

⁵⁴ P. George & P. Sworden, "John Beverley Robinson and the Commercial Empire of the St. Lawrence" (1988) 11 *Research in Economic History* 217 at 238.

⁵⁵ Letter from Robinson to Maitland (12 May 1828) CO 42, vol. 385 at 234-44; *Journal of the Legislative Assembly, 4th Session 9th Assembly, supra*, note 32 at 86, 100, 102.

What reformers suspected was that the judge responsible for equity would be answerable to the Crown. Huskisson had requested as much. Immediately, the question of judges' commissions derailed the equity debate and the assembly turned to the reformers' cause of an independent judiciary. Later, a committee on equitable jurisdiction drafted a resolution demanding that judges be independent of the Crown and that the Chief Justice should be excluded from the Executive Council, an old complaint raised anew. In his *post mortem* on the affair, Robinson remarked too that "some members were impressed with apprehensions of the delay and abuses which in their minds seemed inescapable from a Court of Equity."⁵⁶ The bill died. Neither Robinson nor many reformers greatly lamented this outcome; Robinson disliked both Willis and equity while some reformers resisted a costly new court and the framing of judicial commissions to make judges' tenure contingent on the pleasure of the Crown.

IV. THE AWAKENING OF EQUITY, 1832 - 1837

The equity issue could not vanish in the mayhem of tangential issues. It was too important and not all members of the juridical elite had Robinson's vision of the law and society. Solicitor-General Christopher Hagerman believed equity to be a necessity. On 6 November 1832, he moved that the assembly strike a select committee on chancery.⁵⁷ By then, the government had accepted the principle that judges should be granted commissions on good behaviour. With the issue of an independent judiciary resolved to the reformers' satisfaction, nothing extraneous could upset a discussion purely about an equitable jurisdiction. However, it is likely that a good many reformers still had misgivings about a court, given chancery's reputation for devouring the estates of those who used it. In addition to Hagerman, the committee consisted of Marshall Spring Bidwell, John Willson, and William Morris, all

⁵⁶ *Ibid.*

⁵⁷ Upper Canada, House of Assembly, *Journal of the Legislative Assembly, 3rd Session 11th Parliament* at 11.

intelligent and independent men. They reported on 23 December 1832, listing familiar gaps in the law. When they turned to mortgages, they hit upon the problem faced by mortgagors and did not mention an alleged difficulty facing mortgagees, the presumed problem stressed by later commentators. As men familiar with the operations of the law, they knew that the inability to foreclose inflicted no hardship when mortgagors could not redeem.

There are at present no means of redeeming mortgaged estates, after forfeiture and judgment in ejectment, and the possession charged under a writ of possession – thus a person who, from inability or any accidental cause, has omitted to pay a trifling sum secured by mortgage on property of great value, at the day it became due, is without the means of reclaiming this property, although he may offer to pay the money owed by him, and may indemnify the mortgagee.⁵⁸

The committee reported against merging equity into the Court of King's Bench, recommended appointing five court officers, and remarked that costs should not be held against an important undertaking. A draft bill attached to the report got through a second reading on 4 February 1833. On 7 February, it went into a committee of the whole for detailed discussion. Quite likely the bill had encountered the opposition of the more radical reformers who believed a new court presented a costly remedy to specific legal *lacunae*. In any event, further discussions by the committee of the whole were precluded by resolutions proposing the expulsion of William Lyon Mackenzie from the assembly. The session ended before the bill could be passed.⁵⁹

During the next session of Parliament, a chancery bill was not re-introduced. There is no apparent explanation for what the legislature chose to do instead. Somehow both a moderate assembly and the legislative council agreed to introduce the right to the equity of redemption by legislation rather than by court establishment. Perhaps moderate practical men merely wanted to start to tidy up mortgage law. In any event, two acts affected mortgages. The first act assented to in 1834 dealt with many points

⁵⁸ "Report to the House of Assembly, on the Subject of the Establishment of a Court of Chancery in this Province, with a Draft of a Bill for that Purpose," *Appendices to the Journal of the House of Assembly, 3rd Session 11th Parliament, ibid.* at 79.

