Law Transplanted, Justice Invented:

Sources of Law for the Hudson's Bay Company in Rupert's Land, 1670-1870

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SOURCES OF LAW FOR THE HUDSON'S BAY COMPANY IN RUPERT'S LAND 1670-1870

BY

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Abstract

Upon its creation on 2nd May 1670, the Hudson's Bay Company received territorial rights to a vast land that would become the Canadian North West. These were chartered rights that carried with them the obligations of providing good governance of the territories and maintaining order throughout "Rupert's Land", the name given the territory by the Company's charter. The Hudson's Bay Company remained the overlord of these territories — both *de jure* and *de facto* — for nearly two hundred years.

The Company, while it never transplanted the formal English common law all at once, brought bits and pieces of law to Rupert's Land. Some came in the baggage of the Company's servants, such as the common law of master and servant that governed the lawful employment relationships in the Company's factories and forts during the seventeenth and eighteenth centuries. The Company exercised its legislative power to create rules and regulations for the governance of Rupert's Land. Throughout the eighteenth century, however, this aggregation of laws that governed Company servants, both written and unwritten, touched *only* Company servants. Trading practices and marriage alliances adhered to Aboriginal customs, and the Company did not transplant criminal and civil law to Rupert's Land.

The judicature established in the colony at Red River, therefore, had no Company model to follow. Sir George Simpson, governor of Rupert's Land in 1835, established in that year the first regularly convening court of law. Rather than relying on Adam Thom (the first recorder of Rupert's Land) or his expositions on English law, the men who staffed the courts largely invented justice as they went along.

Contents

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Chapter 1
Introduction

In 1715, James Knight, the governor of Rupert's Land, called together his council at York Fort to try Thomas Butler, a servant of the Hudson's Bay Company, for feloniously stealing from the Company's storehouse, slandering the Honorable Company, and attempting to subvert the lawful government of Rupert's Land. Knight and his council thoroughly recorded the trial at every stage. There was a pre-trial process. The commission (granted by the Company) conferring authority on Knight and his council to exercise criminal jurisdiction was read. The "high crimes and misdemeanours" against Butler were listed. Once the preliminary part of the trial was completed, Knight and his council swore in witnesses and examined them under oath. Once this evidence had been laid before the governor and council, the accused was allowed to produce his own witnesses and speak in his defense (according to Knight, Butler brought no witnesses forward and spoke "but little in his own defences"). Knight and council pronounced Butler guilty, but did not record his punishment.[1]

This anecdote illustrating the Hudson's Bay Company's administration of criminal justice in the eighteenth century is deceptive. Taken in isolation, it portrays the Company as an active body politic, concerned with governance and mindful of its responsibility to maintain law and order within its chartered territories. However, the incident was extraordinary because it was isolated; the resident governors of Rupert's Land rarely called together their councils to exercise criminal or civil jurisdiction. But as an incident, it directly engages the

[1] York Post Journal, 27 December 1715; B. 239/a/2, fos. 75-77, Hudson's Bay Company Archives, Provincial Archives of Manitoba: Winnipeg, Manitoba. [Hereafter: HBCA, PAM].

question asked in this study: what kind of law, and what kind of legal institutions, did the Company transplant to Rupert's Land during its two-hundred year rule?

The question eludes a simple answer because the governor and committee, the Company's main governing body resident in London, never attempted to transplant a common law legal system to Rupert's Land to govern the fur trade. They had no need to do so; nearly all the permanent residents in the Company's territories until the 1770s were Natives and Company servants. Disputes rarely arose between servants during this time, and the Company had other methods at its disposal to maintain order within its ranks. The courts that the Company did call together during the late-seventeenth and eighteenth centuries took their structural form from the dictates laid down by the Company's charter of 1670. It gave the Company the power and "authority to appoint and establish Governors and all other Officers to govern" Rupert's Land, and gave the appointed governor and his council "power to judge all persons belonging to the said Governor and Company or that shall live under them in all Causes whether Civill or Criminall according to the Lawes of this Kingdome and to execute Justice accordingly".[2] This roughly resembled a conciliar model for procedure: a court composed entirely of executive officers who were judges of both fact and law, without the aid of a jury to come to a verdict. This, of course, did not exclude the possibility of the Company's addition of a jury to legal proceedings — it merely conferred power on the resident governor and council to judge all cases in the absence of a population from which to draw a jury. During its first 140 years in Rupert's Land, the resident governors relied on this conciliar model for the courts they convened.

Legal machinery may have been absent in Rupert's Land but law still governed the relationships of the Company and its servants. In addition, the

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[2] *Charters, Statutes, Orders in Council Relating to the Hudson's Bay Company* (London: Hudson's Bay Company, 1931), 18.

London Committee held a legislative power to regulate the Company's internal affairs, and servants were bound to follow the London Committee's regulations. Chief factors in charge of the Company's posts in the Bay had direct authority over the resident servants, and they used that authority to maintain discipline and enforce Company regulations. In essence, the Company had two jurisdictions in Rupert's Land: a universal criminal and civil jurisdiction over all persons within its territories, and a specific jurisdiction over its servants. The jurisdiction that the Company enjoyed over its servants was not absolute; it had to conform to the limits governing the lawful relationship of master and servant at common law. This law explicitly demanded the servant's submission to the master's orders and vested the master with power of correction in instances of insubordination. The Company exercised most of its authority through the personal management of chief factors resident in Rupert's Land, and rarely resorted to formal legal proceedings to maintain order. In fact, it did not have a well-established system for dispensing criminal or civil justice. It left nothing in the way of substantive law for Rupert's Land. It left no model to influence the structure of Red River's judicature.

When Thomas Douglas, the 5th Earl of Selkirk, purchased 116,000 acres of land from the Company for the purpose of establishing an agricultural settlement at the forks of the Red and Assiniboine Rivers in 1811, it was the first opportunity to establish formal and permanent legal machinery in Rupert's Land. This opportunity, however, was complicated by early conflict with the North West Company, which adamantly denied the Hudson's Bay Company's chartered claims to the soil. The North West Company's constant attempts to frustrate the colony, and the Hudson's Bay Company's repeated retaliations against its competitor exploded in violence, and the colony was not firmly planted until 1822 after the two companies had merged and the competition over the fur trade had ended.

Between 1822 and 1835 the colony existed in relative peace and experienced moderate growth. Administration of both civil and criminal justice, however, was irregular. Alexander Ross, one of the councillors of Assiniboia appointed after the Company bought back the settlement from Selkirk's heirs and executors in 1835, described it as a "smoothing system" where disputes "were settled by the Governor himself, or not settled at all — as often the one as the other".[3] The various incidents that required the attention of the governors of Assiniboia from 1822 to 1834 reflected a personal system, dependent on the ability of the governor to settle disputes and do justice between parties.

On 12 February 1835, George Simpson, governor of Rupert's Land, informed the council of Assiniboia that "the time is at length arrived when it becomes necessary to put the administration of Justice on a more firm and regular footing than heretofore".[4] He desired a regular court in Assiniboia to enforce the laws, maintain the peace, and protect the Company's interests at Red River. The council agreed, and adopted Simpson's plans to divide Assiniboia into four districts and establish a quarterly court of the governor and council of Assiniboia. The council reformed the structure of Red River's judicature several times between 1835 and 1839. By 1839, Assiniboia had been divided into three judicial districts, and definite dates were established for the meetings of the General Quarterly Court.

When Sir George Simpson proposed his judicial reforms to the council of Assiniboia in 1835, he created a new system from scratch. There was no model left behind from the Company's administration of the law in the eighteenth century, and the settlement had previously relied on the individual discretion of the

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[3] Alexander Ross, *Red River Settlement* (Minneapolis: Ross and Haines, Inc., 1957; originally published 1856), 173.

[4] Minutes of the Council of Assiniboia, 12 February 1835; E. 16/2, fo. 6 [HBCA, PAM].

governor and appointed magistrates. Clearly, there was no 'evolution' of a criminal or civil judicature in Rupert's Land: Simpson and the council of Assiniboia created it. Simpson had to look elsewhere for models for the court's structure. He used the foreign, English county courts as a structural model — the General Quarterly Court of Assiniboia resembled a combination of the quarterly Sessions of the Peace (held four times a year, once during each legal 'term') and the biennial Assizes in any given English county.[5] The jurisdiction of these different courts back in England revealed their different relationships with the crown and the community. Justices of the Peace (JPs) staffed the Sessions of the Peace, and their jurisdiction was limited to minor and local affairs, such as taking recognizances for good behavior, fining petty criminals, and suppressing unlicensed inn-keepers.[6] In addition, JPs possessed the authority to call men and women of their jurisdiction before them outside of sessions, to exercise a summary jurisdiction. The JPs were largely local authorities, drawn from the gentry and responsible for the peace and good order of the community. The Assize judges were royal justices on circuit. They were servants of the crown, and their jurisdiction included felonies, which were offenses against the King's (or Queen's) Peace.[7]

In addition to reforming the districts and petty courts of Assiniboia in 1839, the Company created a new officer: the recorder of Rupert's Land. The title invoked images of the Recorder of London — the chief officer selected by the mayor and aldermen to preside over the city's courts. It represented a conscious

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[5] It is worth noting that Middlesex, one of the counties of London, had one court (Quarterly Sessions, although they met nearly twelve times a year) that acted as both the Sessions Court and the Assize Court.

[6] Louis Knafla, *Kent at Law 1602* (London: HMSO, 1994). This book provides an overview of one full year of litigation in Kent's county courts. The introduction, specifically pp. xviii-xxii, provides general information on the Sessions of the Peace.

[7] J. S. Cockburn, *A History of English Assizes 1558-1714* (Cambridge: Cambridge University Press, 1972).

effort on the part of Governor Simpson and the London directors to bolster their chartered jurisdictional rights and to ensure that legal proceedings in Rupert's Land were indeed legitimate. The recorder also had a prominent role to play in the Red River settlement. He served as a councillor and, as the only legally trained man of the council, he was the legal organ of the General Quarterly Court. It had the potential of becoming a court of record — a court that could act not just as a forum for dispute resolution, but also issue judgments that would reflect the law of Rupert's Land.

Adam Thom, the first recorder of Rupert's Land, entertained this ambition when he arrived at Red River in 1839. His first self-appointed task was to set the General Quarterly Court on solid legal footing. Thom wrote to Simpson in 1840 to tell him (in his typically self-congratulatory manner) that "the systematic establishment of trial by jury and the practical introduction of fixed and invariable rules of decision have inspired the public at large with implicit confidence in the Court of Governor and Council".[8] Thom drew up comprehensive civil and penal codes for Rupert's Land in order to establish a source of law for the Court's administration of criminal and civil law. In addition, Thom suggested that the Company introduce the laws of England of 1840, with modifications, to remedy "the more glaring evils of the existing system".[9] These 'glaring evils', as Thom saw them, lay in the discretionary power of the local authorities. Without a clear statement of the law in the form of a code to act as an authority, the governor and council of Assiniboia had too much arbitrary discretion. Thom submitted his codes and his suggestion to alter the date of reception for the London directors' review in 1840.

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[8] Thom to Simpson, 27 July 1840; D. 5/5, fo. 293 [HBCA, PAM].

[9] Thom to Simpson, 29 May 1840; D. 5/5, fo. 281d [HBCA, PAM].

The London directors, who had initially supported Thom's desire to codify the laws of Rupert's Land, frustrated Thom's efforts. They rejected his codes and advised him to "follow the regulations laid down by the Charter of judging all persons belonging to the said Governor and Company or that shall live under them, in all causes whether civil or criminal according to the laws of this Kingdom".[10] They also refused to legislate for the settlers as they did for the management of the fur trade. The London directors were primarily concerned with form, and wanted all the legal proceedings within its courts to conform to chartered specifications. Any deviation from the charter was, in essence, illegal. Any illegal act under the authority of the charter endangered the Company's territorial and monopolistic privileges.

This left Adam Thom and the settlers at Red River with no clear statement of what laws were in force. The governor and council of Assiniboia had passed various regulations which were collected into a small 'code' in 1841, but it covered only local laws. What laws governed contracts for goods and services or personal wrongs? What sort of criminal law did the court administer? Thom addressed this problem when he charged the grand jury in 1845, the second in Red River's history: "according to the fundamental principles of colonial settlements, Rupert's Land, unless its Charter had positively determined the contrary, would have been subject to the laws of this kingdom, as existing at the time of the grant. Our principal rule of decision, therefore, is the law of England, of 2nd May, 1670".[11] Thom had identified other sources of law for Rupert's Land in his 1840 essay, *Observations on the Law and Judicature of Rupert's Land*, but Thom left the bulk of the law — and particularly the law that governed the everyday relations

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[10] Smith (HBC Secretary) to Thom. 19 March 1842: A. 6/25. fo. 172d [HBCA. PAM].

[11] Adam Thom. *A Charge Delivered to the Grand Jury of Assiniboia* (London: E. Couchman. 1848). paragraph 13.

of the settlers (i.e., contracts, torts, and crimes) — undefined. 'The principal rule of decision' for cases before the General Quarterly Court rested on a law that no one knew.

The court had other sources of law to draw from. The settlers had Richard Burn's *Justice of the Peace* and William Blackstone's *Commentaries on the Laws of England* — both written in the eighteenth century — available for their use. The council of Assiniboia finally rid the colony of the 1670 reception date in 1851, when it legislated into force the laws of 1837 (the accession date of Queen Victoria). In the same year, Governor Eden Colvile handed Adam Thom the deed revoking his commission as recorder of Rupert's Land. With Adam Thom's departure, the Company abandoned its hope of using the court as a legal organ to further its chartered claims. The court became the forum for criminal trials and civil disputes at Red River, where litigants could take their cases for judgment or arbitration. The 'principal rule of decision', no longer an unknown and antiquated law, became common reason.

The Hudson's Bay Company's transplantation of law to Rupert's Land from 1670 to 1870 did not follow a simple or straight path. There was no initial transplantation of legal machinery that grew or evolved into judicature sufficient for a colony. Nor did the governor and council's administration of justice from 1821-1834 lay any foundation on which to build regularly convening courts of law. In order to establish the appropriate machinery to administer justice on a regular and predictable basis for the Red River colony, Simpson had to look outside of Rupert's Land for models. But to conclude that the Hudson's Bay Company did not bring law with it to Rupert's Land would be erroneous. The common law of persons that governed the relationship between master and servant followed the chief factors and lower employees to the shores of the Bay in the late-seventeenth and eighteenth centuries. The London Committee passed

numerous regulations that comprised a body of laws in force to govern the conduct of its servants — both chief factors and common laborers — even if these laws existed only for the governance of the fur trade. Moreover, the source of authority for all the Company's activities sprang from one document: the Company's charter. It was, in essence, the first law transplanted to Rupert's Land. Every captain, governor, and chief factor held his commission from the Company by virtue of its charter. Every formal court called together by the resident governor and council derived its power from the charter. The General Quarterly Court of Assiniboia took its basic structure from the dictates of the charter and administered justice by its authority. Understanding the Hudson's Bay Company's legal transplants to Rupert's Land requires an understanding of the Company's charter. To understand the charter as a legal document requires that it first be returned to its historical context in seventeenth century England.

Chapter 2

Prerogative, Charter, and Common Law: The Principles of Incorporation

In 1607 'certain worshipful Merchants of London' sponsored a ship under the command of Henry Hudson to search the Arctic seas for a Northwest passage to the East Indies. It was a time of exploration, when the legacy of the Elizabethan 'commercial empire' and the demand for luxury imports prompted London's merchant élite to seek new trade routes to the East and to scout North America for lucrative colonial ventures. Hudson, however, was not as successful in the Arctic as he had been for the Dutch in previous years: his lasting northern legacy was the discovery in 1609-10 of the Bay that was to hold his mortal remains and his immortal name. Merchants continued, at various intervals, to sponsor voyages to Hudson's Bay, and in the 1660s two French explorers made feasible the idea of a permanent trading company in the Bay.[1]

E.E. Rich has exploited this fantastic narrative with an almost Victorian flair for romance and adventure. This chapter will explore a slightly less romantic narrative, but one of no less importance than the story of Hudson, Groseilliers, and Radisson: the story of the royal charter granted under the great seal of England to the Governor and Company of Adventurers Trading to Hudson's Bay on 2 May 1670. From it flowed all of the Company's rights and privileges, including the right to formulate laws, establish courts, and govern the vast territory of Rupert's Land. Understanding the fundamental legal principles behind the charter, as well

[1] These two explorers were, of course, Médard Chouart, Sieur des Groseilliers and Pierre Radisson, whose exploits are well covered in E.E. Rich, *Hudson's Bay Company 1670-1870*, 2 vols. (Toronto: McClelland and Stewart Ltd., 1960). [Hereafter: Rich, *Hudson's Bay Company*.]

as the privileges and obligations under the charter, is crucial to understanding the legal underpinnings of the Hudson's Bay Company courts.

Most historical literature on the Hudson's Bay Company begins in the seventeenth century, but few works deal with the origin or background of its charter. Most scholars have been content to use the Company's charter as a starting point without discussing its legitimacy and function in the larger context of charters granted to English trading companies.[2] E.E. Rich skirted the core issue of legitimacy by explaining that it was granted at a time when "the [royal] prerogative was high".[3] Rich went further: "the Company throughout its history showed a canny reluctance to bring the charter to the challenge of a test-case in the courts of law", presumably because "even within the Committee there were always those whose political convictions would not support so strong a claim".[4] His analysis left the charter in a nebulous sphere of legality, and he failed to substantiate his assertion that the men within the London Committee believed that the king did not hold the power to incorporate and grant privileges to the Hudson's Bay Company. His interpretation was 'Whiggish' in that he saw the prerogative as being opposed to common law, abused by the Stuart monarchs, and ultimately a loser in the constitutional battle between rule of law and arbitrary will.

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[2] Kathryn Bindon, "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54", in David Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: The Osgoode Society, 1981), 43-87. Dale Gibson, "Company Justice: Origins of Legal Institutions in Pre-Confederation Manitoba", *Manitoba Law Journal*, XXIII (1996): 247-292 [now available in *Canada's Legal Inheritances*, eds. DeLloyd J. Guth and W. Wesley Pue (Winnipeg: Canadian Legal History Project, 1996). Hamar Foster, "Long Distance Justice: the Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859", *American Journal of Legal History*, XXXIV (1990): 1-48. Russell Smandych and Karina Sacca, "From Private Justice to State Law: The Hudson's Bay Company and the Origin of Criminal Law Courts in the Canadian West to 1870", *Manitoba Law Annual*, 1996; Russell Smandych and Rick Linden, "Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800", *Canadian Journal of Law and Society*, XI (Spring 1996).

[3] Rich, *Hudson's Bay Company*, I: 57.

[4] *Ibid.*

Rich's interpretation misrepresented both the nature of the prerogative power and the dominant legal concepts of the seventeenth century that formulated its contextual legal and political discourses. As Howard Nenner explained, "it is unfortunate that an understanding of Stuart England is often confused by the erroneous supposition that law and prerogative were opposed".[5] Perhaps a more persuasive narrative of the political history of Restoration England lies in emphasizing the struggle to define the terms of the constitution rather than as a struggle to paralyze the mechanisms of royal power. Restoration England experienced a number of constitutional innovations — particularly in the area of finance — but these changes took place in the context of the recent memory of civil war, and not in order to advance any goal of parliamentary sovereignty. If we can divorce our view of the king's prerogative from the Whiggish notion that it began as a power superior to the common law (arguably at its apex under Henry VIII) that was eventually harnessed by the force of popular sovereignty, then the prerogative can be relocated in its original position in the seventeenth century law and the body politic.