⁵⁹ *Journal of the Legislative Assembly, 3rd Session 11th Parliament, ibid* at 18, 66, 77, 119, 127.

of property law and was styled *An act to amend the Law respecting Real Property, and to render the proceedings for recovering possession thereof in certain cases, less difficult and expensive*. One of the proceedings for recovery was the exercise of the right of the equity of redemption. In England, unless the mortgagee barred the mortgagor by foreclosing on the right of redemption through an action in chancery, the mortgagor could redeem at any time. Indeed, heirs could redeem. In Upper Canada, up to 1834, neither redemption nor foreclosure was possible. However, imitating English revisions, 4 Will. 4, c. 1 inserted one important restriction on redemption. It barred the mortgagor from attempting to redeem beyond twenty years "from the time when the mortgagee took possession, or from the last written acknowledgment." In itself, this passage is peculiar for it limited a procedure without also establishing that procedure. Nothing else in the *Act* dealt with redemption.

It is probable that those who drafted the bill considered its provisions as part of a series of measures concurrently under review. Knowing they were about to stir up equity of redemption, they set limits on it beforehand. The legislation that directly introduced redemption, 4 Will. 4, c. 16, was assented to on 6 March 1834 as was 4 Will. 4, c. 1. The former act, *An Act concerning the Release of Mortgages*, observed that the common law would not permit the reconveyance of the original estate of a mortgagor even if he would perform the conditions of the mortgage after the date of default. Equity had allowed such a reconveyance; a mortgagor could redeem at any time on payment of principal, interest, and costs. The *Act* in question stated that a certificate of payment would release the mortgage and reconvey the original estate, but the prior *Act* had limited the mortgagor's right to exercise redemption to twenty years and had asserted that nothing in that *Act* could interfere with "any Rule or Jurisdiction of Courts of Equity." As pointed out earlier, Robinson apparently abhorred these *Acts* for having stirred equity.

The partial reawakening of equity seems to have provided Upper Canada with another extraordinary situation regarding mortgages. To a large extent, mortgagors could now redeem. The countervailing right of mortgagees to force mortgagors to act quickly or to lose the right was not granted. The right to initiate foreclosure could not exist without an equitable jurisdiction and

foreclosure – not withstanding the *feri facias* expedient – was the sole means by which mortgagees under English law could make their titles absolute. They had to bring an action in chancery for foreclosure. The Court would set a further date for payment of the money due. As mentioned earlier, a six month period of grace was usual. If the money were not paid by the new date, the property would belong to the mortgagee. The *Acts* of 1834 showed that a remedy by statute could threaten to grant to one side an inflexible advantage. Conceivably, the legislators attempted to redress this by the twenty year limit and through an amendment, provided in 4 Will. 4, c. 16, proposed by the Legislative Council. The amendment held that a certificate of redemption "if given after the expiration of the period within which the Mortgagor had a right in equity to redeem, shall not have the effect of defeating any Title other than a Title remaining vested in the Mortgagee, or his Heirs, Executors or, Administrators." Apparently, after twenty years, a mortgagor and mortgagee could agree to a settlement of their old accounts, but the mortgagor could claim his land only if it were still in the hands of the mortgagee or his heirs. If a third party had purchased the land from the mortgagee who had occupied it, then the third party's title was secure.

After March 1834, equity no longer slumbered, but the statutes had not completed the process and property law was about as muddled as before. Mortgagors could redeem; mortgagees could not foreclose but could sell recovered estates and the new purchaser would have a clear title. A court of chancery, therefore, came as a measure to aid mortgagees. After heavy losses in the election of 1836, the reformers were more than ever out of the picture and could not block a court. Creditor interests wanted a foreclosure process. They may also have detected that, while chancery still recognized mortgagors' rights and could grant the practical benefit of six months to try to redeem even after a successful foreclosure petition, chancery could also find circumstances in which to delay foreclosure for six months would harm the mortgagee. Mortgagees and those supportive of their interests might have seen in the court a swifter process. Chancery had permitted the evil of mortgagors' rights; however, unless the *status quo ante* 1834 could be recreated, the court presented the best hopes for mortgagee interests. For the government to extinguish the newly legislated right of redemption

would have been very awkward. It had been one thing to ignore equity. However, the awareness of equity had become too strong. Striking it down also might not have been acceptable to the home government which, after all, had been reproachful of the colony's lack of a court of chancery.

The assembly brought a chancery bill up to the legislative council on 9 February 1837. On 15 February, that body referred it to a select committee with power to send for persons and papers, and to report.⁶⁰ Therefore, almost nine years after the colony's juridical establishment initially had been requested for opinions on chancery, it was again canvassed. Now, however, it had to respond to the select committee's set of specific questions and of the five who wrote in 1827 only Robinson and Sherwood remained.

Sherwood, who had opposed the court in 1828, supported it in 1837. He could scarcely admit that a court was needed to hedge in the 1834 legislation, although he was candid enough about his disapproval of legal devices which favoured debtors. Essentially, Sherwood claimed, for the record, that the colony now required the court because of the increase in commerce and real property business. At first glance, this sounds reasonable, but it implies that, in his eyes, a branch of law was needed merely because of the volume of business and not because of the attributes of justice it conveyed. With regard to the right of the equity of redemption, Sherwood maintained a hard line. He insisted that the sale of the lands of a debtor under a writ of *feri facias* should make the purchaser the owner of the equity of redemption. It is important to restate what this meant. Sherwood was insisting on speedy foreclosure which actually violated the whole intent – the whole history – of the right of equity of redemption. This observation certainly raises doubts about the quality of justice dispensed by this worthy. But Sherwood was consistent. He had not budged from his 1828 stance that the principles of equity and common law were nearly allied. He wrote now that "a thorough knowledge of the latter must necessarily include a knowledge of the former in all its

⁶⁰ Upper Canada, House of Assembly, *Journal of the Legislative Council of Upper Canada, 1st Session of the 13th Parliament* at 115.

essential parts."⁶¹ Of course, equity and common law were not quite so married, but was this statement, like that of 1828, an unintended admission that the law meant the common law and equity?

Sherwood's brother on the bench, J.B. Macaulay, professed neutrality on the question of a court. He wrote that either the King's Bench or a Court of Chancery would do. The court for him was not as important as the content of equity. As had happened more times in Canadian history than national myth-makers would like, a man of influence had turned south for a model. Macaulay favoured codification of equity and looked upon a New York law as a product of experience. He portrayed the legality of sales of the equity of redemption under a writ of *feri facias* as "a floating question." He was wrong, but not intransigent. He observed that New York had prohibited the practice.⁶² Attorney-General Robert S. Jameson contributed little. Along with all, save Sherwood, he correctly acknowledged equity as something quite apart from common law. To have added it to the Court of King's Bench struck him as a remedy making an "incongruous union of jurisdictions."⁶³ William Lyon Mackenzie, who during exile and while in politics once again in the 1850s amassed files of arguments against chancery, alleged that the 1837 establishment of the Court was a job done to advance Jameson and create a vacancy for Hagerman.⁶⁴ If true, the Attorney-General rationalized, but did so accurately. Most likely, as an English jurist with equity training, he spoke from conviction and knowledge.

Solicitor-General Christopher Hagerman, who had attempted to move a chancery bill through the assembly in 1834, came to the point. Chancery constituted "a necessity that has long existed, and is daily increasing."⁶⁵ On the matter of the equity of redemption, Hagerman contradicted Sherwood. He asserted that no mortgagor

⁶¹ "Report of the Select Committee, Upon Chancery Establishment Bill" in *Journal of the Legislative Council, 1st Session 13th Parliament, ibid.* at 81-82.

⁶² *Ibid.* at 84.

⁶³ *Ibid.*

⁶⁴ J.D. Blackwell, "Robert Sympson Jameson" 8 *DCB*.