Understanding the prerogative is essential to understanding the nature and history of royal charters. The crown used the charter as a common instrument, primarily to delegate the authority and responsibility of local governance — whether borough or trade guild — to local leaders. In the sixteenth and seventeenth centuries royal charters incorporated the first great joint-stock companies that controlled foreign trade, and the colonial companies that ventured to the New World. By 2 May 1670 the charter of incorporation was an accepted and recognizable instrument that English government used to delegate powers and

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[5] Howard Nenner. *By Colour of Law* (Chicago: University of Chicago Press. 1977). xi. I have included Nenner's book because it is an excellent survey of law in the political culture of Stuart England. even if he over-simplified the political struggles as "King v. Parliament".

responsibilities in both commercial and colonial governances. The Hudson's Bay Company's charter, far from "a magnificent grant of rights and privileges [and] not a specification of duties",[6] carried with its privileges the responsibilities of government across Rupert's Land and over the fur trade within its monopoly.

The Prerogative and Political Discourse in Tudor-Stuart England

The prerogative emerged from the sixteenth century as a definable power of the monarch, even if with blurry edges. It implied certain political and legal powers proper to an executive, as Sir Thomas Smyth expounded during Elizabeth's reign.[7] Contemporaries viewed the powers reserved to the crown as a fundamental tool for the governance of the realm, not as the unlimited power of an arbitrary monarch. Matters of royal prerogative, although sometimes an exercise of the private affairs of the monarch, remained essentially matters of public governance. The king's proclamation, one of the most common expressions of royal prerogative, was a public declaration touching administration of law. A 1539 statute ordered English subjects to obey proclamations, but also recognized that royal proclamations could not create new law, or threaten the liberties of the English subject: "nor that by any proclamation to be made by virtue of this act [of proclamations, no] acts [of parliament], common laws (standing at this present time in strength and force) nor yet any lawful or laudable customs of this

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[6] Rich, *The Hudson's Bay Company*, I: 56. It is worth noting that Professor Morton correctly interpreted the obligations under the charter — even if Rich did not refer to (or read) his text. See Arthur S. Morton, *A History of the Canadian West to 1870* (London: Thomas Nelson & Sons Ltd., 1939).

[7] Sir Thomas Smyth, *De Republica Anglorum*, edited by Mary Dewar (New York: Harper & Row Publishers, 1974), 59-60. Originally published in 1583.

realm...shall be infringed, broken or subverted".[8] The proclamation, and thus the prerogative, had limitations at common law.

The king's prerogative emanated from the pre-eminence he enjoyed as sovereign. Hardly a Tudor or a Stuart invention, this was based on a long-standing view of kingship. In the medieval sense, the king retained this right as the fountain of justice. The common law courts were, after all, the king's courts, and the common law was the king's law. The prerogative acted as the administrative power of the sovereign crown. It did not exist independent of the common law; in fact it existed by virtue of the common law, providing the king with the powers necessary to lawfully govern the realm.[9] In the contemporary political and legal discourse, Sir Thomas Smyth conceptualized these elements as comprehensive parts of the same whole in an organic 'body politic'.[10] Sir Edward Coke's arguments about the ancient constitution reflected these fundamental ideas, and added force to them by giving them an 'ancient' history. Coke, serving successively as attorney-general, chief justice of king's bench and member of parliament, believed himself part of an unbroken chain of legal thought, and cited evidence from the thirteenth century text of Bracton and the fifteenth century text of John Fortescue to demonstrate continuity.[11]

In the seventeenth century the nature of the prerogative came into dispute, primarily over the actions of the early Stuarts (1603-1649) in the name of the royal 'prerogative'. However, participants in the political world of the Restoration

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[8] 31 Henry VIII, c. 8 (1539); cited in G. R. Elton, *The Tudor Constitution* (Cambridge: University Press, 1960), 27-33.

[9] Nenner, *By Colour of Law*, 49. This point cannot be emphasized enough. Although a few writers during this period — such as Algernon Sydney — placed the prerogative outside the realm of common law, they seemed to be adhering or responding to the Jacobean myth of 'divine right', and remained on the fringes of the political and legal debate.

[10] Smyth, *De Republica Anglorum*, 63.

[11] John Pocock, *The Ancient Constitution and the Feudal Law*, 2nd ed., (Cambridge: Cambridge University Press, 1987), 31-33.

government did not view it as a tool of absolutism that drastically needed curtailing. When contemporaries muttered about the growth of 'arbitrary' or 'popish' government, they expressed concern over illegal abuse of the prerogative by a king and his ministers;[12] most of the political nation did not — indeed, could not — conceive of a government without royal prerogative powers. Even the republican voice, itself a lonely call in a hostile climate, recognized the need for an executive power separate from parliament to discharge the task of administration. The uncertainty after the restoration of Charles Stuart in 1660 produced a number of writers eager to define the power of the monarch within English law.[13] Rather than parliament struggling to restrict the prerogative, MPs, lawyers, and political philosophers all looked over their shoulders to the past to find the proper prescription for circumscribing the king's prerogative. That the ardent divine right royalist Sir Robert Filmer and the republican Henry Neville came up with such different solutions revealed the complexity of the debate and the multiplicity of sources available for interpretation. Nearly everyone involved, though, relied on the authority of the English past — and in some cases its unwritten antiquity — for his particular prescription for the present.[14]

The difficulty lay in finding any agreement on the specifics of the constitution. The general nature remained undisputed, and even Algernon Sydney and other 'radicals' recognized the prerogative as an executive power necessary to any government. Milder republicans suggested that the commonwealth entrust the

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[12] Illegal in the sense that the king's ministers might abuse the powers delegated to them by the monarch. The king could do no wrong — a legal maxim still associated with the sovereign body today — but his power was held in trust for the commonwealth and his delegation of authority could be abused. The king's ministers could deceive the king into making grants that, when executed by the king's ministers, were illegal.

[13] For an example of noted political and judicial writers' attempts to fully define the powers of the monarch during Restoration England, see Sir Matthew Hale. *The Prerogatives of the King*, D. E. C. Yale, ed., Selden Society, vol. 92 (London: Selden Society, 1976).

[14] Pocock, *The Ancient Constitution and the Feudal Law*. See especially Part II, Chapter III, pp. 335-361.

important powers of the executive — foreign policy, disposal of public revenue, appointment of civil and ecclesiastical officials, and command of all English forces on land and sea — to elected councils. The king and his privy council, however, would retain jurisdiction over "the Affairs of Merchants, Plantations, Charters, and other Matters, to which the Regal Power extendeth".[15] Importantly, the vast majority of MPs, JPs, and other political participants regarded suggestions like the one above as unattractive and dangerous because they sought to undermine the accepted nature of kingship.[16] The prerogative remained the power of a pre-eminent sovereign, still in use as a tool for everyday administration of the realm. Although later historians portrayed the prerogative as a mechanism of arbitrary will, seventeenth century lawyers viewed it as an executive power that existed by virtue of the common law, for the better execution of laws of the realm. In practice, this meant that common law courts had jurisdiction over the use, or alleged use, of the royal prerogative.[17]

There existed no contradiction in the pre-eminence of the sovereign being subject to the common law courts; as has been seen, the courts themselves were mechanisms of royal justice with all the force of custom and tradition behind them. But the prerogative was reviewable for another reason: while no writ would run against the king, writs could freely flow against his ministers. The king delegated

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[15] Henry Neville, *Plato Redivivus* (London: 1681), 243. One must remember that Henry Neville was one of the few reformers who suggested that England actually change her constitution using foreign examples such as ancient republican Rome or contemporary Venice.

[16] For a very good general discussion of this point, see: John Kenyon, *Revolution Principles* (Cambridge: University Press, 1977).

[17] G. R. Elton, "The Rule of Law in Sixteenth-Century England", in Arthur J. Slavin, ed., *Tudor Men and Institutions: Studies in English Law and Government* (Baton Rouge: Louisiana State University Press, 1972), 265-294. See especially, pp. 271-75. Cf., J. Hurstfield, "Was there a Tudor Despotism after all?", *Transactions of the Royal Historical Society* (1967), 83-103. It is my belief that Hurstfield confused what he believed was the intent of Henry VIII (despotism) with the accepted constitutional discourse (limited monarchy). Whether Henry Tudor strove for despotism, or absolutism, England had a constitutional structure that he had to contend with, and it obviously favored the rule of law and limited prerogative.

authority by virtue of the prerogative, but once that authority was delegated, the common law courts had the right to review the form of the king's grant.[18] Its place in the Restoration discourse, however, was secure. The prerogative — essentially the executive power of the sovereign — was a fundamental attribute of the English constitution and most of Charles II's contemporaries saw it as properly belonging to the crown and no other body.[19]

The host of seventeenth century politicians and philosophers who argued over limits to the royal prerogative were familiar with charters granted as letters patent. Consonant with the prerogative's administrative function, charters enabled the monarch to delegate authority and duties of governance to petitioning bodies. Its origins extended further than the Norman Conquest of 1066 to Anglo-Saxon grants in the eighth and ninth centuries. Although these early grants hardly resembled in form the charters that would emerge from the late medieval age, their antiquity and function gave them credibility and legitimacy. Two types of charters traced a definite form to the fourteenth century: the charter of the *Liber Burgus* and the charter of the livery company.

Letters Patent and Charters of Incorporation

The borough charters did not take standard corporate form until the fifteenth century, but they offered some of the earliest examples of how the Norman conquerors legitimized local self-government through their royal authority. Most pre-fourteenth century charters distinguished separate jurisdictions over boroughs imposed by the king and the feudal lords, as well as

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[18] See *infra* note 37.

[19] Those who wished to restrict the prerogative of the king did not foresee an executive power in parliament, and even Henry Neville agreed that the commonwealth should not bestow executive powers on parliament. See Neville, *Plato Redivivus*, 240.

granted privileges to the burgesses.[20] Henry I's charter to the citizens of London granted them the authority to hold their own courts and hear pleas: "*sciantis me concessisse civibus meis Londoniarum...justitiarium qualem voluerint de seipsis, ad custodiendum placita coronae meae et eadem placitanda*".[21] The grant further secured their independence from 'foreign' jurisdictions: "*et nullus alius erit justitiarius super ipsos homines Londoniarum*".[22] Although this charter recognized elements of corporateness for the city of London, it did not incorporate London. Henry I's charter conferred jurisdiction upon the aldermen of London, but did not create a perpetual self-governing body, or refer to the mayor and aldermen as a fictive, corporate individual.

The borough privileges commonly associated with corporateness — perpetual succession, the common seal, the ability to sue and be sued as a corporate body, and to hold lands as a corporate body — developed gradually throughout the thirteenth, fourteenth and fifteenth centuries. Describing the development of each of these traits would require a much more detailed analysis than can be provided here, but a few points deserve mention. All privileges eventually associated with 'corporateness' enabled the self-governing borough to discharge its tasks more effectively. For instance, royal authority accepted the borough's use of a common seal to authenticate its business.[23] Likewise, charters granted perpetual succession to ensure the predictable continuance of local government. Perpetual succession, however, was a fact well before the royal charter granted it in law; all charters issued in the thirteenth and fourteenth centuries confirmed old chartered liberties, even if they also introduced new

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[20] James Tait. *The Medieval English Borough* (Manchester: University Press, 1936), 143.

[21] William Stubbs, *Select Charters* (Oxford: at the Clarendon Press, 1884), 108.

[22] Stubbs, *Select Charters*, 108.

[23] Martin Weinbaum, *The Incorporation of Boroughs* (Manchester: University Press, 1937), 48.

provisions.[24] This came in the literary form of an acknowledgment and extension of previous royal grants, as John's charter of Nottingham (A.D. 1200) demonstrated:

> *Sciantis nos concessisse et praesenti carta nostra confirmasse burgensibus nostris de Notingam omnes illas liberas consuetudines quas habuerunt tempore henrici regis proavi nostri, et tempore Henrici regis patris nostri, sicut carta Henrici ejusdem patris nostri testatur.*[25]

More difficult to locate was the rise of the concept of incorporation: the mayor, the aldermen, and the burgesses all contained in one legal person. The idea of *communitas*, a word used to express many things, signified something new in Coventry's 1345 charter. The *communitas* in the charter defined the community as a single entity existing not only in the present, but in the future: "the said men, their heirs and successors, shall in future have a community among themselves, with power to choose a mayor".[26]

English kings did not restrict self-government to municipalities, but extended the principle to the governance of trade. Merchant guilds had existed since before the Conquest, but the real formalization of self-governing companies appeared in the charters of the livery companies during the reign of Edward III. Although the crown did not originally grant full incorporation, these early charters contained many of the facets of corporateness apparent in the charters of the later trading companies. The royal charters granted monopolies to these fellowships, giving companies the authority to oversee production, determine price, and assess quality. Although the charters granted monopolies, the crown did not intend to promote exclusive merchant oligarchies. The charter primarily delegated authority to allow for localized governance when the royal government could not provide it.

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[24] Stubbs, *Select Charters*, 164, 264, 307, 487.

[25] *Ibid.*, 308.

[26] Weinbaum, *The Incorporation of Boroughs*, 48. The reference is taken from the *Calendar of Charter Rolls*, v. 36.

An early charter, issued by Henry VI to the Drapers' Company, gave the privileges of monopoly "to rule and govern the said mystery of drapery in the same city, to the common profit of the people, and that due punishment be done on them in whom defaults shall be found".[27] The charters specified government, almost always in the same form: "Fishmongers may have the power to elect, each year, four persons of their proper Mystery...in presence of the Mayor or Sheriffs, or their deputies, to oversee the selling of fish, and to well and loyally rule and govern the said Mystery".[28] The same provisions for government applied to all livery companies. Four officers elected by the fellowship and verified by municipal and royal authority — the mayor and the sheriff — governed the livery company.

The fourteenth century livery companies should not be thought of as full fledged corporations. They lacked several pertinent powers: for instance, the ability to make by-laws for their governance or act as fictive persons during either litigation or the purchase of land. This meant that they could not sue or, more importantly, be sued as independent legal entities. These privileges eventually came with incorporation in later letters patent during the fifteenth and sixteenth centuries. The livery companies' early role as recognized governors of trade, however, was pivotal in the development of the later and larger trading companies of the sixteenth and seventeenth centuries. The crown conferred jurisdictions on these companies, much as it had on the earlier *liber burgus*, as a means of delegating authority and publicly registering that that authority existed by virtue of the royal prerogative.[29] The letters patent of Edward III outlined the process by

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[27] William Herbert. *The History of the Twelve Great Livery Companies of London*. 2 vols. (New York: Augustus M. Kelley, 1968). I: 481.

[28] Herbert. *The History of the Twelve Great Livery Companies of London*. II: 120.

[29] Tait. *The Medieval English Borough*. 141-45, and 159.

which merchants "besought us, by their Petition presented to us and our council in our present parliament".[30]

Another common facet of these early charters — and one that would become a vital element of the seventeenth century trading company charter — was the presence of public justification for incorporation. Common phrases like 'for the common profit' gave broad justification for royal grants.[31] Many charters spelled out previous abuses to demonstrate an exigency, as in the Goldsmiths' charter: "now of late the said merchants, as well private as strangers, do bring from foreign lands into this land counterfeit sterling...whereupon the said Goldsmiths have petitioned us, that we would be pleased to apply convenient remedy thereto".[32] The charters issued by letters patent were more than just lists of rights and privileges; they reflected the petitioning process and the justification for granting royal privilege.

These elements of public justification and emphasis on the petitioners' process accentuated the public nature of these charters. The royal instruments for conveying these grants lay in a bureaucratic process even in the fourteenth century. The lord chancellor held the weightiest of the seals — the great seal — and kept it with him in the chancery. By the fourteenth century, the chancery as a department of state had lost most of its initiative in matters of administration, and the great seal was subject to the intrusion of a new seal closer to the king: the privy seal.[33] Court intrigues aside, the seals were essential in the process of authentication, in letters both personal (letters close) and public (letters patent).

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[30] Herbert. *The History of the Twelve Great Livery Companies of London*. II: 520.

[31] As evidenced in the Drapers' Charter, taken from Herbert. *The History of the Twelve Great Livery Companies of London*. I: 481.

[32] Herbert. *The History of the Twelve Great Livery Companies of London*. II: 288.

[33] T.F. Tout. *Chapters in the Administrative History of England*. 6 vols. (Manchester: University of Manchester Press. 1920). For a general discussion of the seals, see vol. I, pp. 15-31. For a specific discussion of the privy seal's eclipse of the great seal, see vol. V, p. 11.

Charters issued from the fourteenth century onward took the form of letters patent, the letters being sealed in such a way as not to break the seal upon opening the 'closed' letter.[34] Letters patent gave the royal prerogative a real form. The use of these two seals gave the king's will, indicated then by the evidence of the red wax of the privy seal, the stamp of a department of state separate from the king's personal household.

This form of incorporation by letters patent was commonplace by the sixteenth century. Although the privy seal and the signet ring began a general decline in actual administrative utility and power, the public expression of the prerogative through letters patent under the great seal still passed through these old channels.[35] The administrative reform of the sixteenth century meant only that policy decisions were in the hands of a strong privy council, watched over by the king and manipulated by his secretaries. Still, secretaries often adhered to process, and the petitions once granted would travel from privy seal to the great seal for authentication. The resultant letters patent of incorporation retained the ancient form, reflecting the petitioner's process and containing the public justification for incorporation. Thus, the prerogative power did not advance at the king's whim, but moved through these channels and took its form from the custom of letters patent. The final expression of the prerogative adhered to the legal language of clerks trained to draft letters patent as public documents.

This executive power was never considered absolute by sixteenth or seventeenth century standards. Custom gave the charter a definite form and the common law limited the prerogative and gave the king a substantive set of principles to apply to the use of the prerogative. If the monarch overstepped his or

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[34] Tout, *Chapters in the Administrative History of England*, V: 126.

[35] G. R. Elton, *The Tudor Revolution in Government* (Cambridge: Cambridge University Press, 1953), 261.

her bounds, cases went to court for review. The 1602 *Case of Monopolies* formally repealed a monopoly established by letters patent of Queen Elizabeth. The general issue of the case was the grant of monopolies within the realm, specifically the manufacture and import of playing cards to Edmund Darcie.[36] The court judged that "such charter of a monopoly, against the freedom of trade and traffic, is against divers Acts of Parliament", and was thus void.[37] The common law courts served as one means of reviewing the use of the prerogative, but they were not the only means. Parliament voided a series of monopolies granted by letters patent of James I, which prompted the 1624 parliament to pass their Act of Monopolies.[38]

This Act was a result of specific grievances, not any innovative attempt to restrict the prerogative of James I. But in so doing, MPs made a deliberate point of informing the king that his prerogative had common law limits and that he should not attempt to step outside those limits.[39] The king responded diplomatically, thanking parliament for the reporting of grievances, but ended with a dissonant note, warning them not "to snatch at abuses" for "spleen or private purposes".[40] The underlying tension was readily apparent; importantly, it indicated that all parties involved recognized the Elizabethan constitution, even if they could not agree on its exact definition. Also, it exposed the prerogative as a

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[36] W. R. Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720*, 3 vols. (Cambridge: Cambridge University Press, 1912), I: 114. [Hereafter: Scott, *Joint-Stock Companies*.]

[37] *Case of Monopolies* (1602), [88 *English Reports* 1265].

[38] 21 James I c.3 (1624): "An Act Concerning Monopolies and Dispensations with penall Lawes and the Forfeyture thereof", cited in *Statutes of the Realm*, 11 vols. (London: Dawsons of Pall Mall, 1963), Vol. IV, part 2.

[39] *Proceedings and Debates of the House of Commons, 1621*, 2 vols. (Oxford: Clarendon Press, 1766), I: 80-81.

[40] *Ibid.*, I: 286.

definable entity, with a special sphere in the constitutional relationships of king, lords, commons, and commonwealth.

It is questionable what effect the 1624 Act had on the granting of charters, or even monopolies. The crown had already incorporated most of the 'great' chartered companies that controlled foreign trade: the Muscovy Company, the Merchant Adventurers, the Levant Company, and the East India Company. Parliament never questioned the king's power to incorporate and the king continued to incorporate for another century, until the South Sea Bubble shook England's faith in the joint stock company.[41] Part of the attraction of incorporation from the crown's and parliament's point of view was ease; delegation of authority to a body of merchants meant that those merchants shouldered the cost and responsibility of administration and regulation of trade. While king and parliament had the last word and stood as a perennial watchdog over the affairs of the chartered companies, the corporate body dealt with its jurisdictions with relative freedom.