⁶⁵ *Supra*, note 58 at 87.

should be deprived of equity of redemption. Even in the days before equity's appearance in statutes, lenders ought to have recognized that equity of redemption existed as a latent if not imminent factor. A jurisdiction, he implied, could have been created at any moment. "It is to be presumed that this right [the equity of redemption] was well understood, and in contemplation of all parties at the time of the execution of these securities."⁶⁶ One wonders if the same presumption was not also alive among colonial men of capital in 1827 when Robinson fretted that chancery would introduce a new factor unfairly into contracts. Upper Canada's peculiar property laws, after all, had been commented upon by Judge Thorpe in 1806 and surely had been known as problematic to anyone who made a business of land sales and mortgage lending. Hagerman's comments reveal him as consistent and astute on the equity issue. The Upper Canadian judiciary was not a uniform and intractable body and even one as prone to bluster as Hagerman could shine.⁶⁷

Chief Justice Robinson's comments appeared first in the report of the select committee. Once more Robinson had an occasion to write at length on chancery. His apparent conversion seems astonishing; he waxed eloquent in his support for a court of chancery. Whereas Sherwood was stubborn and Jameson potentially self-serving, Robinson could recognize a lost cause and discover new stratagems for the maintenance of a socio-economic system. The man who in 1827 had wished to curb equity before creating a Court of Chancery now saw no reason for limiting cases – for example, by a minimum sum involved in the suit. "There may be flagrant cases of imposition or injustice under that amount, which should not go without remedy, though the Common Law Court cannot reach them."⁶⁸ Had Robinson grown in wisdom? Perhaps. He had now had eight years on the bench and had been required to deal with cases where justice required equity, and to apply equity without sound authority to do so. Had he become more secure as a Chief

⁶⁶ *Ibid.*

⁶⁷ For an appraisal of Hagerman see R.L. Fraser, "Christopher Alexander Hagerman" 7 *DCB*.

⁶⁸ *Supra*, note 65 at 77.

Justice with no sharp English chancery rivals in sight? Most likely. Had the reawakening of equity in 1834 forced him to come to terms with something he basically disliked? Absolutely. He could see that a court of chancery could do no more damage to mortgagees' interests than the 1834 *Acts*. Indeed, it could rein in mortgagors by foreclosure and by the power to deny redemption. He did not state this in so many words, but wrote, in a more general manner, that Chancery's principles "are not arbitrary or dangerous, but sound and well established, and are in advance of justice."⁶⁹ The select committee had asked directly whether a court of chancery should be restrained from interfering with mortgaged estates in the possession of mortgagees, assignees, or purchasers at Sheriff's sales on the ground of equity of redemption. He saw no grounds for restraining.

The Chief Justice intimated why a court was needed and why it should not be limited. The 1834 *Acts* and even the 1837 chancery bill itself allowed mortgagors to exercise their power of redemption retroactively, back 20 years in the 1834 legislation and back 10 years in the 1837 *Court Act*. A dispossessed mortgagor could pay off his old debt, exercising his right of redemption, and regain his former estate. In a community where property values remained static, the mortgagee, his heirs, and devisees would not have suffered great loss. Presumably they would have benefitted from occupancy, crops, or rents. Such economic benefits, however, did not seem to satisfy the expectations of many participants in the land market of Upper Canada. Here land had become a lively commodity, not just a resource from which to extract a living over the long term. Robinson clearly recognized this. In 1828, he had claimed the colony was different from England. Now he repeated the claim and added reasonable support. "Real estate, it is well known, passes in this country very rapidly from owner to owner." In the process, it would get improved; it could increase enormously in value. Therefore, he could swallow the right of equity of redemption, but only if something could be done to countervail it and guarantee fairness to men of capital. Otherwise those men might discover that estates which they considered as absolute and

⁶⁹ *Ibid.* at 79.

which had escalated in value no longer belonged to them. They wanted certainty; a commodified land market with many turnovers of parcels of real property required certainty of title. There could be no general rule for fair treatment in these instances, claimed Robinson. Thus, he preferred each case be tried on its own and also that there be a proper appeal procedure.⁷⁰ As we concluded earlier, instrumentalism does apply to at least a certain area of Robinson's thought.