Merchants justified their petitions for monopolistic and corporate privileges by assuming the responsibility for governance of trade. Resultant charters of incorporation closely resembled contemporary political language, and the incorporated companies defined themselves in the same terms as corporate boroughs, towns, or cities. Merchants petitioned for charters for the purpose of 'better government' for trade.[42] The Muscovy Company, the Merchant Adventures and the Levant Company all appealed to Elizabeth for charters, and all their petitions complained of commerce that suffered for want of good governance.

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[41] The South Sea Company did not possess a royal charter of incorporation, but the Bubble resulted in parliament's tightening of regulations on joint-stock companies. In many ways, the Bubble reaffirmed the belief that the only safe joint-stock corporation was one sanctioned by the English government, with a charter of incorporation.

[42] Cecil Carr, ed., *Select Charters of Trading Companies* (London: Selden Society, vol. 28, 1913), 29, 33, 82. [Hereafter: Carr, *Select Charters.*]

Nor did public justification end with the governance of trade. When Elizabeth incorporated the Fellowship of English Merchants for Discovery of New Trades in 1577, she expressed the sentiment that killing whales for train oil was "to the great commodity and benefit of this our Realm of England".[43] The opening paragraph of the Levant Company's charter: "know ye therefore that We [the royal government], greatly tendering the wealth of our people and the encouragement of them and other our loving subjects in their good enterprises for the advancement of lawful traffic to the benefit of our common wealth",[44] returned the same sentiment.

Naturally, such openly simplistic and self-exculpatory justification lay only at the surface of the merchant petitioners' designs. The stabilization of wool exports to Europe in the later sixteenth century, combined with a dramatic increase in the domestic demand for imports (particularly luxuries), gave the impetus for merchants to pursue an extremely lucrative trade to the Mediterranean and beyond to the East Indies.[45] Merchants sought monopolistic privileges by letters patent in order to secure an oligarchic dominance over foreign markets and goods; free trade threatened to glut the market, significantly reduce the price of imports in the home market, and thereby erode the profit margin for London's élite merchant community. These rationalist motives, however, mixed with a dominant economic ideology that stressed stability; the right — indeed the responsibility — of the government to regulate trade, and thus preserve the social order, went unchallenged throughout the sixteenth and seventeenth centuries.[46] Public

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[43] Carr, *Select Charters*, 29.

[44] *Ibid.*, 31.

[45] Robert Brenner, *Merchants and Revolution* (Princeton: Princeton University Press, 1993), 21-34.

[46] Joyce Appleby, *Economic Thought and Ideology in Seventeenth Century England* (Princeton: Princeton University Press, 1978), 99.

justification in the charters themselves enshrined the corporation's responsibility to provide governance, and thus stability, where the royal government would not.

In effect, the chartered companies were becoming enmeshed in the body politic as part of the sinews of the English government. Private citizens conducting private trade became at law a public, fictive person (the corporation) responsible to the commonwealth. Their foremost requirements were to better the English commonwealth through trade, and to provide responsible governance and act as an authority on quality. For the better execution of these duties, charters allowed self-government that contemporaries readily accepted. Common law courts were accustomed to dealing with cases from people appealing from the special jurisdictions of charters, and the common law courts accepted the authority of the companies' courts so long as they agreed with the common law. These jurisdictions and privileges remained under the watch of the public eye. The political storm over the numerous grants of internal monopoly by James I had led to the Act of Monopolies. Parliament's grievances centered on the king's use of patents as political gifts and as means for securing revenue outside of normal channels (i.e., through parliament). Parliament did not associate the internal monopolies with the broader monopolies of trading companies, primarily because it viewed those monopolies as inclusive rather than exclusive — as long as the trading company allowed for liberal entry and membership.[47] The English government entrusted chartered companies with public responsibilities for their private privileges, and failure to live up to those responsibilities could be grounds enough for impeachment.[48]

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[47] W. H. Price. *The English Patents of Monopoly* (Boston and New York: Houghton, Mifflin and Co., 1906), 36.

[48] *Case of Monopolies* (1602), see the resolution by Chief Justice Popham [88 *English Reports* 1263].

This directive to act for the public weal left chartered companies in a legal gray area. On the surface, they owed allegiance to the crown for the grant of incorporation and its privileges. Political struggles in the opening decades of the seventeenth century seemed to cement that allegiance in the face of parliamentary opposition. James's first parliament targeted the Merchant Adventurers and the Levant Company for their monopolies, and the Levant Company's charter was revoked in 1604 and reissued in 1605. Part of the storm was provincial: merchants from localities outside London complained that the domination of these monopolies by London merchants hampered their efforts to trade.[49] Indeed, most complaints against monopolies during James's 1604 Parliament came from merchants eager to be included in the trading companies, not from those who desired eradication of the corporations themselves.[50] The new charter for the Levant Company conceded this criticism and made liberal concessions in entry fines and membership. Although parliament ruthlessly singled out the large companies, one notable exception remained: the East India Company. It emerged unscathed from the 1604 parliamentary sessions, and MPs readily admitted that the advantages of incorporation — perpetual succession and joint stock share holding — were necessary to promote trade to the Far East.[51]

It would be incorrect to cast these struggles as between the interests of the crown and those of parliament, with chartered companies seeking refuge in Whitehall under the king's prerogative rather than in the halls of parliament. James Stuart continually aggravated the merchants of London with his meddling, particularly when he issued grants under the great seal of Scotland, breaking the monopolies of English trading companies. James demanded a loan of £20,000

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[49] Robert Ashton. *The City and the Court* (Cambridge: Cambridge University Press. 1979). 89.

[50] Scott. *Joint Stock Companies*. 119-121.

[51] Ashton. *The City and the Court*. 90.

from the East India Company in 1618, bluntly reminding the company that it existed by virtue of his prerogative and at his pleasure.[52] Moreover, the Act of Monopolies mentioned above aimed at the real grievances created by the internal monopolies of James's patents, particularly the gold and silver thread monopolies. The grants, so obviously political favors and revenue gathering schemes, achieved the disfavor not just of parliament but of the major trading companies and the livery companies as well.[53] MPs and merchants alike condemned the private grants for their exclusive and illegal nature and, in so doing, confirmed the role of the chartered company in the commonwealth. Chartered companies carried with their privileges the obligations of the governance of trade and the prosperity of that trade for the realm. If they abused privileges — monopolistic or otherwise — they could easily become targets of provincial MPs expressing the discontent of regional merchants with the London merchants' dominance of trade.[54]

The Hudson's Bay Company's charter of 1670 was granted within this larger context. At first glance, the charter appeared generous and, considering the relationship between Charles and his cousin Prince Rupert, a political gift. However, a more careful reading of the charter against the background of charters granted to trading companies and colonists revealed the continuity in form and the obligations laid on the Company by the charter. The privileges that the Hudson's Bay Company received were not out of step with the general privileges held by foreign trading companies.[55] The charter, far from being "a magnificent grant of rights and privileges [and] not a specification of duties",[56] carried with it the same

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[52] *Ibid.*, 103.

[53] *Ibid.*, 118.

[54] For a discussion of parliament as a voice of the locality, see Derek Hirst, *The Representative of the People?* (Cambridge: Cambridge University Press, 1975).

[55] See Table 1:A, *infra*, p. 30.

[56] Rich, *The Hudson's Bay Company*, I: 56.

obligations of earlier trading companies. Along with its monopolistic privileges the Company shouldered all the responsibilities of the governance of the Hudson's Bay fur trade. With its territorial grant, the Company carried a responsibility to settle and cultivate Rupert's Land.

Privileges and Obligations: The Hudson's Bay Company Charter (1670)

The crown's territorial grant to the Company followed the forms of previous grants not just to colonists, but also to proprietary trading companies. The charter made the petitioners "absolute Lordes and Proprietors" of the territory known as Rupert's Land "in free and common Soccage, and not in Capite, or by Knightes Service".[57] The technical legal language was purely a matter of form. Parliament had abolished feudal tenures (knight's service) in 1660[58] and the designation of 'free and common Soccage' rather than 'in Capite' meant that the Company held the land free of obligations to divide it and with the power to alienate any portion of it. In consideration for the grant, the Hudson's Bay Company owed a yearly rent to the Crown:

> Yeilding and Paying yearely to us our heires and Successors for the same two Elkes and two Black beavers whensoever and as often as Wee our heires and successors shall happen to enter into the said Countryes Territoryes and Regions hereby Granted.[59]

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[57] *Charters, Statutes, Orders in Council Relating to the Hudson's Bay Company* (London: Hudson's Bay Company, 1931), 12.

[58] 12 Charles II, c. 24, "An Act takeing away the Court of Wards and Liveries and Tenures in Capite and by Knights Service and Purveyance, and for setling a Revenue upon his Majesty in Lieu thereof"; for the specific abolition of feudal tenures, see ¶7, in *Statutes of the Realm*, V: 260.

[59] *Ibid.*

Table 1:A
A Comparison of Trading Company Charters

African Company Charter (1660)

I) Opening clause:
"Charles by the Grace of God, &c."

II) Justification for Charter.
* mentions previous grants.

III) Territorial grant.

IV) Grant of incorporation.

V) List of corporate rights:
* perpetual succession.
* purchase lands as a corporation.
* plead and be impleaded as a corporation.
* common seal.

VI) Provisions for the constitution of company:
* Governor.
* Council of 24 or 36.

VII) Provision for General Court.

VIII) Power to assemble and govern:
* power to make laws.
* power to administer oaths.
* power to enforce laws and impose punishment.

IX) Power to grant and assign stock in the Company.

X) Powers and Limitations relating to trade:
* Power to set ships to sea for the purpose of trade.
* Power to travel to regions forbidden to other subjects.
* Grant of Monopoly.
* Further forbidding of subjects to trade to the said region without license.
* clause disallowing private trade by factors and ships' masters of the Company.
* Power to arrest and seize all ships contrary to those under the grant. One-half forfeiture to the crown.

XI) Clause allowing for the Crown to come in as a trading partner.

XII) Powers of Governance:
* Power to appoint Governors.
* Full governance of Plantations.
* Power to execute martial law.
* Provisions for sharing profits of gold mines.

XIII) Confirming Clauses
* Grant as good as any given by the crown.
* Grant to be favorably construed.
* Charges officials to aid the Company.
* Dispenses with any statutes or laws to the contrary.

Hudson's Bay Company Charter (1670)

I) Opening Clause:
"Charles by the Grace of God, &c."

II) Justification for Charter.

III) Grant of Incorporation

IV) List of corporate rights:
* perpetual succession.
* purchase lands as a corporation.
* plead and be impleaded as a corporation.
* common seal.

V) Provisions for the constitution of the company:
* Governor.
* Council of 7.
* Names first appointments.

VI) Provisions for General Court.

VII) Territorial Grant:
* Description of territory; now reckoned as one of the crown's plantations or colonies in America.
* Grant of monopoly for aforesaid territory.
* Grant of territory to the Company.

VIII) Power to assemble and govern:
* Power to make laws.
* Power to enforce laws and impose punishment.

IX) Powers and Limitations relating to trade:
* Reaffirmation of monopoly.
* Forbids other subjects to trade to the said regions without license.
* Power to arrest and seize all ships contrary to those under the grant. One-half forfeiture to the crown.
* Power of governor to take sureties of £1000 from private traders arrested by the Company.

X) Powers of Governance:
* Membership provisions.
* Procedure for making bye-laws.
* Servants placed under the authority of Governor, saving allegiance due to crown.
* Power of civil and criminal jurisdiction over Rupert's Land.
* Power of defensive action in times of war.
* Power to punish English subjects and take them back to England for trial, if necessary.

XI) Confirming Clauses
* Charges officers to aid the Company.
* Dispenses with any statutes or laws to the contrary.

Territorial grants to companies — either trading companies or colonizing companies — contained only slight variations on this phrase. The charters granted to the first New England colonists contained a much more substantial consideration, usually a portion of the precious metals mined in granted land; in the case of the 1610 grant to the Newfoundland Company, the Crown demanded the fifth part of all the ore of gold and silver.[60] The Maryland charter of 1632 also specified the payment of one-fifth of the precious metals mined on the granted territory. It also demanded a token rent for the land: "Yielding therefore unto Us, our Heirs and Successors Two Indian Arrows of these Parts, to be delivered at the said Castle of Windsor, every Year, on Tuesday in Easter Week".[61] A similar clause is located in the Royal African Charter, specifying payment of two elephants yearly, any time the king or his heirs set foot in the African territories.[62] Beginning at least as early as the Maryland charter, the 'two Indian arrows' clause gave the crown a nominal consideration for the granted territories, which framed the territorial grant in a contractual manner.

The jurisdictional grant was a bit more complex. The crown conferred the same jurisdiction upon the Hudson's Bay Company that it had upon the livery companies three centuries earlier and the other chartered companies of the sixteenth and seventeenth centuries. The jurisdiction allowed for courts and gave the Company power:

> to make ordeyne and constitute such and soe many reasonable Lawes Constitutucions Orders and Ordinances as to them or the greater part of them

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[60] Carr, *Select Charters*, 54. For a discussion of the quit rent system in British North America, and the failure of Crown agents to collect quit rents in the eighteenth century, see P. J. Marshall, "Empire and Opportunity in Britain, 1763-1783", *Transactions of the Royal Historical Society* (1995), 115.

[61] F. N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or heretofore forming The United States of America*, 7 vols. (Washington: Government Printing Office, 1909), III: 1679. [Hereafter: Thorpe, *The Federal and State Constitutions*.]

[62] Carr, *Select Charters*, 174.

> being then and there present shall seeme necessary and convenient for the good Government of the said Company and of all Governors of Colonyes Fortes and Plantacions Factors Masters Mariners and other Officers employed or to bee employed in any of the Territoryes and Landes aforesaid.[63]

This clause, while effectively allowing the Hudson's Bay Company to legislate for the territories, did not directly confer civil or criminal jurisdiction on the Company. That came in a separate clause, which specified that the governor and council resident in Rupert's Land "have power to judge all persons belonging to the said Governor and Company or that shall live under them in all Causes whether Civill or Criminall according to the Lawes of this Kingdome and to execute Justice accordingly".[64] The Company really had two jurisdictions: one relating to the governance of its servants and its factories, and the other covering the civil and criminal jurisdiction of Rupert's Land.

The grant of territory and grant of civil and criminal jurisdiction over that territory led E. E. Rich to conclude that the charter "in itself must, from an analysis of its terms, be considered as the charter of a colony, Rupert's Land, as much as the charter of a trading company".[65] Rich compared the Hudson's Bay Company charter to the Virginia charter and pointed out similarities to back his claim. Similarities existed, particularly in the territorial and jurisdictional clauses. However, the same clauses were in patents given to other trading companies, notably the Royal African Company charter granted in 1660.[66] Trading companies received grants of land on occasion, sometimes without any promise of colonization on the company's part; the commonwealth's expectations for such grants were necessarily different from those of the colonist charters. In fact, the original Virginia Company was organized along joint-stock lines and in reality was

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[63] *Charters, Statutes, Orders in Council Relating to the Hudson's Bay Company*, 12-13.

[64] *Ibid.*, 18.

[65] Rich, *The Hudson's Bay Company*, I: 55.

[66] Carr, *Select Charters*, 172.

little more than a trading company that intended to plant a colony solely to mine precious metals and trade with the Natives for furs.[67] It was only after the failure of these initial projects that the Virginia settlers turned to the production of tobacco as a cash-crop; the subsequent failure of the single-crop export economy to produce a reasonable profit completely collapsed the Virginia Company. The later New England charters abandoned the joint-stock, monopolistic organizational structure. Charters of the 1620s and 30s — such as Massachusetts (1620), Maine (1622), and Maryland (1632) — had a form distinct from the trading companies. Maine's charter, for instance, established a rudimentary outline for government in the colony, a process for appeals, and a specified obligation that the incorporated proprietors plant "ten families at least of his Majestie's subjects resident and being in and upon the same premises".[68] The Massachusetts charter established elaborate plans for the settlement of the colony and expressed as its purpose the settlement of "a hopeful Plantation".[69]

The Hudson's Bay Company charter reflected a different desire on the part of the petitioners. The petitioning metchants had risked their capital in an "expedicion for Hudsons Bay in the North west part of America for the discovery of a new Passage into the South Sea and for the finding some Trade for Furrs Mineralls and other considerable Commodityes", and they desired incorporation and a grant of "the sole Trade and Commerce" of Hudson's Bay and the land that contained rivers draining into the Bay.[70] The charter made no provisions or specifications for colonization whatsoever, although it allowed for colonies if the Company chose to plant them. The Hudson's Bay Company's charter was the

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[67] Brenner, *Merchants and Revolution*, 94.

[68] Thorpe, *The Federal and State Constitutions*, III: 1624.

[69] Thorpe, *The Federal and State Constitutions*, III: 1828.

[70] *Charters, Statutes, Orders in Council Relating to the Hudson's Bay Company*, 3–4.

charter of a trading company with a territorial grant, not the charter of a colonists' company with provisions for conducting trade. The difference was crucial: there was no specific provision in the Company's charter for immediate colonization, but the territorial right implied that the Company would have to take possession of the land (*seisin*) and establish a prescriptive claim to its chartered territories.

Charter obligations lay in a contractual framework, prescribed by the Company's public responsibilities. The Company did not have to pay an annual rent for its corporate privileges, but that was not uncommon in the later seventeenth century. The York Building Concessionaires paid an annual rent of five shillings to the crown in 1675 for their charter; companies sixty years before had paid around £4000 per annum. It would be wrong, though, to interpret this as meaning that the charter gave the Company privileges without reciprocal obligations. Just as the monopolies of the Merchant Adventurers, the East India Company, and the Levant Company underwent scrutiny in parliament for their legality and benefit to the commonwealth, so did the commonwealth charge the Hudson's Bay Company to act for the public benefit by increasing England's wealth through trade. With the privilege of monopoly came the expectation that the fur trade would never suffer from want of free trade. The English government expected the Company to pursue not only the fur trade, but also the proper exploitation of the land to which it was given rights. This included a long term obligation of settlement, if the geographical circumstances allowed it. The question of the validity of the charter would often find its root in the latter conditions, although the charter itself laid no specific burden on the Company to that effect.

Despite the emphasis on duties, fundamental questions about the validity of the charter as granted by Charles II surfaced in the eighteenth century. Much of this concern, particularly on the part of the Committee men of the Hudson's Bay

Company, emanated from the eighteenth century hostility toward charters granted by Charles. In a 1786 case concerning Charles II's charter to the City of Cheshire, Chief Justice Lord Mansfield leveled a heavy criticism against charters issued by Charles II:

> The great question is on the acceptance of the charter of Charles II. We know the obloquy under which charters granted at that time lie. As Lord Hardwicke said, they have never received any countenance in Westminster Hall; and he would never give any opinion in support of them, unless the strongest evidence were laid before the court of their having been accepted and uniformly acted under.[71]

The objection to the charter in question followed a technical line of reasoning, and the judges of king's bench were more concerned with form and conditions than with the fact that it was one of Charles's patents. The real problem in Charles's grant to the citizens of Cheshire was a clause reserving to the crown the power of removal of city officers. The prosecutor claimed that the one clause annulled the entire charter: "if this clause be illegal, it must be presumed that the King was deceived in his grant...in which case the grant itself is void".[72] The principle cited by the prosecutor was: "the King hath nothing of his own; he holds his prerogatives in trust for the public; and therefore he cannot grant to their prejudice".[73] The prosecutor lost this point, and the court declared that it would "not presume a fraudulent intent concealed under the terms of the charter".[74] Furthermore, the appearance of one illegal clause in a charter did not invalidate the charter: "there is no doubt but that a charter of incorporation, like other grants, may be good in part, and bad in part.... The reservation of a power to amove all

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[71] Cited in *R v Amery* (1786), [99 *English Reports* 1143].

[72] *R v Amery* (1786), [100 *English Reports* 289].

[73] *Ibid.*

[74] *Ibid.*, 301.

the members of the corporation, being repugnant to the spirit and substance of the grant, is therefore void; but that the rest of the charter remains good".[75]

Legal incorporation required an adherence to the form that was laid down centuries before for the boroughs and livery companies and refined during the sixteenth century. This form began with the crown, as the crown was the only power that could incorporate. The 1612 Case of Sutton's Hospital proved this beyond any doubt: "it is impossible to take in succession for ever without a capacity; and a capacity to take in succession cannot be without incorporation; and the incorporation cannot be created without the king".[76] There were other legal methods of incorporation — by prescription or by act of parliament — but those methods required the consent and the recognition of the monarch. The specifics of the charter form followed the ones discussed earlier in this chapter: the endowment of succession and the elements of 'corporateness' developed in the fourteenth and fifteenth centuries. These elements were so common by the sixteenth and seventeenth centuries that the Exchequer Chamber judges deemed their declaration in any charter superfluous: "corporation is sufficient without the words to implead and to be impleaded, &c. and therefore divers clauses subsequent in the charters are not of necessity, but only declaratory, and might as well have been left out".[77] Importantly, incorporation had by 1612 achieved a distinct and recognized form at common law. The privileges of perpetual succession, a common seal, pleading and being impleaded under the corporate name, and owning and purchasing assets as the corporate body were privileges granted immediately with incorporation.

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[75] *Ibid.*, 303.

[76] *Sutton's Hospital Case* (1612), [77 *English Reports* 964-5].

[77] *Ibid.*, 970.

The incorporated borough or company in the late-seventeenth century inherited a *de facto* legality at the moment of incorporation which enabled them to accept and act under their charter. Whether or not the charter was valid *de jure* depended on the form of the charter. A corporation with an invalid charter could act under the authority of its charter indefinitely, so long as the common law courts never scrutinized its validity *de jure*. Lord Mansfeld's condemnation of charters issued by Charles II revealed this *de facto* aspect of their validity; he acknowledged that they were valid until brought before the court and scrutinized by the common law. The accepted nature of incorporation and the formal nature of letters patent gave the corporate entity the stamp of validity at the moment of incorporation. This did not mean, however, that every corporate grant was valid at common law. In keeping with the common law, an illegal grant never carried legal force. Any authority exercised under that grant existed by pretended right until disturbed, tested in a common law court, and invalidated by that court.

A case in 1853 illustrated the point when the Vice Chancellor, G.J. Turner, issued an opinion that reflected the later common law thinking about charters:

> The next question arises upon the charter under which the London Hospital was incorporated: and I do not think that it is necessary for me to give any opinion on that charter. That charter is a subsisting charter: it is valid until it is impeached and disturbed.[78]

If the charter was good, then the corporation was valid. A number of cases in the seventeenth century reaffirmed the validity of charters issued by the king, and also affirmed the common law courts' role in reviewing the king's use of the prerogative.[79] It was not the king's power of incorporation, but the form under which the king incorporated that the common law scrutinized.

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[78] Cited in *Robinson v. London Hospital* (1853), [68 *English Reports* 823].

[79] *Wood v Haukshead* (1602), [80 *English Reports* 11]; *Sutton's Hospital Case* (1612). *East India Company v. Sandys* (1685), [91 *English Reports* 43].

The legality of the Hudson's Bay Company charter must be assessed considering the terms described above. The charter adhered to the general form laid down for incorporation, and the normal powers that came with corporateness — perpetual succession, use of a common seal, ability to hold assets under the corporate name, plead and be impleaded under the corporate name, and the power to assemble and make by-laws for governance — were never in contention. The more extensive privileges embodied in the trading monopoly and the territorial grant rested on less secure legal footing, but they were not outside the king's ability to grant. If the grants were legal, then their continuing validity depended on the Hudson's Bay Company fulfilling its duties in the Bay.

The first true test of the charter occurred in 1749, when a motion was carried in the House of Commons for an investigation of the affairs and conduct of the Company in the Bay. Unfortunately, we have no extant record of the House of Commons debates on the report, nor do we have a verbatim transcript of the testimony given to the committee by witnesses from either side. Our knowledge of the proceedings comes from two somewhat removed sources: the report of the proceedings delivered by Lord Strange, and the resultant decision of both crown and parliament to support the claims and the charter of the Hudson's Bay Company. Lord Strange's report contained examinations of witnesses, but he had obviously 'reported' on them rather than repeated them. He wrote about what they said and most likely did so selectively, weeding out what he believed to be irrelevant information.

Parliament faced two questions in its inquiry: was the charter of the Company of Adventurers trading to Hudson's Bay valid, and had it fulfilled its obligations under the charter? The first question apparently received little attention, and parliament seemed ready to accept the recommendation that both the solicitor-general and attorney-general had given the privy council earlier:

"considering how long the Hudson's Bay Company had enjoyed and acted under this Charter without interruption or encroachment they did not think it advisable for His Majesty to make any express or implied declaration against the validity of it".[80] Parliament did not express an opinion one way or another on the charter's validity; it recognized the charter as a subsisting charter, with authority *de facto*, if not *de jure*. If the charter was void, then nothing could hinder others from "exercising the same Trade which the Company now carries on".[81]

Parliament was more concerned with the Company's management of both the fur trade and its settlement and governance of the territories it held. Lord Strange's report of the examination of witnesses revealed a steady line of similar questions. The witnesses were asked if the Company had maintained adequate military preparedness in the face of French aggression, if the Company had treated the Natives well, if it was trading to the maximum profit of the commonwealth, and if it had endeavored to exploit the natural resources and settle the land granted by the charter. Although all these questions carried considerable weight, Lord Strange afforded the last one the most attention. Joseph Robson, who had worked as a stone mason for six years in Hudson's Bay, criticized the Company in nearly every respect. The committee focused on questions regarding the Company's efforts to settle the land, and Lord Strange reported that Robson

> does not know, nor ever heard of any Settlement up the River; nor did he see any Marks of Cultivation there; that the Company have four Forts in Hudson's Bay, and a small Settlement or Two; but the Witness was never at any of the said Forts, except the Two before-mentioned, and that he cannot say how far the Company's Settlements extend North and South.[82]

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[80] *Reports of the House of Commons, volume II: report from the committee appointed to enquire into the state and condition of the countries adjoining to Hudson's Bay* (London: House of Commons. 1749), Appendix E, 285. This document was the Solicitor-General's recommendation to the Privy Council, when it considered a petition to license another trading company in the Bay.

[81] *Ibid.*

[82] *Ibid.*, 215.

The testimony of other witnesses regarding the Company's efforts to settle Rupert's Land mainly concurred with Robson's account, but the parliamentary committee had reasons to take Robson's testimony with a grain of salt. Robson was a dissatisfied servant and not an impartial observer, and Strange's report carried a skeptical tone. Besides noting in his report that "the witness was never at any of the said Forts, except the Two before-mentioned", Strange reported that the chief factor in charge of Robson "contradicted him in every point".[83]

This contributed to the decision of the English government to support the Hudson's Bay Company and leave its charter of incorporation undisturbed. There was the looming possibility of another war with France, and the Company — for all its faults — had a foothold in the Bay and an organized government in North America to aid the British cause in wartime. Possibly the strongest point in the Company's favor was the recommendation to the privy council by the attorney-general, Sir Dudley Ryder, and the solicitor-general, Mr. William Murray, to leave the charter unmolested. Both Ryder and Murray were ardent proponents of free trade, and both had supported the unpopular 1747 bill prohibiting insurance of French ships on those principles. Their assessment of the conduct of the Company ended negatively: "they have designedly confined their Trade to a very Narrow Compass; and have for that Purpose abused the Indians, neglected their own Forts, ill-treated their own Servants and encouraged the French". However, the evidence of the Company's antagonists and dissatisfied servants was not enough to condemn the Company: "But on Consideration of all the Evidence laid before us, by many Affidavits on both sides, we think these Charges are either not sufficiently supported in point of Fact, or in a great measure accounted for from the Nature or Circumstances of the Case".[84] That two influential men devoted to

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[83] *Ibid.*, 216.

[84] *Ibid.*, Appendix E, 286.

free trade could recognize the need for a joint-stock trading company's existence in the Bay lent immediate support to the Hudson's Bay Company's monopolistic regime. Even Adam Smith lent the Company tacit recognition, if not support, in his *Inquiry into the Nature and Causes of the Wealth of Nations*, when he conceded that the geographical conditions of the Bay necessitated a monopolistic trading company.[85]

Charles II granted incorporation to the Hudson's Bay Company at a time when incorporation meant more than privileges for groups of private merchants. The fact that the Company derived its authority from the prerogative of the king did not invalidate its claims. Rather, it illustrated what had been a long-standing tradition of the central English government: the delegation of authority, and thereby the costs, to bodies of citizens for the better governance of trade and municipalities. For centuries, merchants regulated their own trade and did so under the authority of their charters granted by the English monarch. English subjects of the crown never regarded this prerogative power as an absolute power, or as an expression of the will of an arbitrary monarch. The prerogative moved through highly public channels, and emerged from under the great seal as a legal document, adhering to the established form of letters patent. There existed common law limits to what the prerogative power could grant, and the common law courts had reviewed the monarch's use of the prerogative well before the Hudson's Bay Company was established. The common law recognized the crown's delegation of authority by charter to govern municipalities and trade, and

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[85] Adam Smith. *An Inquiry into the Nature and Causes of the Wealth of Nations*. ed. James Rogers. 2 vols. (Oxford: Clarendon Press. 1880). II: 328. I found this reference in E. E. Rich. *Letters Outward 1679-94* (Toronto: Champlain Society. 1948). xii.

seventeenth century contemporaries understood the need for the good governance of international commerce.

Thus, it should not surprise us that parliament, in its 1749 inquiry, was more concerned with the Company's fulfillment of its obligations than the legality of its monopoly. Incorporated companies had existed for over two centuries in England, and held public responsibilities in exchange for their privileges. The commonwealth expected trading companies to provide governance of trade, and to increase the wealth of the realm. The crown of England had granted the Hudson's Bay Company a huge tract of land in 1670, but the Company carried responsibilities with its grant. It needed to settle, cultivate, and exploit the mineral and natural resources of Rupert's Land. With the privilege of monopoly came responsibility for the good governance of trade, and an expectation that a vibrant trade would benefit the commonwealth.

Chapter 3

Company Servants, Company Law: Legal Transplants to Hudson's Bay in the Eighteenth Century

Few scholars have examined the Hudson's Bay Company's administration of laws in Rupert's Land in the eighteenth century, but some preliminary steps have been taken to uncover the laws that the Company brought to the Bay.[1] Under its charter the Company was responsible for maintaining law and order in Rupert's Land, an obligation that was implicit with a grant of civil and criminal jurisdiction. This, however, did not necessarily translate into a dictate to establish a regularly convening judiciary. The charter vested judicial authority in the governor and council. If any "crime or misdemeanor" occurred in Rupert's Land

> where Judicature cannot bee executed for want of a Governor and Councill there then in such case itt shall and may bee lawfull for the chiefe Factor of that place and his Councill to transmitt the party together with the offence to such other Plantacion Factory or Fort where there shall bee a Governor and Councill where Justice may bee executed.[2]

This translated into 'commissioned' justice; the governor and council resident at the Bay convened and dispensed justice as the need arose. The Company was under no obligation to set up a new system of common law courts to execute justice, particularly if there was no colony or plantation that necessitated a regular judiciary. Nor was there any indication that parliament in 1749 was concerned

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[1] Russell Smandych and Rick Linden, "Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800", *Canadian Journal of Law and Society*, XI (Spring 1996). Professor Smandych's work on the eighteenth century private justice of the Hudson's Bay Company has provided me with the crucial background for my own research and analysis. Without reference to his writings, my archival research would have been much more difficult and less productive.

[2] *Charters, Statutes, Orders in Council Relating to the Hudson's Bay Company* (London: Hudson's Bay Company, 1931), 18.

with the Company's neglect of supplying Rupert's Land with resident governors versed in the intricacies of the common law.

The Company's position on the matter was to leave well enough alone. During its first 140 years of chartered rights in its Hudson's Bay territories the Company made no attempt to establish a court of law for Rupert's Land. The exigencies of circumstance commanded the London Committee's attention; the presence of barely over one hundred servants in the Bay throughout the eighteenth century in any given winter did not necessitate elaborate judicial machinery to administer civil and criminal laws. At no time in the eighteenth century did a civil case arise in Rupert's Land between Company and servant, or servant and servant.[3] On several occasions the Company exercised its jurisdictional rights to try criminal cases, but this was done without adherence to common law procedure.

The absence of legal machinery did not mean, however, that the Company did not take charge of the governance of its servants in its chartered territories. By charter the Company possessed the authority to pass regulations for its own governance, and it did so on numerous occasions. Moreover, the common law of master and servant bound the Company's servants to obedience and duty. The chief factors in charge of the Company's forts also possessed legal and corrective authority over their servants. These two fundamental sources of law — Company regulations and the common law of master and servant — only applied to Company employees. Very few records of formal legal proceedings exist, and nearly all of them named the Company as prosecutor. With one exception involving the Cree at Henley House, the Company never extended its criminal jurisdiction in the eighteenth century over anyone other than Company employees.

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[3] At least, after reviewing the official reports from the Bay-side governor to the London Committee and the various post journals. I have not found a single civil case. A more exhaustive review of the post journals is needed to prove this point.

As a result, the Company never transplanted or received English common law — as it stood in 1670 or otherwise — to Rupert's Land.

Virtually the only source of material for assessing the day-to-day life, activities, and resistance of the Company servants came from the chief factors, written in their post journals and supplemented by annual letters (essentially status reports) to the London Committee. Although the chief factors generally recorded the instances of servants' insubordination and wrote about the punishments they meted out, the scarcity of corroborating reports leaves the modern investigator with a problematic source: the chief factors wrote the journals knowing that they would be transported back to London for the Committee's review. There were other accounts, though. In 1752, Joseph Robson published a description of his six years' residence at the Bay as a stone mason.[4] Robson's account gives a negative view of the Company's rule that dissents from the post journals, but his relationship with Arthur Dobbs and hostile association with the chief factor for whom he worked created a highly charged account written for political ends. For the everyday life in the Company's posts, however, the post journals are still the most comprehensive source. Post journals offer an example of what offenses and which servants chief factors punished, and the magnitude of the punishment they saw fit to apply; however, the question of frequency remains obscure. There were two general methods of regulating servants recorded in the post journals: the frequent disciplining actions of the chief factors, and the uncommon convening of the governor and council to punish criminal offenses.

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[4] Joseph Robson, *An Account of Six Years' Residence in Hudson's Bay* (London: J. Payne, 1752).

Discipline in the factories varied with the character of the chief factor, the conditions he found upon his arrival there, and the state of affairs with the French. The need for strict discipline during the English wars with France in the 1690s created much more austere forts than appeared after the Treaty of Utrecht in 1713. The Committee issued vague instructions to its resident governors, ship captains, and chief factors concerning their treatment of lower level servants, as evidenced in John Bridgar's instructions in 1682: "You must bee carefull to carry your Selfe...with lenity and gentleness towards those who are under your Comand".[5] The chief factor was to combine this 'lenity and gentleness' with strict discipline, in order to keep servants from debauching themselves or slacking in their services. The London Committee did not issue explicit instructions on how to instill discipline, with the single exception of the announcement to forfeit the wages of any servant caught embezzling or conducting private trade.

The post journals for the Albany and York factories during the eighteenth century described a vertical organization, very much akin to the familiar model of the English household. The ultimate authority rested with the governor and London Committee, itself subservient to the sovereign British crown. But its authority did not always translate into direct control, a fact due primarily to the distance and infrequent communication between London and the Bay. In terms of immediate authority in the factories, the chief factor stood at the head, the other officers comprised an élite, and the skilled and unskilled laborers were the lower servants.[6] The surgeons, masons, and other title-designated servants enjoyed a higher status than the laborers, and the stone mason Joseph Robson expressed his

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[5] London to Bridgar, 15 May 1682; E. E. Rich, *Letters Outward 1679-94* (Toronto: Champlain Society, 1948), XI: 36. [Hereafter: Rich, *Letters Outward.*] John Bridgar was the Governor of Port Nelson (York Fort).

[6] Jennifer Brown, *Strangers in Blood* (Vancouver: University of British Columbia Press, 1980), 21.

indignation when the chief factor of the Prince of Wales Fort "ordered me out to hawl the sled, and do other drudgeries of a common servant".[7] All these lower servants, though, were under the command of the chief factor, who answered immediately to the resident governor and distantly to the London Committee.

The chief factor exerted an authority over his immediate servants in ways that the distant London Committee could not. The chief factor reported yearly to the Company, both in letters and post journals, and the Company knew that the means for instilling discipline varied from one factor to another. This was an acceptable practice, as long as the chief factors used their authority to keep industrious order in the factory and to punish servants who threatened the profits and interests of the Company. Thomas McCliesh reported that certain men in his factory complained of his "severe and somewhat tyrannical" conduct, but he justified it to the London Committee in a letter dated 12 September 1716:

> At first I was obliged to be somewhat severe for the men was grown to that degree of ill manners that they did what they pleased with Mr Staunton. and thought to have used me with the same. So that I took five of the greatest transgressors and whipped them; ever since they have been obedient and willing in the discharge of their duty. Neither have I beat a man since nor have I had any occasion.[8]

Eleven years later, Joseph Myatt informed the London Committee that "some of the men are grown to such a pitch of ill manners", but assured them that he "punished three or four of the greatest transgressors, and they have been very obedient to command since".[9]

The resultant system gave the chief factor an enormous amount of latitude in the governance of his factory. The resident governors and chief factors instilled different degrees of discipline at different times, usually dependent on the state of

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[7] Robson. *An Account of Six Years' Residence in Hudson's Bay*. 13.

[8] MacCliesh to London. 12 September 1716: K. G. Davies. ed.. *Letters from Hudson Bay* (London: The Hudson's Bay Record Society. 1965). XXV: 55.

[9] Joseph Myatt to London. 12 August 1727: Davies. *Letters from Hudson Bay*. XXV: 125.

affairs with the French. During wartime, the London Committee and the governor in Rupert's Land stressed a rigorous discipline akin to a military order: servants performed martial exercises, and stood ready to defend their 'forts' from possible French aggression.[10] During more peaceful times, the governance of forts remained the responsibility of the chief factor, but the discipline took on a different emphasis. No longer primarily concerned with checking hostile French aggression, the chief factors had to increase efficiency and productivity to combat French competition for Natives' furs. They ran their forts like large-scale households, keeping servants industrious and punishing those who either slacked or, much worse, embezzled or stole from the Company.[11] The means of punishment varied from slaps or beatings to actual floggings. The power of the chief factor over his servants arose from the master-servant law, a customary part of the 'law of persons' that did not really end until the late nineteenth century.[12] The master-servant relationship was not a relationship of social or juridical equals. Matthew Bacon explained this fundamental principle in the nineteenth century:

> the relationship between a master and a servant, from the superiority and power which it creates on the one hand, and the duty, subjection, and, as it were, allegiance, on the other, which are both in a superior and a subordinate degree: such as...merchants and factors, and all others having authority to enforce obedience on others to their orders from those whose duty it is to obey them.[13]

The master had the right to enforce his orders, and to punish disobedient servants, as Blackstone related: "a Master may by law correct his apprentice or servant for negligence or other misbehaviour, so it be done with moderation".[14] Moderation

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[10] Brown, *Strangers in Blood*, 11-13. Cf. Smandych and Linden, "Administering Justice Without the State".

[11] Cf. Smandych and Linden, "Administering Justice Without the State".

[12] Robert J. Steinfeld, *The Invention of Free Labor* (Chapel Hill & London: University of North Carolina Press, 1991), 15.

[13] Matthew Bacon, *A New Abridgment of the Law*, 7th ed., 8 vols. (London: A. Strahan, 1832), V: 333.