A final detail from the briefs given to the select committee deserves comment. English and continental justice had evolved many differences. One distinction was that common law court proceedings, being largely verbal, did not accumulate thick files of depositions. The continental inquisitorial system did build up files, much to the joy of historians. But chancery, with its roots in petitions to the Crown, also assembled documents. The legendary ponderousness of chancery owed much to the collection and examination of depositions. Willis' 1827 plan had included a Master in Chancery who would have handled matters requiring minute investigations. The master would have functioned like the examiner of witnesses in the English Home District who took depositions of witnesses residing within forty miles of London. The juridical experts in 1837 opposed the idea of written declarations in Upper Canada. Hagerman voiced a familiar refrain against English chancery and preferred verbal testimony, believing it would "be found the least expensive and less likely to lead to prolonged litigation."⁷¹ Typically, Robinson had more to say than the others and produced interesting reasons for preferring *viva voce* evidence.

A searching cross examination often detects the intention to conceal or prevaricate, and the demeanours of a witness aids much in giving satisfaction to the mind. Besides, experience proves that depositions may be artfully drawn, so as to produce a false impression, and yet screen the deponent from the guilt of perjury; and many persons in the world, will subscribe to a written affidavit without much scruple. It is best they should be made to tell their own story.⁷²

⁷⁰ *Ibid.* at 78-79.

⁷¹ *Ibid.* at 81.

⁷² *Ibid.* at 78.

Sherwood cited similar reasons.⁷³ The detail on verbal proceedings contributes slightly to the general picture of colonial law as a product of something other than mere imitation. In some cases, the colony's leading juridical authorities ignored English law like the right of equity of redemption; several even turned a blind eye to an improper measure such as the use of *fieri facias* to seize and sell the equity of redemption. They ignored English criminal justice reforms for many years. Here, on the taking of evidence, they set out to change a customary practice. Canadian law drew selectively from the English well. This point is of some interest, although the real challenge is to discover why. To claim concern for the environment is superficial. Robinson, to give him credit, spelled out his reasons for pursuing courses different from England, whether he was writing against equity in 1828 or finding merit in the New York legislation in 1837. These are inconvenient facts for anyone who believes that "Robinson clung to English law and customs" or that "Upper Canada welcomed British institutions and accepted the English rule of law as the basis for freedom."⁷⁴ Moreover, concern for the environment scarcely does credit to Robinson's social attitudes and his reflections on human nature. In sum, standard generalizations have problems.

An *Act to Establish a Court of Chancery in this Province*, 7 Will. 4, c. 2, established a jurisdiction and a court structure that strongly resembled what John Walpole Willis had recommended. First, as he had insisted, equity was not merged with the Court of King's (Queen's) Bench; there was to be a judge known as "the Vice-Chancellor of Upper Canada." Second, the powers were as Willis had enumerated. The Court of Chancery would deal with fraud, trusts, executors, mortgages, dower, infants, idiots, lunatics, specific performance of agreements, and letters patent. Reformer John Rolph found the court's power to compel the discovery of concealed papers or evidence a threat to civil liberty.⁷⁵ It may have been inserted as a recognition of the fact that, in a period before the compulsory registration of property instruments, Upper Canadian

⁷³ *Ibid.* at 81.

⁷⁴ George & Sworden, *supra*, note 50 at 237; Brode, *supra*, note 18 at 175.

⁷⁵ *Christian Guardian*, 15 February 1837.

estate cases involved privately held documentation. Nevertheless, given the history of attacks on the freedom of expression in the colony and the immediate disposition of many reformers to secretive contact, the origin of the measure remains open to interpretation. A third element of Willis' plan, a full complement of court officials, was provided for in the *Act*. The government was to appoint a registrar, two masters, an accountant, and a Sergeant-at-Arms. The *Act* had several distinctive elements. It did provide for *viva voce* proceedings and a Court of Appeals consisting of the Vice-Chancellor, the Chief Justice, and the *puisne* judges. Mindful of the basis for complaints about equity in England, the legislators charged the Vice-Chancellor with defining process and rules of practice "to facilitate the despatch of business and occasion the least expense."