[14] William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago and London: University of Chicago Press, 1979), I: 416. First published in 1765.

was a relative term, and flogging and other forms of corporal punishment were acceptable at law as long as the punishment did not cripple or kill the servant. Bacon echoed Blackstone's assessment about punishment: "It is clearly agreed: that a master may correct and punish his servant in a reasonable manner for abusive language, neglect of duty, &c". Furthermore, in the case of a servant bringing an action of assault and battery on his master, "if it appears in evidence that the punishment was such as is usual from masters to their servants, the master will be acquitted".[15]

Master-servant relationships permeated every level of the Company's hierarchy. The resident governors and chief factors were themselves servants of the Company; they received their posts by commission and were expected to follow the Company's commands obediently. They, in turn, commanded the men of their factories in a similar superior-subordinate relationship. This was not a privilege but an obligation; the chief factors shouldered the responsibility for maintaining order and productivity. This responsibility translated into authority over the servants and a duty to correct servants who failed to perform tasks or challenged the authority of either their chief factor or the Company. The frequent references to corporal punishment, sometimes for failure to follow the Company's rules in the factory and at other times for 'ill treating' the chief factor, reflected an application of the master-servant law to the servants themselves. The chief factors separated that activity from the formal proceedings of a criminal trial that — on occasion — the resident governor would convene and preside over.

In addition to the general master-servant law, the Company exercised its legislative power to pass several rules and regulations for its servants in the Bay. Its dependence on Natives for the majority of its furs necessitated a number of

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[15] Bacon. *A New Abridgment of the Law*. V: 378.

orders regarding proper conduct between Company servants and Natives. Mr. John Bridgar, whom the Company commissioned in 1682 as governor of Port Nelson, received instructions on how to treat the Natives: "You must bee carefull to carry your Selfe with prudence humanity and justice towards the Natives".[16] In 1682, the London Committee reprimanded Governor Nixon for his mistreatment of Natives: "wee had complaints from most of our Servants (that returned upon the last ships) that you have carried your selfe with to [sic] much inhumanity and cruelty towards the Natives which is very ill done".[17] The Company instructed Nixon's successor, Henry Sergeant: "It is our Desire that you and all others who are emploied by us in the Bay should treate the Indians with Justice and humanity".[18] The London Committee tempered these reproaches with cautious instructions, warning the resident governors to take care "when they come downe in considerable Numbers to Trade with us that you put it not into their power to surprise our Forts or doe us prejudice".[19] These instructions provided general guidelines for the conduct of the upper level servants of the Company, as well as indicated the London Committee's expectations of its governors. Natives were not to be trusted, but treated with the proper respect to encourage the fur trade.

The Company, though, had different regulations for its lower servants. Natives may have been important trading partners with the Company, but they were also seen as doormen to a private trade for dissatisfied Company employees. A letter to Governor Nixon in 1682 illustrated this concern when the London Committee warned that "Indian Woeman resorting to our Factories are very prejudiciall to the Companies affaires, not only by being a meanes of our Servants

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[16] London to Bridgar, 15 May 1682; Rich, *Letters Outward*, XI: 36.

[17] *Ibid.*, 39.

[18] London to Sergeant, 27 April 1683; Rich, *Letters Outward*, XI: 79.

[19] *Ibid.*

often debauching themselves, but likewise by embeazling our goods and very much exhausting our Provisions".[20] The London Committee was concerned with the potential of private trade between servants and Natives draining its own precarious trade: the Company had paid only one dividend before 1713 and needed to suppress interlopers in order to generate profit. There was also the French influence to contend with and, as has recently been argued, the "English did not trust Natives because of their prior contact with, and potential loyalty to, French fur traders".[21] During a time of violent conflict with the French this was a cogent concern.

The chief factors enforced Company regulations mainly through their own brand of personal discipline, underneath the umbrella of the master-servant relationship. On occasion, and usually justified by the extreme misbehavior of a certain employee, the resident governor would actually charge a servant with crimes and hold a formal trial. The governor could not do so alone, however, and had to call together his council to conduct the trial. Post councils formed an important and formal executive body at the Company's posts, composed of the resident authorities and the ships' captains (when they were available). The London Committee encouraged the use of councils in decision-making rather than relying on the sole discretion of the governor, a strong indication of their desire to establish a conciliar government for their distant territory. The governor had ultimate authority, as the London Committee undoubtedly wanted decision-making in the Bay oriented toward quick action rather than subject to lengthy procedure, particularly during the years of outright war with the French. The council, though, acted as an executive arm and provided the London Committee with insight into the conduct of the chief factors and the governor. When the governor wanted to

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[20] London to Nixon, 15 May 1682; Rich, *Letters Outward*, XI: 40.

[21] Smandych and Linden, "Administering Justice Without the State".

formally charge a servant with crimes, the council was a vital part of the proceedings and, in fact, was required by the charter's prescription for judicature in Rupert's Land.

During the wars between England and France in the 1690s, three instances of formal legal proceedings occurred. In 1694 Joseph Eglinton purportedly threatened to sink the Perry Frigate, and James Knight took three depositions from witnesses who claimed to have heard Eglinton make the threats. Unfortunately, nothing other than the witnesses' depositions remain.[22] In 1696, Knight prosecuted one John Cartwright for the serious crime of mutiny. Knight recorded the indictment, but made no mention of the evidence presented or the witnesses examined. The indictment itself was very formal: "Whereas you John Cartwright have been stirring up Mutiny and Rebellion in the Factory, Endeavouring the utter destruction of the Government and Country".[23] The indictment listed specific crimes: "throwing out lyes and false reports upon my Deputy and his Brother, relateing up and down the factory that they should Stirr up the men to demand the ship of me to carry them all home".[24] In addition, Knight alleged that Cartwright had lied about the amount of provisions entering the country, using that as fuel for stirring the Company servants to mutiny and rebellion.

The allegations were serious, and Knight recorded the verdict of the council and the punishment:

> The Governor and Council takeing the above mentioned thinges into Serious consideration, well pondering and Considering the Bad Inconveniencies that doth accrue from such factions turbulent follows. To prevent the like for the future and that it may be an example to others, hath ordered that You John Cartwright Shall be whipt, thirty Stripes, Lye in Irons confined close prisoner, and fed upon

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[22] Albany Post Miscellaneous Files. 1694; B. 3/z/2. fo. 1. Hudson's Bay Company Archives. Provincial Archives of Manitoba: Winnipeg, Manitoba. [Hereafter: HBCA, PAM.] I owe this reference to Russell Smandych.

[23] Albany Post Miscellaneous Files. 15 August 1696; B. 3/z/2. fo. 2; [HBCA. PAM].

[24] *Ibid.*

> Succoo's as you call them, till either Our Ships arrive here from England to carry you home, Or the ships wee have Now in the Countrey go from this.[25]

James Knight made record of the event for official purposes but made no effort to record the proceedings in detail. He convened the council and they reviewed the evidence, but he made no mention of the manner in which the evidence was presented or scrutinized by the court. Knight did not mention whether the accused was allowed to plead in his own defense, nor was there any record of a technical or legal discussion among the members of the council involving the charges. In no sense did he "report" the case, as the conventional common lawyers' literature would have required.

James Knight conducted the trial of William Lilpot in the same manner. Lilpot was charged with "endeavouring to overthrow, utterly ruin and subvert from the crown of England one of his majesties plantations here in the Northwest parts of America". Although his specific crime was not treason or mutiny, he endeavored "to stirr up a party to act and joyn...in committing outrage and burglary, in forceing and breaking open the Company Storehouses to Steal, purloin, embazle and wast those provisiones the Company had therein for the preservation and Safeguard of our lives and Country".[26] As in the Cartwright case, Knight recorded the indictment, verdict and sentence by governor and council. The verdict came back guilty, with noticeable similarity in form to the decision in the Cartwright case: "The Governor and Council takeing those thinges into their consideration, and considering the ill consequence of your design, whereby they find it was utterly to overthrow Subvert and ruin the Factory therefore to make you a Publick example...have thought good to order you to be whipt thirty nine lashes upon the bare back".[27] Significantly, Knight and the post council interpreted the

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[25] *Ibid.*

[26] Albany Post Miscellaneous Files, ca. 1696; B. 3/z/2, fo. 3 [HBCA, PAM].

[27] *Ibid.*

crime of burglary as more than just 'theft at night', which was its common law definition. Lilpot's intent was 'utterly to overthrow Subvert and ruin the Factory', which was a direct act against 'one of his majesties plantations here in the Northwest parts of America'. By linking these two crimes Knight made burglary the vehicle for subversion, making the issue in the case turn on mutiny as in the Cartwright case.

The cases of John Cartwright and William Lilpot both followed a general procedure, although neither gave a satisfactory account of the extent of the formalities. Despite this, the records allow for a cursory examination of the fledgling legal processes in the Bay. The court Knight described was a conciliar court, with the governor and council presiding as judges of both fact and law. The specific indictments charged the defendants with something akin to mutiny, and mutiny was a military crime punishable by death in courts-martial. Statute defined mutiny and provided for courts-martial, and courts-martial required adherence to a strict procedure: thirteen officers assembled, none under the rank of captain, and commissioned by the crown to conduct trials which touched life and limb.[28] Unfortunately, Knight's record itself was so sparse that the model for the court — whether prerogative or common law, civil or martial — remains obscure. The gravity of the crimes and their link to subversion and mutiny must be located in their historical context: a time of violent, intermittent conflict with the French. In 1694 the French were in possession of the Company's forts in the Bottom of the Bay, and in 1696 Lemoyne d' Iberville captured York Fort.[29] James Knight governed a British territory that was at war and partially under hostile occupation. Subversives within the ranks were removed and made public examples, as a

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[28] For the general procedure applicable to courts-martial, see 1 William III & Mary II, c. 5: *Statutes of the Realm*, VI: 55.

[29] Rich, *The Hudson's Bay Company*, I: 333.

warning to other men who might have entertained similar notions of insubordination or even mutiny. If Knight did in fact attempt to follow a common law model for the trials he presided over in the 1690s, he did so with constant allusion to the implications of such crimes in the face of the French menace.

In 1715, James Knight called another trial at York Fort. This trial occurred after the Treaty of Utrecht in 1713 had recognized the British possession of the Bay, during a period of peace after a long stretch of war. The trial of Thomas Butler for various and sundry crimes — among them, the crime of sleeping with an Indian woman — reflected the conscious recording of specific procedural points. in what looked vaguely like a trial modelled after common law procedure.[30] The trial began with the reading of the commission that conferred civil and criminal jurisdiction on Governor Knight and his council:

> A Councell held at York Fort Hudson's Bay America by Captain James Knight Governor of the whole country belonging to the Honorable Hudson's Bay Company the said Governor Knight being impower'd by Commission from Queen and Company with the Assisstance of Councell first sworn to him.[31]

The commission described the purpose of governor and council in common law terms: "sitting in Councell for the Maintaining and Keeping the [Legal?] Rights & Priviledges of the Crown of England as by Law Established & for the Peace and Tranquillity of this Government".[32] The commission announced fealty to the sovereign: "as being Subservient & Obedient unto our Soveraign, Lady Queen Ann".[33]

Once the commission established the legality and authority of Knight's court, the indictment was read. Butler, "being Arraigned and brought before wee the Governor & his Councell to be tryed for high Crimes & Misdemeanours", was

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[30] Smandych and Linden, "Administering Justice Without the State".

[31] York Post Journal, 27 December 1715: B. 239/a/2, fo. 75 [HBCA, PAM].

[32] *Ibid.*

[33] *Ibid.*

charged specifically with "Feloniously Stealing at Sundry times as likewise threatening Mens Lives and allso most Seuriously in very Unbecoming Language abuseing his worthy Governor and most Slanderously Scandalizeing his Honorable Masters the Company in England which lended to the Subverting of this Government".[34] Butler allegedly had told other servants that the Company would not pay their wages, hence the slander was "enough to make them Mutinize if they had not been better Satisfied of the [Giftness?] of the Company in theire due payments of their Wages as is due to them in there Hands".[35] His final crime was "Abuseing the Natives here by lyeing with a Woman of this Country which is to the Endangering of all our Lives and wee may be cutt of by them as a great many of the french Man was for so doing when they was in Possesion of this Place which is a thing will not be Suffered by those Natives".[36] Thus, the Company had charged Butler with grand larceny (a capital offense), threatening other men's lives, mutinous slander, and fornication with a Native woman.

The court presented evidence, both oral and physical, to support the charge. Witnesses produced by the Company testified under oath against Butler, and the depositions mentioned in the indictment appeared with the record. In addition to this testimony, physical evidence was reported. Apparently, Butler had hidden his stolen goods in a hole that he had dug in his room. Knight carefully recorded the liberties of the accused that were recognized by his court: "Allowing him a fair and Legall hearing first gave him the Liberty if he could bring any one Person in his behalf or to his Reputation, but rather added to his Aforewritten Crimes & Misdemeanours and speaking but little in his own Defences".[37] The verdict came

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[34] *Ibid.*

[35] *Ibid.*

[36] *Ibid.*

[37] York Post Journal, 27 December 1715; B. 239/a/2, fo. 76 [HBCA, PAM].

back guilty: "Wee the Governor & his Councill found the said Thomas Butler Guilty of all the Severall Indictments of and for Feloniously Stealing and upon Scandilizeing the Honorable Company tended to Mutinizeing and breaking the Queen's Peace in Striveing to Subvert this Government".[38] Once again, Knight recorded his diligent observation of lawful procedure:

> Note in those Indictments where Mr. Alex Apthorp & Mr. Botherby Jackson were Witnesses against the said Thomas Butler they did not sitt as Councill to pass there Verdict, but...was found Guilty by the Governor and the rest of the Councell and in all the Other Indictments the said Thomas Butler was found Guilty of the Aforewritten Crimes Unanimously Agreed to by us all the Governor & his Councill.[39]

The verdict ended with the announcement of the signature under oath of the governor, the council, and all the witnesses involved in the trial.

James Knight's careful record of the trial he conducted revealed both the strengths and the weaknesses of the young legal system in the Bay. The court had observed the legal rights of the accused, and had exercised impartiality by removing those members of council who had a conflict of interest because of their role as witnesses. The accused had not been granted a jury trial, however, as Company authorities comprised the councils. Post councils could not be considered juries as they represented yet another body of authority from the Company and were not the employee's peers. Knight, in fact, never used the term 'jury'. The absence of a jury did not invalidate the trial, particularly since the Company's charter specified that the 'governor and council' were competent to hear and judge all civil and criminal cases. The model for this procedure was essentially the conciliar prerogative court, which also served as the model for the courts-martial. Notably, the trials of John Cartwright, Wiliam Lilpot, and Thomas Butler all had a similar 'victim': the Honorable Company. Its court acted as sole

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[38] York Post Journal. 27 December 1715: B. 239/a/2. fo. 76d [HBCA. PAM].

[39] *Ibid.*

guardian for the Company's interest, to prosecute servants who committed crimes against the Company. Neither Knight nor his successors recorded any quarrels between servants that needed the court's arbitration or judgment to resolve.[40] Furthermore, the jurisdiction of the court — regardless of its legal description — extended solely to Company employees, simply because no other British subjects had taken up residence in the Bay and Natives were not deemed British subjects. This legal system, established solely by Knight's endeavors early in the eighteenth century, only handled Company business; even if sufficient for the governance of employees, it played little or no part in establishing an acceptable procedure, proper rules of evidence, or substantive law for Rupert's Land.

Nor did the Company entertain such lofty goals at any time during the eighteenth century. The Company was concerned with preserving order and discipline in its factories, and this left little necessity for a regularly convening judiciary. Chief factors had authority over the servants in their own forts, and most minor crimes were handled at that level, under the master-servant law. Occasions arose when a chief factor might punish criminal acts of his servants through those means, without the convening of a formal council to actually try the crime. Anthony Beale, for instance, whipped four men for petty theft in 1713 without officially trying them for their crime.[41] It was a common English practice for masters to punish their servants personally for such crimes, as the severity of the common law was often an unattractive alternative for minor offenders in the master's household.[42] The courts called by Governor Knight reinforced the social order imposed by the master-servant relationship in the factories by adding a

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[40] This applies only to the eighteenth century, and is based on the review of evidence conducted so far. Given the exhaustive evidence available, it is perfectly possible that such a case exists.

[41] Albany Post Journal, 26 January 1713; B. 3/a/4, fo. 19d [HBCA, PAM].

[42] John Beattie, *Crime in the Courts of England 1660-1800* (Princeton: Princeton University Press, 1986), 173. [Hereafter: Beattie, *Crime in the Courts.*]

formal method of punishment for servants who repeatedly stole from the Company or threatened the stability of Rupert's Land's lawful government by encouraging mutiny and rebellion.

This order, despite its military cloak during the war with France before the Treaty of Utrecht, remained fundamentally a social order modelled after the English household.[43] The severity of the punishments exacted by the Company, particularly to a twentieth century viewer, might conjure up visions of military justice: swift, uncompromising, corporal. Employees complained of brutal treatment, mainly in the forms of whipping, beating, and other physical punishments. However brutal these punishments might appear to someone familiar with twentieth century western law, eighteenth century Englishmen and women were used to corporal punishment under the common law. The punishment for petty larceny in England — the theft of goods valued under one shilling — was whipping. JPs and magistrates used whipping to discipline vagrants, and increasingly used it in the eighteenth century to punish more serious property crimes, such as grand larceny.[44] Additionally, most whipping was carried out publicly, 'at the cart's tail', although this practice — common in the seventeenth century — declined in the eighteenth century as most whipping became confined to the privacy of the house of corrections. Public punishments like the pillory, seemingly less cruel than whipping, sometimes proved fatal in the face of an angry crowd.[45] The Company's use of the whip as punishment undoubtedly did not seem odd or out of place to contemporary Englishmen, or to parliamentary authorities. The 1749 inquiry into Company affairs had included allegations of brutal treatment of Company servants, but the Company focused its

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[43] Brown, *Strangers in Blood*, 20. Cf. Smandych and Linden, "Administering Justice Without the State".

[44] Beattie, *Crime in the Courts*, 461, 486.

[45] Beattie, *Crime in the Courts*, 467-68.

efforts on proving that it had established a presence in the Bay and was actively seeking to settle the land and drive out French traders. It did not even respond to the allegation that it had ill-treated its servants, and parliament did not press the matter. Punishment in the Bay too closely resembled punishments exacted in England.

Procedure in the trials discussed above followed a different model. Knight administered his court along court-martial procedural lines, in what was akin to the common law's conciliar institutional structure. Moreover, Knight had made a conscious attempt to document each segment of the Butler trial — from the reading of the commission to the passing of judgment — to portray his conviction of Thomas Butler as in accord with common law principles. The timing was crucial; the Company had prosecuted military crimes (i.e., mutiny) during the wars with the French, but Knight needed to prove that the governor and council were exercising criminal and civil jurisdictions in Rupert's Land that were not repugnant to the laws of England. For the Company to prosecute crimes committed under its jurisdiction after the Treaty of Utrecht, it had to follow strict common law guidelines.

Under the circumstances, Knight made sure in 1715 to distance himself from the procedure and punishments of the courts-martial. Military justice lacked the established procedure and rule of law that the common law courts provided, and this may help explain why eighteenth century Englishmen displayed a distrust of the military and their laws. Blackstone dismissed martial law as being "built on no settled principles", and "entirely arbitrary". Thus, military law "in truth and reality [was] no law, but something indulged rather than allowed".[46] Despite

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[46] Blackstone. *Commentaries*. I: 400. Cited in Arthur Gilbert. "Military and Civilian Justice in Eighteenth Century England: An Assessment". *Journal of British Studies*. XVII (Spring 1978): 15. [Hereafter: Gilbert. "Military and Civilian Justice".]

Blackstone's criticism, a rudimentary system did exist for the military to administer justice. Trials took place on two levels: at the regimental jurisdiction and at the general courts-martial. The regimental level was reminiscent of the captain's jurisdiction in the late medieval period, and regimental officers had immediate jurisdiction over the common soldiery.[47] The general courts-martial acted as an officer's court, and also heard appeals from the regimental level. Laws were simple and vaguely worded to cover desertion, treason, theft, and other broad areas. Case precedents and substantive law were practically unknown, and evidence was introduced in these trials without any apparent set of rules, at least not apparent to the common lawyer. Possibly the most abhorrent aspect of military justice to contemporaries was the use of lots in capital cases to determine who would be killed.[48] This represented a true assertion of arbitrary will over reason and undoubtedly many Englishmen found it repugnant to the principles of the common law.

The military procedure for trying cases of desertion, mutiny, or rebellion was 'indulged rather than allowed' because it permitted military authorities to touch life or limb without due process. The first Mutiny Act passed by the parliament of William & Mary stressed the uneasiness in which parliament 'indulged' military law: "noe Man may be forejudged of Life or Limbe or subjected to any kinde of punishment by Martiall Law or in any other manner then by judgement of his Peeres and according to the Known Laws of this Realm". However, the foregoing of these lengthy and legal processes was necessary "during this Exigence of Affaires...an exact Discipline be observed, and that soldiers who shall Mutiny or stirr up Sedition or shall desert their majestyes

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[47] M. H. Keen, *The Laws of War in the Late Medieval Ages* (London: Routledge & Kegan Paul, 1965), 31-33.

[48] Gilbert, "Military and Civilian Justice", 59-60.

Service be brought to a more Exemplary and Speedy Punishment then the usuall Forms of Law will allow".[49] The Company, despite exacting discipline through the usual forms of floggings and beatings, showed a real reluctance to take its servants' lives or limbs under its authority and jurisdiction: not one recorded case can be found of a resident governor or chief factor exacting such penalties in the eighteenth century.

Joseph Isbister, the Albany Fort chief factor from 1753 to 1756, did resort to capital punishment in one instance, although it involved Natives and not British citizens. In 1754, Cree Indians killed five Hudson's Bay Company employees at Henley House, apparently as a reprisal for violation of reciprocal trading obligations.[50] Isbister was responsible for Henley House, and the death of the Company servants there left it unmanned in the face of French competitors eager to establish a foothold in the Bay trade. Isbister, undoubtedly concerned about his career as well as the killings, took immediate action. On 8 March 1755, he recorded a meeting of his post council to discuss "this unfortunate affair which has happened at the Company Factory House at Henley".[51] Isbister immediately framed the act as an aggressive act of war, committed not by the Natives but by the French: "That as the French by their treacherous Means have Seduced and Corrupted the Indians or employd to delude the English out of their place of defence, have taken and Carried off the Master Men and the Companys effects, the men to Captivity or Massacre".[52] Taking immediate action, Isbister and council decided that the French had left Henley House standing in order to take possession

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[49] "Mutiny Act": 1 William III & Mary II c. 5, ¶ 1; *Statutes of the Realm*, VI: 55.

[50] Smandych and Linden, "Administering Justice Without the State".

[51] Albany Post Journal, 8 March 1755; B. 3/a/47, fo. 25 [HBCA, PAM].

[52] *Ibid.*, fo. 25-25d.

of it, and so they immediately ordered their 'trusty Indians' to set fire to the House and burn it to the ground.[53]

Three months later, Isbister apprehended the Natives he believed responsible for the act. Isbister recorded on 7 June 1755 that "when they [the Natives] found that their Villany was discovered began to Confess their guilt so soon as our men laid hands on them".[54] Isbister placed them all in different cells and examined each separately, reporting that their confessions concurred with his informant's report, and that they differed

> only in of disposeing of the dead men & Killing the Master.... Wouldbee and his two sons says that they did not put the dead men in the river but laid them on the land and Covered them with wood and Snuff the Blanket says that he did not Shoot the Master, but his brother Shenap did.[55]

Isbister convened his post council, and he recorded that

> upon the Consideration of the whole Confession the Sentance was past and judgment given by the whole Council of 24 men, that Wappesiss Alias Woudbee and his two sons, Shenap and young Snuff the Blanket should be hanged untill they are dead, dead, dead for so barborously murdering the men at Henly and robing the Companys Factory House.[56]

Isbister reported that he waited for the sentiments of the Moose Fort council, and on 21 June, he recorded that the "Packet from Moose Fort" arrived, and "Mr. White and Council [approve] of our proceedings with regard to Woudbee the Land Pirate and his two Sons and seems by his manner of writing to think wee have deferred the Execution of those Murders robers too long".[57] Interestingly enough, the chief factor at Moose Fort recorded on 17 June that he had received Isbister's letter, and referred to the affair as a "proceeding" and a "trial", and that "the judgment and sentence [was] pronounced against them", but he did not express

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[53] *Ibid.*, fo. 25d.

[54] Albany Post Journal, 7 June 1755; B. 3/a/47, fo. 38 [HBCA, PAM].

[55] *Ibid.*, fo. 38-38d.

[56] Albany Post Journal, 12 June 1755; B. 3/a/47, fo. 41 [HBCA, PAM].

[57] *Ibid.*, fo. 42.

approval, or even note that he had returned a letter to Isbister.[58] Isbister hanged the Indians on the day he claimed to have received the letter from Moose Fort. Woudbee and his two sons hung for thirty minutes until dead, and were buried in a sawpit some distance below the fort, "a Gentle punishment for so heinous a Crime, at the Same time to let the Indians know that the English will not putt up with Such Villainous Treatment from Indians, although wee are a people Strangers to all Savage brutality".[59]

Isbister's execution of Woudbee and his two sons set a precedent in Rupert's Land — the Company had not formerly attempted to establish jurisdiction over the Natives. The Company orders regarding Natives never specified, nor even suggested, that the governors place them under the Company's criminal jurisdiction. Nor was it the policy of the Company to subject Natives to English law throughout the later eighteenth century and well into the nineteenth century.[60] The Company had also been reluctant to institute capital punishment. Isbister justified his action largely by inferring that the French used the Cree to and in their plan to force the Company out of the Bay. Thus framed, Isbister's response to the Henley House killings — although he referred to it as a trial — could be liberally conceived by the London Committee (and parliament, if it investigated the matter) as an act of retaliation in the face of aggression. Although the London Committee did not express either approval or disgust with Isbister's

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[58] Moose Post Journal, 17 June 1755; B. 135/a/27, fo. 26d-27 [HBCA, PAM].

[59] Albany Post Journal, 12 June 1755; B. 3/a/47, fo. 42 [HBCA, PAM].

[60] Hamar Foster, "British Columbia: Legal Institutions in the Far West, from Contact to 1871", *Manitoba Law Journal*, XXIII (1996), now in *Canada's Legal Inheritances*, eds. DeLloyd J. Guth and W. Wesley Pue (Winnipeg: Canadian Legal History Project, 1996). For an interesting case of Company reluctance to extend its authority over the Cree as late as 1843, see Jennifer Brown, "The Track to Heaven: The Hudson's Bay Cree Religious Movement of 1842-43", in W. Cowan (ed.), *Papers of the Thirteenth Algonquian Conference* (Ottawa: Carleton University, 1982), 55. Cf. Russell Smandych and Karina Sacca, "From Private Justice to State Law: The Hudson's Bay Company and the Origin of Criminal Law Courts in the Canadian West to 1870", *Manitoba Law Annual* (1996).

conduct regarding Woudbee and his two sons, it recalled him the following year and chastised the Albany post council for the burning of Henley House:

> to the bad effect it may possibly have on our Trade in that Part of the Bay, especially under such management, had it not been more prudent, to endeavour to regain possession of that house, rather that to have Ordered it to be Burnt to the Ground, when at the same time it was acknowledged Absolutely Necessary to be rebuilt for the preservation of the Company's Trade?[61]

The Company also expressed concern over what impression Isbister's decision would leave with the Natives: "If the Indians Consider this Affair rightly, it will give them but a slender Opinion of either your Conduct or Courage, and thereby be of bad consequence to our Trade at Albany".[62]

Throughout the eighteenth century, the Hudson's Bay Company saw no need to create an established judiciary or to formally transplant English common law. The infrequent convening of governor and council for formal trials reinforced a social order modelled after the master-servant 'household' relationship and largely dependent on the authority of chief factors over their individual factories. The system worked well when protecting the Company's interests against recalcitrant servants, but after the British conquest of New France, as active competition from Montreal-based companies began in the 1770s to encroach on Rupert's Land, the want of legal machinery struck at the heart of the Hudson's Bay Company's claim to the soil and to a trading monopoly. Without the legal apparatus to carry out its jurisdictional claims against rivals, the Company had to send cases back to Canadian courts, or to England for trial. The only cases eligible for trial in England were treason and murder, leaving the Canadian courts as the only option for testing the Company's territorial claims. Although this did not constitute an urgent problem when the Company exclusively governed

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[61] London Correspondence Inward. 12 May 1756; A. 6/9, fo. 29d [HBCA. PAM].
[62] *Ibid.*.

employees, the case of Joseph Lamothe in 1802 touched on all the legal uncertainties concerning Rupert's Land.

Lamothe was not an employee of the Hudson's Bay Company, but of the XY Company. The man he shot, James King, was employed by the North West Company. The act took place in an Indian village within what the Hudson's Bay Company claimed was its territories.[63] Who had jurisdiction? By its charter, the Hudson's Bay Company claimed the land and jurisdiction, but its lack of interest in the case and the absence of official courts to dispense justice complicated that possibility; in fact, I have found no evidence that the Company considered the option of trying the case itself. The supervising companies of both Lamothe and King based themselves in Montreal, so the trial moved there for resolution. But jurisdictional questions haunted the courts, who doubted their authority outside of their territorial, and thus jurisdictional, limits. The issue dragged on until Lamothe disappeared. The jurisdictional question, though, lingered on.

Hamar Foster has suggested that the Lamothe case and the jurisdictional uncertainties it raised were the main impetus behind the 1803 Canada Jurisdiction Act,[64] which established the authority of the courts of Upper and Lower Canada to try cases in Indian territories.[65] The Act achieved little more than rampant confusion, primarily because it ambiguously referred to "all Offenses committed within any of the *Indian* Territories, or Parts of *America* not within the Limits of either of the said Provinces of *Lower* or *Upper* Canada, or of any Civil Government of the United States of *America*".[66] Hudson's Bay Company lawyers

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[63] A. S. Morton, *A History of the Canadian West to 1870-71* (London: Thomas Nelson & Sons Ltd., 1939), 513.

[64] Hamar Foster, "Long Distance Justice", *American Journal of Legal History*, XXXIV (1990): 6-12.

[65] 43 George III, c. 138 (1803). Cited in *Charters, Statutes, Orders in Council Relating to the Hudson's Bay Company*, 87.

[66] *Ibid.* Emphasis in original.

immediately claimed that the act pertained only to the 'Indian territories' exclusive of Rupert's Land and reassured Company officials that the jurisdiction granted by the charter did not subject Rupert's Land to the Act.[67]

The Hudson's Bay Company faced a serious dilemma. Although the Company believed it stood on strong legal ground in the jurisdictional question, lawyers were less optimistic about the legality of the trading monopoly.[68] Solicited legal opinions suggested that the Company refrain from testing its proprietary claims in court, lest its monopoly come under scrutiny, which could result in the demolition of the exclusive right of trade. That problem rooted itself firmly in the position of corporate charters and trading monopolies during the seventeenth century (addressed in the previous chapter). The king had validly incorporated the Company and the form of letters patent had authenticated the Hudson's Bay Company role in the western fur trade, but the charter had only been confirmed once, by statute in 1690.[69] Corporations required recognition of their cause, but also confirmation from time to time of their privileges by the government. In successive reigns, charters granted by previous monarchs would be ratified as a way of confirming their privileges and amending any outdated elements. The Hudson's Bay Company had followed that pattern by applying for statutory confirmation in 1690, but its failure to continue this process in the eighteenth century left it in possession of an outdated monopoly that severely prejudiced the legality of the jurisdictional and territorial grants in the 1670 charter.

This kept the Hudson's Bay Company from making its case in the courts of England, but a more pressing problem in the early nineteenth century needed

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[67] Foster, "Long Distance Justice", 27.

[68] *Ibid.*, 13.

[69] *Charters, Statutes, Orders in Council, Relating to the Hudson's Bay Company* (London: Hudson's Bay Company, 1931), 75.

addressing. Without an adequate judicature in Rupert's Land, the Company could not exercise its jurisdictional rights. The case of the Hudson's Bay Company employee John Mowat in 1809 illustrated this problem. Mowat was charged with the murder of a North West Company employee within the boundaries of Rupert's Land. The North West Company forcibly removed him and took him to Montreal for trial.[70] Although the murder charge was eventually reduced to manslaughter, and his two primary witnesses were allowed to testify (they initially had been charged with complicity in order to dismiss their testimony), the Hudson's Bay Company was outraged at the events. It had little choice but to accept the ruling, because it had no machinery to dispense justice of its own.

Until Lord Selkirk's plans in 1811 for the agricultural development of Red River provided the impetus for a regular judiciary for colonists, the Hudson's Bay Company had no reason to establish formal courts of law within its territories. The eighteenth century 'legal system', in the form of the resident governor and post council, amounted to little more than a simple, if efficient, mechanism for the enforcement of Company regulations. As for the law it enforced, this was as much rooted in the common law's master-servant principles as in the practices of courts-martial. The cases of Lamothe and Mowat in the early nineteenth century revealed the impotency of both Hudson's Bay Company jurisdiction and the fiction of 'long distance justice', which created more problems than it solved. Hovering above this was the dire problem that the lack of legal machinery created for a Company that needed to prove its territorial claims in a court of law. The North West Company had continually encroached on Hudson's Bay Company territory

[70] For a narrative of the events, see Morton, *A History of the Canadian West*, 525-26.

throughout the first decade of the nineteenth century, but the Hudson's Bay Company could only seek legal remedy in the distant Canadian or English courts. Parliament had restricted cases returning to England, as noted above, to murder and treason, and the Company had ample reason to believe that the Montreal courts were prejudiced in favor of the Montreal companies.[71] Without its own courts to exercise criminal and civil jurisdiction, the Company had precious few options for finding remedies against Canadian traders who committed crimes or trespasses in the Company's chartered territories.

The settling of the Red River colony in 1811 required a judiciary for the everyday governance of the colonists, but it was the first of its kind in Rupert's Land. The Company governed its servants in its fur trade posts with its internal laws and regulations, but those laws did not provide a body of substantive law appropriate for colonists. The Company had espoused a legal system in the Bay that meted out justice on an irregular basis, and it did not leave a recognizable example for the colonists to follow. Lord Selkirk and his colonists, rather than building on an inherited system of law or a body of laws, had a creative opportunity in establishing a judicature at Red River.

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[71] Gene M. Gressley, "Lord Selkirk and the Canadian Courts", in J. M. Bumsted, ed., *Canadian History before Confederation* (Georgetown, Ontario: Irwin-Dorsey Ltd., 1972), 294.

Chapter 4

The Judicature and Legislative Reform at Red River

Understanding the structure of government in Assiniboia in the years 1812-1870 demands an understanding of the Hudson's Bay Company's chartered powers, the acceptable means of governance for colonies in 'his majesty's plantations in America', and the various models that the Company and the councillors of Assiniboia utilized. The constitutional and jurisdictional uncertainties hovering above these concepts were prominent issues for the Company during the unstable years following the founding of the colony in 1812. The three decades of competition between the North West Company and the Hudson's Bay Company that erupted in a pitched battle at Seven Oaks in 1816 led to a parliamentary inquiry and the second Canada Jurisdiction Act of 1821. But the 1821 Act papered over the fissures and did little more than establish confusing and overlapping jurisdictions in Rupert's Land.

The 1821 Act did not provide any prescription for the proper governance of Rupert's Land; that was left in the hands of the proprietary Company. Nor was much progress made in establishing and formalizing judicial courts, or in positive legislation for the colony, until 1832.[1] The governors in Red River never attempted to separate — in concept or practice — the legislative, executive, and judicial branches of government. The governor and council of Assiniboia legislated for the settlement, formed the committees that executed the laws and maintained order, and sat in their judicial capacity as the General Quarterly Court. This was not a rare practice in the colonial experience; most of the American

[1] The minutes of the Governor and Council of Assiniboia indicate that the council did not begin actively legislating until 1832. Minutes of the Council of Assiniboia, E. 16/2, Hudson's Bay Company Archives, Provincial Archives of Manitoba: Winnipeg, Manitoba. [Hereafter: HBCA, PAM].

colonies had combined all three functions of government within their 'assemblies', and for small communities it seemed the only option.[2]

But Red River was a unique colony in many ways. To begin with, the original settlers — and all the inhabitants until Confederation — did not administer government directly from the Crown through a colonists' charter. Rather, the legislative, executive, and judicial bodies of Red River received their authority from the Hudson's Bay Company charter. The London Committee appointed the governor and council of Assiniboia and reviewed the minutes of their meetings. It inspected laws passed by council and the work of committees formed by the council. Justices of the Peace in the district of Assiniboia received their commissions from the Company. This all effectively made the governor, deputy governor, and committee in London the source of all legitimate authority exercised in the colony.[3] Sir George Simpson and the London directors authored the reforms of the Red River judicial system in Assiniboia between 1835 and 1839. The Company formalized the courts, ensured the keeping of records, and added a learned man of the law to the court under the title of 'recorder of Rupert's Land'. Two important goals underlined these active reforms. First, the formalization of the courts enabled the Company to exercise its jurisdictional claims in Rupert's Land on solid legal footing. Second, by the introduction of a barrister to the bench as recorder, the Company sought to turn the General Quarterly Court of Assiniboia into a true court of record.[4] Both goals were necessary in the Company's protection of its monopoly and claims of governance over Rupert's Land.

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[2] Bruce Daniels, ed., *Town & County* (Middletown: Wesleyan University Press, 1978).

[3] One must not forget that the Company was not truly the *source* of all legitimate authority. The English crown was the true source, and through the instrument of the royal charter, had conferred powers on the Company to administer government and justice in Rupert's Land.

[4] 'Court of record' means more than just a court that kept records; it meant a court whose decisions would be respected as law even outside that court's jurisdiction.

Law and Justice in the Infant Colony: 1812-1835

On the fourth of September 1812, William Hillier, one of the Company's attorneys, delivered "peaceable possession of the land and hereditaments" to Miles Macdonell, Selkirk's agent in North America.[5] It was the legal step that completed the Company's 1811 grant of 116,000 acres of land in Rupert's Land to Thomas Douglas, earl of Selkirk. The grant itself was a complex transaction which specified a number of obligations for both parties. The Company alienated the tract of land — designated as the District of Assiniboia — along with mineral, timber, and water rights, and any and all appurtenances, reversions, remainders, and any other profits associated with the land.[6] The terms of the conveyance bound the earl of Selkirk to provide land for retired Company servants, allowing masters of trading posts 1000 acres and anyone beneath that rank 200 acres.[7] The deed also specified that the earl of Selkirk would settle at least 1000 married families in ten years. If he did not comply, the Company was bound to give written notice to him to fulfill his obligation. Failure to settle the requisite number of families within three years of written notice would result in the Company's revocation of the grant.[8] The Company also bore obligations in the deed above and beyond the transfer of the land to Selkirk. The Company promised to provide a port, shipping, and storage for the colonists' goods. The revenues from a customs duty of 5 per cent was to be applied toward improving communication by

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[5] E. H. Oliver. *The Canadian North-West: Its Early Development and Legislative Records*. 2 vols. (Ottawa: Government Printing Bureau, 1914), I: 168.

[6] Grant of the District of Assiniboia by the Hudson's Bay Company to the Earl of Selkirk, 12 June 1811; Oliver. *The Canadian North-West*, I: 154-156.

[7] *Ibid.*, 157.