There is no conclusive proof that the 1837 *Act* came about because of the 1834 measures; however, internal evidence as well as our analysis make this a plausible interpretation. Section XI of the *Act* is the only one that spelled out a power that had been declared in the list of jurisdictions in section II. The highlighted power pertained to mortgages. It conferred upon the Vice-Chancellor the authority to make orders and decrees in respect to foreclosure and redemption "where before the passing of this Act the estate had become absolute in law, by failure in performing the condition." Whereas the equity of redemption had been denied for forty years and then put in place by legislative formula, it was now fully alive under the care of the Vice-Chancellor who could treat the rights and claims of mortgagees and mortgagors as appeared to him to be "just and reasonable under the circumstances of the case." It was upon this section that the decision in *Simpson v. Smyth* would hinge.

V. CONCLUSIONS

What can be learned from this labyrinthine sequence of episodes in the history of Upper Canadian civil law? For one thing, puzzling and difficult concepts or seemingly arcane disputed practices should never be avoided, glossed over, or tackled by shortcuts when they have raised passion as equity did. Complaints about a lack of equity came from the only two judges – Thorpe and Willis – ever dismissed from the Upper Canadian bench. This pair and other English judges (Allcock and Jameson) understood equity as supplementing common law. They understood it as necessarily part of the law. We might want to set aside provincialism, the instinct for dismissing English meddling, and admit that they properly disputed half-baked local law. In the case of the dismissal of John Walpole Willis, the chancery muddle precipitated a muckraking review of colonial jurisprudence and a major political excitement prior to an election. Then, too, in coming to appreciate the significance of equity, there is the otherwise curious instance of Mackenzie's work to defeat reforms to chancery, a successful campaign that helped to precipitate the retirement of Robert Baldwin from politics. Neither the attack nor Baldwin's reaction were strange, given the background of the question. Little Mac had come over to Rolph's position, especially after witnessing the nature of the court established in 1837, and discovering, in exile, the existence of European and American jurisdictions spared courts like chancery. In 1851, he moved that chancery be abolished and equity be served by the common law courts. Later in the century, the two systems were combined.

The abstruse principles of equity seem complicated and odd; in fact, though now obscure, they dealt with the definition of the law and, among other things, with basic relations between creditors and debtors. They compelled discussions which would not cease even into our own age when legislation has revised mortgagor and mortgagee rights from time to time. When the significance of chancery is grasped, Upper Canada takes form as more than a notoriously litigious community whose frontier circumstances led to juridical forgetfulness or innovation. Those latter points are easily said and vague. The litigation was not conducted with all the

safeguards evolved by English law. Possibly, economics initially had precluded an equitable jurisdiction. We will never know for certain and that remains an unsatisfactory part of this reconstruction. In any event, by the 1820s, the omission had grown into a convenience – though ultimately a risky one – for men of landed wealth who sold parcels of their estates or for men of credit and liquid assets who lent capital for land purchases. The dimensions of this convenience have yet to be explored; it can only be said now that mortgagors were potentially disadvantaged. How many were affected? How did the quirk in mortgage law specifically benefit some of the wealthy landed and mercantile families of Upper Canada? The precise answer will not come easily, but Henry Bolton opined that the equity of redemption had been sold under a *fi fa* in "numerous, perhaps hundreds of instances."⁷⁶ The shifting demands of a capitalist land market have shaped and re-shaped the mortgage law of Ontario to the present, in a process which had begun during the first decades of the society.

The chancery issue also pertains to hoary debates in Upper Canadian history. Was there a family compact and, if so, what united its members? The colony's pompous legal personalities make any list of potential compact members. Their variety of statements in 1828 and 1837 exposed individual ideas; these compact members could split hairs brilliantly. Sherwood stands out as an obdurate and dull defender of the *status quo*, while Robinson's shift in direction to protect men of capital betrays significant instrumentalism. Basically, however, most shared a colonial elite mentality. This mentality was a bit less than an admiration for English law. They liked their colonial pond. Robinson made the case for excepting the colonies in 1828. In 1837, he revealed an awareness of New York law and a preference for *viva voce* proceedings found in New York though rare in England. We ought to expose loyalty to English law to a critical analysis which assumes there are many traditions within it. It is the way in which public figures selected and assembled the parts, while invoking the name of the whole, that must concern historians who also must keep in mind what was the law.

⁷⁶ *The Upper Canadian Jurist*, *supra*, note 43 at 191.