[8] *Ibid.*, 159.

land and water from Port Nelson to Lake Winnipeg and maintaining public courts, offices, and a police force for the settlement.[9]

The Company's obligations under the deed reinforced its position as the ultimate governor of the settlement. The land grant, while giving Selkirk absolute proprietary ownership of Assiniboia, had reserved "to the said Governor and Company and their successors all rights of jurisdiction whatsoever granted to said Company by their Charter".[10] Unlike most of the North American colonists of the seventeenth century, Red River colonists did not possess a crown charter, and any court established in Assiniboia had to receive its authority by way of the Company's charter. The Company also controlled the main governing body in Assiniboia. The governor of Assiniboia was a Company official and received his commission from the London Committee, who also appointed councillors. The proprietary Company reserved jurisdiction primarily to consolidate its legal monopoly over its North American territories. Without the legal monopoly, the Company had no means of enforcing its trade monopoly on an independent settlement. A separate grant of jurisdiction to Selkirk could problematically undermine its own authority in all of Rupert's Land.

The Company's jurisdictional rights in 1812, however, faced uncertainties. The 1803 Canada Jurisdiction Act had extended the jurisdiction of the courts of Upper and Lower Canada to "the Indian Territories, or Parts of America not within the Limits of either of the said Provinces of Lower or Upper Canada, or of any Civil Government of the United States of America".[11] Although this statute made no reference to the Hudson's Bay Company's territories and was thus ambiguous about whether it applied to Rupert's Land, Selkirk took it into account and secured

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[9] *Ibid.*, 163-167.

[10] *Ibid.*, 156.

[11] *Charters, Statutes, and Orders in Council Relating to the Hudson's Bay Company* (London: Hudson's Bay Company, 1931), 87. [Hereafter: *Charters, Statutes, and Orders in Council.*]

commissions for Justice of the Peace in 1811 from the Lower Canadian governor for Miles Macdonell — the governor of Assiniboia — and several other officials in the colony.[12] Two years later he informed Miles Macdonell that "the grant of Jurisdiction contained in the Charter is valid with only a few points of exception, and that is not affected by the Act 43, Geo. III., called the Canada Act".[13] The Canada Jurisdiction Act of 1803 did not apply, or so Selkirk believed, and therefore the Company was within its rights to establish courts of law without the sanction of the Upper or Lower Canadian governor.

In an 1813 letter to Macdonell, Selkirk gave instructions concerning the application of laws in Red River but, for the most part, these instructions were extremely vague. Selkirk warned Macdonell to use judicial authority only when absolutely necessary in order to preserve order, and to avoid carefully "any step that could give a handle for misrepresenting these proceedings as directed to sinister objects and particularly to the invidious purposes of monopoly".[14] Selkirk wanted to cement the Company's jurisdictional rights, but did not want it to appear to parliament that the Company was using its authority for the personal purpose of reinforcing its monopoly. In order to follow the guidelines of both the charter and English law, Selkirk instructed Macdonell to sit as a judge with his council and to empanel a jury in all cases that would require a jury in England. Selkirk also instructed Macdonell to appoint a sheriff and named a member of the council to the post. Since the sheriff had a duty to execute the judgments of the court he would be required to abstain from sitting as a councillor during trials.[15]

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[12] Oliver. *The Canadian North-West*. I: 177.

[13] Selkirk to Macdonell. 13 June 1813; Oliver. *The Canadian North-West*. I: 178.

[14] *Ibid*., 179.

[15] *Ibid*., 181-83.

The first ten years of settlement were marred by the conflict between the North West Company (and its Métis colleagues) and the Hudson's Bay Company that exploded at Seven Oaks on 19 June 1816. The British parliament heeded the events and appointed a Royal Commission to inquire into the affair. W. B. Coltman presented his report to parliament in 1819. The 98-page report contained correspondence in and out of Red River that indicated numerous indications well before Seven Oaks to the potential of violence between the rival companies.

The report split the blame for Seven Oaks equally between the two companies. Coltman's report laid out a long string of incidents beginning in 1812 that continually heightened the tension at Red River. For its part, the North West Company had immediately opposed the settlement as a threat to its dominance of the fur trade along the Assiniboine and Red rivers. John Pritchard, the clerk in charge of the North West Company Assiniboine post, told Coltman that "it was the general opinion of the partners in the quarter, that if the colony succeeded, the result would be to form a nursery of servants for the Hudson's Bay Company, and thereby enable that company more effectively to oppose them in trade".[16] Selkirk's settlement also endangered the North West Company's pemmican supply that had been vital to maintaining the fur trade in the prairies since the late eighteenth century.[17] Pritchard had resolved to use fair means to discourage the colony, primarily by buying up provisions to keep them from the colonists. Not all of the North Westers, however, opposed the settlement by merely 'fair means'.

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[16] "A general Statement and Report relative to the Disturbances in the Indian Territories of British North America, by the undersigned Special Commissioner for inquiring into the Offences committed in the said Indian Territories and the Circumstances attending the same", 1819 [Hereafter: "A general Statement and Report relative to the Disturbances in the Indian Territories of British North America"]; Professor P. Ford and Mrs. G. Ford, eds., *Irish University Press Series of British Parliamentary Papers; Colonies, Canada* (Shannon: Irish University Press, 1971), V: 337. [Hereafter: Ford and Ford, eds., *British Parliamentary Papers*.] All page numbers refer to the IUP pagination rather than the original page in the report.

[17] Arthur J. Ray, *Indians in the Fur Trade* (Toronto: University of Toronto Press, 1974), 128.

Shots were exchanged in 1815 when employees of the North West Company fired on the colonists' homes. After having successfully broken up the settlement, the North Westers burned the buildings left behind.

For their part, the Hudson's Bay Company officials in the colony had continually exacerbated the tensions. Besides taking a number of men prisoner during the 1815 conflict, the settlers had at one point broken into a North West Company post and removed several items, including a howitzer.[18] Moreover, Company officials had entered North West posts on numerous occasions with notices for eviction throughout the four-year period before Seven Oaks. In fact, Company men had returned in arms after the 1815 dispersal of the settlement, and had seized a number of North West posts in the month preceding Seven Oaks. This led Coltman to conclude that "of the general existence of hostile feelings, and mutual designs of future aggression, there can be no doubt".[19] Each party held firmly to its position that it was the rightful proprietor of the soil at Red River, and their stubborn refusal to relent in their separate courses of action led directly to the conflict. Coltman noted it well in his report:

> it was the determination of the Hudson's Bay party to keep forcible possession of the Forks of Red River, in support of their territorial rights: and equally the determination of the North West party to oppose their so doing by force, and to revenge the injuries they conceived themselves to have suffered, in the imprisonment of Duncan Cameron, and the seizure of their property; whilst on behalf of the half-breeds, the intention of driving off the colonists is openly avowed by Cuthbert Grant, on the grounds that their pretentions were inconsistent with the rights of natural justice, both in respect to themselves, and of the North-West company, and had been the cause of continued disputes from nearly the first establishment of the colony. These feelings had been further irritated during a long period of hostile preparations, of mutual injuries and menaces.[20]

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[18] "A general Statement and Report relative to the Disturbances in the Indian Territories of British North America"; Ford and Ford, eds., *British Parliamentary Papers*, V: 351.

[19] *Ibid.*, 375.

[20] *Ibid.*

Coltman's report sought to locate the blame for the violence, but the tenor of his writing indicated that both companies were culpable. Rather, it was the competing claims of the parties and the subsequent actions of the parties in support of their claims that were the real culprits.

The imperial parliament, however, had more sources to review than Coltman's report. Petitions from Red River settlers and pamphlets in support of the Hudson's Bay Company's settlement gave much more vivid accounts of the outrages that the North West Company had perpetrated. John Pritchard, a North Wester who changed his allegiance to the Hudson's Bay Company and settled at Red River before Seven Oaks, petitioned parliament in 1819 for protection against the North West Company. Pritchard offered a vivid and gruesome account of the Seven Oaks massacre:

> the horsemen...surrounded the Governor and his party, so as to prevent the possibility of their return. In a few moments your petitioner and the others were fired at by the horsemen, in consequence of which twenty-one of them were immediately either killed or wounded.... Cuthbert Grant left [Governor Semple] in [the] charge of one of the Company's Canadian servants, and that another of their party came up close to Mr. Semple, and shot him through the breast, while lying on the ground in a defenceless state. That the others who were wounded implored and begged for mercy; but they were all massacred, and their bodies stripped and mutilated in a manner too horrible for your petitioner to describe.... Your petitioner, and Mr. Rogers, who had come out from England to the Settlement as a mineralogist, having thrown down their arms, implored for mercy; notwithstanding which, a clerk of the North-West Company, (a half-breed son of one of their retired partners,) being close to Mr. Rogers, deliberately shot him through the head, while he was begging his life; and another half-breed servant of the Company immediately ripped open his belly with a knife. That your petitioner was the only person of the whole party from the Settlement to whom quarter was given; and his life was spared at the intercession of one of the Company's Canadian servants, with whom he had formerly been well acquainted.[21]

The petition played on the larger fears associated with the North West Company, something the Hudson's Bay Company exploited. French Canadians and half

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[21] The Petition of John Pritchard, in *Substance of the Speech of Sir James Montgomery, Bart. in the House of Commons on the 24th of June, 1819* (London: J. Brettell, 1819), 44-46.

breeds, the Company claimed, had united to massacre and turn out British subjects in British North America. Indeed, Coltman had investigated the possibility of a conspiracy on the part of the North Westers to unite the Natives and half-breeds against the settlers, and to use violence to turn them out. Although he overruled the possibility, he reported that Katawabetay, "an Indian chief from Fond-du-Lac", had stated that in 1814 "Daniel McKenzie did offer him all the goods at Leach Lake, Sandy Lake, and Lac-la-Pluie, as an inducement to make war upon the English at Red River".[22] Katawabetay claimed that he refused the request, but the whole incident reinforced fears that the Aboriginal population, together with the Métis, were planning to make war on the English in North America. Faced with the prospect of more violence over the fur trade and a conflict with Natives for portions of British North America, parliament responded by reaffirming the Hudson's Bay Company's chartered rights in the second Canada Jurisdiction Act of 1821.

Coltman's report brought to the surface more than just the violent affair at Seven Oaks. He addressed the question of ownership of the Assiniboia territory, and this meant that the Hudson's Bay Company and the North West Company were not the only contenders. Both the Métis, under the direction of Cuthbert Grant, and the Natives had claims to the territory, and Coltman listed them all. The Hudson's Bay Company had cited its chartered rights to the territory, and the North Westers claimed a prescriptive right to the soil backed by fifty years of trade in the region and a reference to French traders of Montreal, whose presence along the rivers was "beyond the memory of man".[23] The Métis and Natives in the Red River region, however, also claimed a prescriptive right to the soil:

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[22] "A general Statement and Report relative to the Disturbances in the Indian Territories of British North America"; Ford and Ford, eds., *British Parliamentary Papers*, V: 314.

[23] *Ibid.*, 350.

> It is further stated by witnesses, of whom one has frequented the Red River for forty-six years past that the half-breeds, with the Crees and Assiniboins, were always considered the proprietors of the country; and it is fully admitted by all the parties, that the Salteaux Indians who came there only about twenty-five years ago, have always been considered as occupying the lands under the permission of the Crees, and not as proprietors.[24]

Of all the proprietary claims on Red River, Coltman's report made this one seem the most plausible. The Company's chartered rights had no prescriptive grounding. Likewise, the North Westers had failed to establish a clear lineage to demonstrate title, which required more than just vague references to French traders from Montreal in the past two centuries. The Cree, Assiniboine, and Métis, however, had true prescriptive rights. Furthermore the Salteaux who were occupying part of the Cree territory did so with the permission of the proprietors. Coltman's report, however, never again mentioned Aboriginal land claims.

Selkirk was aware of the proprietary claims of the Natives, and began negotiating with them for the sale of their land in 1817. He entered into a contract with the Natives on 18 July 1817, promising in return for the district of Assiniboia

> to the Chiefs and warriors of the Chippeway or Saulteaux Nation, the present or quit rent consisting of one hundred pounds weight of good and merchantable tobacco, to be delivered on or before the tenth day of October at the forks of Ossiniboyne River—and to the Chiefs and warriors of the Killistine or Cree Nation, a like present or quit rent of one hundred pounds of tobacco, to be delivered to them on or before the said tenth day of October, at Portage de la Prairie, on the banks of Ossiniboyne River.[25]

Selkirk's treaty aimed at extinguishing all other land claims to the territory he purchased from the Hudson's Bay Company. It was a pre-emptive move on his part, both to appease the Natives by promising them an annual payment and to satisfy British authorities that he had undisputed title to the land.

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[24] *Ibid.*, 351.

[25] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Saskatoon: Fifth House Publishers, 1991), Appendix A. First published in 1880.

Parliament did not address the issue of Aboriginal land claims in 1821. Parliament's solution was to ratify the Hudson's Bay Company's chartered rights of monopoly in light of the union of the Hudson's Bay Company and the North West Company. By securing the monopoly, parliament significantly reduced the potential for violence that seemed endemic to competition in the fur trade. The 1821 Act, however, did little to resolve the major jurisdictional questions that had lingered since 1803.[26] The Act formally ratified the Canada Jurisdiction Act of 1803, and declared that it was "in full force in and through all the Territories heretofore granted to the Company of Adventurers of England trading to Hudson's Bay".[27] Commissions for justice of the peace could be attained through "the Governor or Lieutenant Governor or Person administering the Government for the Time being of Lower Canada, by Commission under his Hand and Seal", or directly from the crown under the great seal.[28] The jurisdiction of the Canadian courts, however, was not to impinge on the jurisdictional rights of the Hudson's Bay Company. The Company was entitled to claim and to exercise all "Rights, Privileges, Authorities, and Jurisdictions...as if this Act had never been made; any thing in this Act to the contrary notwithstanding".[29] The statute had both reaffirmed the jurisdiction of the Canadian courts over Rupert's Land and legitimated the Hudson's Bay Company's jurisdictional claims. In short, it had left the question of jurisdiction as confused as before, "as if [the] Act had never been made".

Regardless of parliament's intentions, the whole issue was settled in 1822. His Majesty's government did not appoint Justices of the Peace (JPs) or establish

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[26] See Hamar Foster, "Long Distance Justice". *American Journal of Legal History*. XXXIV (1990): 35.

[27] *Charters, Statutes, and Orders in Council*, 96.

[28] *Ibid*, 98, 101.

[29] *Ibid*, 102.

courts of record for the territory; the Canadian courts retained jurisdiction without sending commissioned JPs to expedite local actions. Since parliament had upheld the Hudson's Bay Company's jurisdictional claims, the Company set out to establish a judicature in the district of Assiniboia. However, the Company gave no real instructions as to what kind of laws to enforce or what kind of judicature to erect. Besides a small collection of penal laws published in 1815 at Moose Factory — which were little more than regulations for Company servants at Company forts — the Company had yet to codify or publish what laws were really in force.[30] Selkirk had given instructions but had died on 8 April 1820 while his settlement was still wracked in turmoil. Andrew Colvile, an executor and trustee of Lord Selkirk's estate, told John Halkett, a London director and also an executor and trustee, that:

> You will have to advise [Governor Andrew] Bulger as to his conduct in regard to the Jurisdiction. If substantial justice is done and the punishments moderate the forms will not so much signify. Everything should be done in open court and juries sworn on proper occasions but I believe it is not necessary that the jury should be 12 if so many unexceptional persons from the thinness of the population cannot be brought together.[31]

The model for the new judicature roughly followed the specifications of the charter that enabled the governor and council to hear and decide cases. The addition of a jury to decide issues of fact indicated that the London directors wanted to institute a common law court. The form of the court, however, was secondary in importance to the judgments it delivered. In order for outside

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[30] Kathryn Bindon asserted that this was the standing penal code for the colony in "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54", in David Flaherty, ed., *Essays in the History of Canadian Law* (Toronto: Osgoode Society, 1981), 45. However, as Russell Smandych and Karina Sacca pointed out in "From Private Justice to State Law: The Hudson's Bay Company and the Origin of Criminal Law Courts in the Canadian West to 1870", *Manitoba Law Annual* (1996), 15-16, the code pertained mainly to factory regulations involving Company servants, and was not a comprehensive list of penal laws that would apply to colonists. The code of penal laws can be found in Oliver, *The Canadian North-West*, II: 1287.

[31] Colvile to Halkett, 31 May 1822; Oliver, *The Canadian North-West*, I: 221.

authorities — particularly the British parliament and the Upper Canadian courts — to consider the Company's court legitimate, the court had to appear fair in its administration of justice. The form of the court was considered a technical affair and was secondary in importance.

Considering the absence of any quarterly sitting of the court from 1822 to 1835, it does not appear that great attention was paid to form. Alexander Ross, who came to Red River in 1825, noted that up until 1835 "a few councillors, to assist the Governor, some few constables too, had been nominally appointed; and this little machinery of government had dragged along under what has been very properly called the smoothing system, or rather no system at all".[32] The Reverend Roderick MacBeath, whose father had been a magistrate in Assiniboia, recalled that "the science and art of statecraft had made but little progress on the banks of the Red River, and that laws and the administration of them were primitive enough in those early days".[33] Both Ross and MacBeath described a system largely dependent on arbitration and equitable settlements, aided by the spirit of mutual cooperation among the colonists. Ross considered it "a political miracle" that an apparently lawless community functioned so well. MacBeath gave several heartwarming anecdotes of how justice was administered. In one case, a drunken half-breed chased a merchant whom he held responsible for the death of his son into MacBeath's home. The two of them spent the night there — in opposite ends of the house — and in the morning, "when the half-breed was sober, court was held, and after being shown how groundless his view was, he was bound over to keep the peace under severe penalties, and that settled it". MacBeath went on to note that "nowadays, or then, if enforced strictly, the criminal law would not deal

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[32] Alexander Ross. *Red River Settlement* (Minneapolis: Ross and Haines, Inc., 1957; originally published 1856), 173.

[33] R. G. MacBeath. *The Selkirk Settlers in Real Life* (Toronto: William Briggs, 1897), 66.

so gently with a man who was disposed to prowl after innocent parties with murderous intent and a fork; but a wholesome dread of the court, if any breach of the law were committed, made the plan effective".[34] Although the story in question must have occurred after 1852 (the year Robert MacBeath became a magistrate), it was obviously reminiscent of a flexible and personal system of justice for a small colony.

Nor do the several records of the trials that did take place indicate that the governor and council of Assiniboia consciously attempted to transplant the complexities of the common law or English procedure to Red River. Several instances of criminality were recorded by Andrew Bulger, governor of the settlement in 1822 and 1823.[35] Bulger, though, did little more than take depositions and issue commissions for constables. He admitted to Andrew Colvile in 1822 that he "did not expect...to be called upon at any time to perform any judicial functions", primarily because he was "not competent in point of ability, nor qualified by law".[36] The system, such as it was, truly must have been as Alexander Ross described it: a smoothing system rather than a formal, English legal process.

Legislative Reform and the Court of Assiniboia: 1835-1841

The subject of law and judicial machinery in Red River, particularly for the period from 1835 to 1839, has captured historians' attention for some time. E. H. Oliver reproduced many of the legislative documents and provided a general

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[34] *Ibid.*, 70. MacBeath did not attach a date to the case in question, and it appears that it could have occurred at any time during his father's tenure as a magistrate.

[35] Smandych and Sacca, "From Private Justice to State Law", 42.

[36] Bulger to Colvile, 1822; Oliver, *The Canadian North-West*, I: 43.

account of the established government and judicature of Red River.[37] Roy Stubbs added a description of Adam Thom to Oliver's narrative, although his work was admittedly based on Oliver's account.[38] Recently, Kathryn Bindon has retold the events discussed by both Oliver and Stubbs, although she added a deeper and more convincing analysis of the conflict between the Company and the settlers.[39] In her view the Company actively sought judicial reform to formalize the legal system, largely to vindicate and protect its monopoly. But all accounts of judicial reform during the crucial period between 1835 and 1839 remain largely the same.[40]

Part of the reason for the similarity is the straightforward nature of the evidence. The reforms were detailed in the minutes of the governor and council of Assiniboia and only briefly mentioned in letters among participants in the legislative reform. The events themselves were straightforward. In 1835, the council of Assiniboia divided Red River into four districts and appointed a magistrate in each section. Each magistrate presided over a quarterly, petty court authorized to hear "cases of petty Offence, and debts under 40s.". Two constables were to attend the court and obey the commands of the magistrate, presumably to maintain order in the court and aid in the execution of sentences. In addition to these petty courts, the governor and council of Assiniboia were authorized to sit as a general quarterly court at the governor's residence, "where cases of a more

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[37] Oliver, *The Canadian North-West*, 2 vols.