The tangled chancery question of the 1820s and 1830s finally is partly amenable to the well-known reflections on English law presented by E.P. Thompson in his conclusion to *Whigs and Hunters*. However, Thompson meant the common law when he referred to the law. In our presentation, the law has meant more than that. But let us see how Thompsonian principles work. We can document that in Upper Canada "the law can be seen to mediate and to legitimize existent class relations."⁷⁷ For example, the special uses of a writ of *fieri facias* and the foot-dragging over an equitable jurisdiction fit this generalization. It is worthwhile mentioning that the erosion of limitations on common law writs which occurred in the colonies, first generally in 1732 and then specifically in Upper Canada by juridical action from 1794 to 1809, coincided with a phase in English law when the aristocracy and gentry attempted to turn the law to the service of those with property interests and against those without. Neglecting the establishment of an equitable jurisdiction can be seen in association with the eradication of agrarian use-rights by enclosure acts in the home country. Both "modernized" and both strengthened the position of men who wanted to use wealth actively.

On the other hand, such men could not succeed in imposing new laws and practices that would sweep away entirely older definitions of property and property rights. Thompson maintained that, though the elite might think the rules of law were a nuisance to be overcome, such rules nevertheless existed. They were "a legacy as substantial as any handed down from the struggles of the seventeenth century to the eighteenth."⁷⁸ Interestingly, the doctrines of equity as they applied to the protection of mortgagors had been challenged and then reinstated in the seventeenth century. Some of Thompson's claims are dicey. "If the actuality of the laws' operation in class-divided societies has, again and again, fallen short of its own rhetoric of equity, yet the notion of the rule of the law is itself an

⁷⁷ E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (London: Allen Lane, 1975) at 264.

⁷⁸ *Ibid.* at 265.

unqualified good."⁷⁹ It must be remembered that he meant the common law and it was in the hands of the whig aristocracy. But if we include equity within the definition of the law, then his essential point is more tenable. The rule of the law, broadly but soundly defined, is not simple and not readily extinguished.

In Upper Canada, when the rule of the law was allowed to be less than what it was in England, knowledge of the law's completeness created quandaries and anomalies that cried out for remedy. Indeed, the indiscrete and supercilious John Walpole Willis came into Upper Canada as a vessel of knowledge freighted with a wealth of information about the historical and the contemporary components of civil and criminal law. Quite likely he applied his knowledge to expose colonial misconduct because of vindictiveness. Reformers harnessed his bitterness and made use of his erudition. And why not? The colonial juridical establishment had countenanced backwardness; it merited criticism by an erudite lawyer steeped in equity. Shortly before his dramatic courtroom address of 16 June 1828, Willis had published in a United-States newspaper notice of his intention to produce an account of Canadian jurisprudence. He evidently attached a motto to the project: *Meliora Sperans*.⁸⁰ Hoping for something better was an understandable ambition for an English jurist who had published two treatises on equity.

Willis survived his dismissal by Maitland. The Secretary of State for the Colonies declared in 1831, in respect to the events of 1828, that Willis' "personal honour and integrity were free from reproach." He sat on the bench in British Guiana and New South Wales. "Honest and fearless, and alert to prevent fraud and oppression, but [lacking] the judicial temperament," Willis made enemies in Australia and was sacked a second time by a colonial governor. A Melbourne newspaper that had opposed him said, upon his removal, "we like him the better that he has never administered one kind of justice to the rich and another kind to the

⁷⁹ *Ibid.* at 267. For a critique of this position about the common law, see the review of *Whigs and Hunters* by M.J. Horwitz in (1977) 86 Yale L.J. 561-66.

⁸⁰ Clipping enclosed in letter from Maitland to Huskisson (6 June 1828) CO 42, vol. 385 at 6.

poor.⁸¹ One wonders how Upper Canadian law would have developed if Willis, rather than Jameson, had been its first chancery judge. Indeed, what if Willis instead of Robinson, had been made Chief Justice of Upper Canada?

⁸¹ "John Walpole Willis" in *Australian Dictionary of Biography, 1788-1850*, vol. 2, (Melbourne: Melbourne University Press, 1967).