[38] Roy St. George Stubbs, *Four Recorders of Rupert's Land* (Winnipeg: Peguis Publishers, 1967).

[39] Kathryn Bindon, "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54", in David Flaherty, ed., *Essays in the History of Canadian Law*. [Hereafter: Bindon, "Hudson's Bay Company Law".]

[40] Louis Knafla, "From Oral to Written Memory: The Common Law Tradition in Western Canada" in Knafla, ed., *Law & Justice in a New Land* (Toronto: Carswell Co. Ltd., 1986). [Hereafter: Knafla, "The Common Law Tradition in Western Canada".] Dale Gibson, "Company Justice: Origins of Legal Institutions in Pre-Confederation Manitoba", *Manitoba Law Journal*, XXIII (1996). [Hereafter: Gibson, "Company Justice".] Now in *Canada's Legal Inheritances*, eds. DeLloyd J. Guth and W. Wesley Pue (Winnipeg: Canadian Legal History Project, 1996)

serious nature, cases of debt exceeding 40s. and all appeal cases from the decision of the Justice of the Peace shall be examined into".[41] As a check on 'frivolous' litigation, the prosecutor had to pay 3s. to initiate proceedings, and in cases of appeal, the fee was 5s.[42]

In 1837 the council repealed the 1835 resolution that divided Assiniboia into four districts. It formed three districts and appointed two magistrates for each. Petty courts in each of the districts consisted of any three magistrates and exerted jurisdiction over petty offenses and debts not exceeding £5. The General Quarterly Court consisted of the governor — or the principal representative of the Company then in Red River — and the council.[43] The council made further reforms in 1839. Each district was appointed three magistrates, of which at least one had to reside inside, and one outside, of the district of appointment. The Company empowered these magistrates to hold courts of summary jurisdiction over civil suits under £5, and any criminal misdemeanors where the resultant fine did not exceed £5. All the general appointments were rescinded and both the administrative and judicial posts received minor reform. The London directors created a governor-in-chief of Rupert's Land, a governor of Assiniboia, a recorder of Rupert's Land, four sheriffs of Rupert's Land, and two sheriffs of Assiniboia. Councils were created and named for both Rupert's Land and Assiniboia.[44] In 1841 the council of Assiniboia further restricted the summary jurisdiction of the petty courts to fines not exceeding 20 shillings.[45]

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[41] Minutes of the Council of Assiniboia, 12 February 1835; E. 16/2, fo. 6 [HBCA, PAM]. [Hereafter: Minutes of Council]. The Council minutes are all reproduced in Oliver, *The Canadian North-West*. Since my citations are taken directly from the archives, all my references will be to the original documents.

[42] Minutes of Council, 12 February 1835; E. 16/2, fo. 6d [HBCA, PAM].

[43] Minutes of Council, 16 June 1837; E. 16/2, fo. 15-15d [HBCA, PAM].

[44] Minutes of Council, 1839; E. 16/2, fo. 19d-22d [HBCA, PAM].

[45] Minutes of Council, 25 June 1841; E. 16/2, fo. 37d [HBCA, PAM].

The system was roughly modelled after the English county courts. The presence of quarterly courts on a petty scale with summary jurisdiction closely resembled the jurisdiction that JPs had exercised throughout Tudor-Stuart England. The Company issued commissions to the magistrates that made them JPs in both fact and law, and the Company intended the magistrates to fulfill all the functions consistent with their English counterparts. JPs in Assiniboia were charged "to keep and cause to be kept all Ordinances and Statutes for the good of the Peace and for preservation of the same and for the quiet Rule and Government of the People".[46] The commission empowered them to examine witnesses and administer oaths in order to inquire into the truth of any crime, whether felony or misdemeanor. Mirroring the functions of their English counterparts, the Assiniboia JPs monitored victuallers to check the abuse of weights and measures and to act as safety inspectors. Their jurisdiction extended beyond the district courts and into the community. JPs in England bore a duty to prevent crimes from occurring. Similarly, JPs in Assiniboia were expected to call before them men who had threatened others with injury or breach of the peace, "to find sufficient Security for the Peace or their good behaviour".[47] The use of a 'sheriff' to frame lists for juries was consistent with the quarterly court model. The two sheriffs were expected "in turn, [to] officiate as Chief Officers of the Court, and that if either of them be absent from his Share of duty the other shall officiate in his stead".[48]

This series of active reforms emanated not from the members of the Red River community, but from the London directors. Alexander Ross noted that "the first steps taken by the Company after its new acquisition, was to organize

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[46] Commission for Justice of the Peace. 1850; MG2 B47 [PAM]. Another commission issued in 1852 is located in Council of Assiniboia—Miscellaneous Papers; E. 16/4, fo. 5 [HBCA, PAM].

[47] Commission for Justice of the Peace. 1850; MG2 B47 [PAM].

[48] Minutes of Council. 4 June 1839; E. 16/2, fo. 24d [HBCA, PAM]].

something like local regulations, courts of justice, and a code of laws for the colony".[49] The early reforms Ross spoke of — the organization of four judicial districts in 1835 — were drawn up and promoted by Sir George Simpson. In 1835 he addressed the council of Assiniboia and explained that it was time "to put the administration of Justice on a more firm and regular footing than heretofore", in order to "guard against the dangers from abroad or difficulties at home, for the maintenance of good order and tranquillity, and for the security and protection of Lives and Property".[50] In a letter from London to George Simpson, the Committee expressed its desire to see good order and tranquillity maintained in the colony and endorsed the resolutions of the governor and council. The Committee also expressed its desire to take an active role in the governance of the colony: "we feel deeply interested in the prosperity of this Settlement, and [are] of opinion, that it could be better, and with greater facility managed, if entirely in the hands of the Company".[51]

The Company made good on its promise, and there can be little doubt that, upon taking possession of the infant colony, it actively involved itself in the Red River settlement. Appointments of councillors, magistrates, sheriffs, and governors all came from London. The London Committee drew up the judicial reforms of 1839, Simpson read them to the council in Red River, and the newly appointed council "unanimously adopted the same". Nor did this supervision end with the judicial reforms, but rather continued throughout Red River's history as a part of Rupert's Land. This structure of governance for Rupert's Land relied on the corporate model and depended wholly on chartered rights. Ultimate authority (apart from the crown) rested with the London directors, although their

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[49] Ross, *Red River Settlement*, 174.

[50] Minutes of Council, 12 February 1835; E. 16/2, fo. 4 [HBCA, PAM].

[51] London directors to Simpson, 1836; D. 5/4, fo. 160 [HBCA, PAM].

dependence on George Simpson for information and administration in North America gave him considerable influence as a local governor. As the governor-in-chief of Rupert's Land, Simpson's authority was supreme anywhere within the Company's territories. When present in Red River he superseded the governor of Assiniboia as president of the council of Assiniboia. He carried all the instructions, judicial reforms, and appointments from London to Assiniboia; he also authored and influenced many of the resolutions. The appointed councillors of Assiniboia were not silent, however. For their part, they played an active role in their own governance and acted as legislators, albeit perpetually under Company supervision, as much in 1862 as they had in 1832.

Despite receiving most of their instructions from the London directors, the councillors did retain control over one aspect of their governance during the period of reform: the police. The London Committee never specified what manner of constabulary the settlers should adopt, and so the council of Assiniboia, under Simpson's direction, formulated its own policies. Before 1835, councillors had appointed constables to handle routine duties for the settlement, but in 1835 they selected a different form for their actual police force. It was a bizarre choice. The local council dissolved the existing constabulary and replaced them with "a more efficient and disposable force...to be styled a Volunteer Corps".[52] The force was sixty men strong, ordered in a hierarchical military fashion: privates, sergeants, sergeant-majors and a captain. 'Enlisted men' were given an oath that stated the duties of their double office as private in a military corps and police officer for Red River. In establishing guidelines for the conduct of these police officers/volunteer soldiers, the council stated "in short that every thing Connected with the good order or discipline of the Corps be as much as possible in union with

[52] Minutes of Council. 12 February 1835: E. 16/2. fo. 5d [HBCA. PAM].

and conformable to the practice and usages connected with such service in the British Army".[53] The council immediately requested guns and ammunition for their soldiers/police officers, something that Simpson made sure the London Committee followed up on. The first regular police force in Red River was consciously modelled after the British military.

One might wonder why the council elected such a course of action and abandoned any notion of a traditional common law constabulary.[54] There were several reasons cited for creating a police force that had military readiness. The police force in existence before 1835 apparently was not large enough, or endowed with enough authority, to maintain the tranquillity of the settlement. Additionally, in a remote region, the volunteer corps could offer at least cursory protection from outside hostility. London approved of the action, and congratulated Simpson on the council's choice:

> We approve very much of the determination you came to with the Council of Assiniboia, to continue the Police Corps, the presence of which must be useful in maintaining the tranquility of the Settlement, at the same time it commands the respect of the neighbouring Indians and checks their disposition to commit depredations.[55]

Simpson had previously complained to the London Committee about the problems with keeping peace in the settlement. He reiterated these before the council and predicated the establishment of a military police on that point. Simpson's letters from the Red River settlement to London, however, mentioned only one incident of internal disturbance. Cuthbert Grant, claimed Simpson, had led the Salteaux in an attack on a Sioux band that had come into the settlement in July of 1834. Alexander Christie and a number of gentlemen safely escorted the Sioux out of the

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[53] Minutes of Council, 12 February 1835; E. 16/2, fo. 7d [HBCA, PAM].

[54] DeLloyd J. Guth, "The Traditional Common-Law Constable: from Bracton to the Fieldings to Canada", in R. Macleod and D. Schneiderman, eds., *Police Powers in Canada* (Toronto: University of Toronto Press, 1994), 5.

[55] London directors to Simpson, 1837; D. 5/4 fo. 237.

settlement, preventing Grant and his Salteaux party from 'butchering' the Sioux. Simpson followed the story with his plea for a military power:

> The affair in question, which happily was attended with no Serious immediate consequence, shows the necessity that exists of early measures being taken to organize a more powerful force, for the protection of the Settlement from a foreign enemy, likewise for maintaining good order at home, than the inefficient police we now have amounting only to 30 men; and I have the satisfaction to say it has been suggested by the Scotch, and other respectable Settlers, that a Militia, or Volunteer Corps, should be raised, for the defense and protection of the Colony, which I beg leave strongly to recommend to the favorable consideration of Your Honors.[56]

Simpson also spent a good deal of his letter praising Alexander Christie for his 'excellent' management of the situation — and of the settlement in general — and criticizing Grant as a 'drunken' and violent barbarian.

Except for Simpson's claims, however, none of the extant records pointed to any serious disturbances in Red River or any real problems with maintaining order. Alexander Christie, the Chief Factor at Fort Garry, reported to Simpson in 1835 "with much satisfaction...that this Settlement is, at present, generally speaking, perfectly tranquil and healthy".[57] Alexander Ross had actually expressed displeasure with the numerous judicial reforms, and noted that, before the Company reformed the judiciary, "in no instance were the decisions of the magistrates questioned or disobeyed; no collision of interests or parties disturbed the peace.... Peace and order were thoroughly maintained throughout every part of the settlement; the laws were respected, and life and property was everywhere secure".[58] The appointment of military-style officers and enlisted men by an executive council to execute writs and fulfill the other duties of policemen smacked of an absolutist, and very non-English, system of government. The 1761

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[56] Simpson to London directors, 21 July 1835; D. 4/101, fo. 4d [HBCA, PAM].

[57] Christie to Simpson, 14 December 1835; D. 5/4 fo. 137 [HBCA, PAM].

[58] Ross, *Red River Settlement*, 223.

"Militia Act" in England specifically prohibited "any Constable, or any other peace officer" from serving in the militia.[59] The chosen model lacked the authority of the magistrate — the expressed leader of the locality — to appoint constables and thus keep them under the supervision and careful watch of the community's common law standards.

Despite creation of a military police force, the council of Assiniboia imposed constraints to keep it under public supervision. By stipulation, the council had to approve the funding of the police annually. This prevented the police from becoming an independent power outside the control of council. Also, the small size of the settlement acted as a guard against the possible abuse of power by a small police/military unit — the volunteer corps was not linked to distant power but in the hands of Alexander Ross, a resident of Red River. The council also continually reformed the police to make them responsible and answerable to the community. In 1843, besides some structural changes (the office of sergeant-major was abolished), the council required that half of the privates be changed every other year, ostensibly to avoid the rise of career soldiers.[60] In 1844, the council reduced the volunteer corps to 50 and empowered magistrates to make a "strict examination...into the character of every individual employed in the capacity of policeman". Furthermore, to receive their pay policemen had to acquire a certificate of good conduct under the hand of their commanding officer and present it to the magistrate who dispensed their salaries.[61]

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[59] 2 George III. c. 20. ¶ 43. "An Act to explain, amend, and reduce into one Act of parliament, the several Laws, now in being, relating to the Raising, and Training the Militia, within that Part of *Great Britain* called *England*.". *Statutes at Large* (London: Eyre and Strahan, 1786), Vol. VII: 392. *N. B.*: the Statute "exempted" constables from serving in the militia — it also exempted solicitors, barristers, and other officers of the Court, any man in the British army, Peers of the realm, poor men with at least two legitimate children, and others. The conceptualization was clear. Officers of the Court — in the business of upholding the peace — were not in any way connected with the executive's military or militia.

[60] Minutes of Council, 3 July 1843; E. 16/2, fo. 43 [HBCA, PAM].

[61] Minutes of Council, 19 June 1844; E. 16/2, fo. 45 [HBCA, PAM].

In 1845, the council disbanded the police and created a force of 15 constables to assist magistrates and execute writs. The council retained the power to appoint constables, but thereafter left them in the hands of the individual magistrates, who held the power of review and dismissal.[62] Thus, in 1845 the council of Assiniboia abandoned the military model and fully adopted the common law constable as the legitimate police of Red River. The impetus behind this change lay in 'reduction'; apparently there was no need for a large police force to keep the peace and execute the various tasks that the constable normally would. The change in conceptualization, however, was far more important. The abandonment of a pseudo-military structure for a common law model indicated the reception of an English common law structure within the courts, with the same emphasis on authority as coming both from the crown (and thus through the charter) and from the support of the community.

Aside from the police and various executive committees appointed directly by the governor and council of Assiniboia, the whole of the Red River government — as well as the reforms between 1835 and 1839 — belonged to the Hudson's Bay Company. Among other things, the Company undoubtedly had the welfare of the colony in mind as it sought to reform Red River's judicature. The London Committee meant to smooth out the possibility of conflict in a growing settlement by the formalization of a two-tiered system of justice that required a nominal fee to begin actions. Expediency was the goal. Magistrates came from the community, but the requirement of one sitting magistrate 'outside of the district' (meaning outside of the three judicial districts within the district of Assiniboia) aimed to insure an impartial hearing. Expediency and impartiality, however, lay only at the surface of the Company's designs. Bindon asserted that the

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[62] Minutes of Council, 16 June 1845: E. 16/2, fo. 49d [HBCA, PAM].

reorganization of judicial machinery and the presence of a recorder "was intended to impress the colonists with the legality of the Hudson's Bay Company's trade monopoly".[63] The appointments to judicial and legislative posts in Assiniboia necessarily came from the community, but they had ties with the Company or — as in the case of Duncan Finlayson, governor of Assiniboia — had previously been in the Company's service. This led Alexander Ross to admit in his history of the settlement that the councillors "did not carry the public feeling with them, consequently were not, perhaps, the fittest persons, all things considered, to legislate for the colony".[64]

Of all the Company's reforms, none smacked so much of self-interest as the appointment of Adam Thom as recorder of Rupert's Land. Thom, who had done some private work for George Simpson, had few qualities to recommend him to the position.[65] Both Simpson and the London directors made it clear that their appointment for recorder was a Company official first and a servant of justice second. In a private communication from Simpson to Thom in 1837, Simpson explained that — if Thom wished to accept the appointment — he would act not only as recorder, but also as a magistrate and a councillor in Assiniboia, and as a legal advisor to the Company. Furthermore, Simpson instructed Thom that

> your time & services should be entirely devoted to the duties of your various offices & to the promotion of the Company's interests: & that you should not devote any portion of your time or attention to any occupation that might be prejudicial to the interests of the Hudson's Bay Company, or foreign to the duties you would have to perform in the offices to which you would be appointed.[66]

If the Company had indeed anticipated the sentiment for free trade among the colonists, then it undoubtedly placed Thom in Red River as a legal bulwark for the

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[63] Bindon, "Hudson's Bay Company Law", 51.

[64] Ross, *The Red River Settlement*, 176.

[65] Bindon, "Hudson's Bay Company Law", 54. See also Knafla, "The Common Law Tradition in Western Canada", 38.

[66] Simpson to Thom, 5 January 1838; D. 4/23, fo. 85 [HBCA, PAM].

protection of its monopoly. Although, as Bindon pointed out, this action was meant to impress the colonists with the legality of the Company's monopoly, it also represented something deeper. After 169 years of chartered rights in Rupert's Land, the Company had never established a formal or regular court of law. By formalizing the judicature in Red River in 1839, the Company finally had the means to exercise its claims of jurisdiction over its chartered territories. Furthermore, by adding a lawyer to the Court, the Company could now impress upon Canadians and foreigners that the General Quarterly Court of Assiniboia was a true court of record.

For the settlers in Red River, however, Thom was an outsider and a Company man. The men of influence who were appointed as councillors and magistrates came from the community, and even if the vast majority of inhabitants had no say in the governance of their colony they at least knew their immediate governors were their neighbors. The Company may have had the power to appoint anybody it chose as councillors or governors of Assiniboia, but expediency and common sense led them to select men present in the settlement as its governors. In contrast, Adam Thom assumed a newly created position of great power in Red River, and he arrived on Company money. Nor was this point lost on the majority population of the settlement. Remarking on the liberal salary of £700 the Company afforded Thom, Alexander Ross remarked, "in the nature of things, a paid servant must have a special eye to his employer's interest, above that of all others".[67]

Thom's appointment begged the question of why the Company chose a 'recorder' as opposed to a 'judge'. Bindon suggested that the Company used the less formidable title to downplay the role that the recorder would play at Red

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[67] Ross, *Red River Settlement*, 223.

River.[68] There is not one shred of evidence to substantiate such a claim, as the Company clearly envisioned a dominant role for the recorder in the court and council of Assiniboia. Moreover, the Company had grand designs for the recorder of Rupert's Land that Thom did not live up to. Besides acting as legal advisor to the Company, overseeing the General Quarterly Court, and acting as a councillor for both Assiniboia and Rupert's Land, the recorder was "to proceed to any part of the Companys Territory to hold Courts or act as legal adviser to the Council,".[69] The recorder had a wide range of duties that extended throughout Rupert's Land, even though Red River was his natural headquarters. Rather than using it to downplay Thom's role, the title of recorder suggests that the Company modelled its judicial machinery after another corporate entity with a grant of jurisdiction: the municipality.

Municipal governments in England employed recorders to assist with judicial proceedings in municipal courts. Although municipalities all held different charters and thus, different courts, most municipalities employed the services of a recorder. As Giles Jacob explained, the recorder was "a Counsellor or other Person well versed and experienced in the Law", chosen by the mayor and the aldermen, who was "one of the Justices of *Oyer* and *Terminer*; and a Justice of Peace of the Quorum, for putting the Laws in Execution for Preservation of the Peace and Government of the City: And being the Mouth of the said City, he learnedly delivers the Sentences and Judgments of the Courts therein".[70] The duties Jacob detailed were those of the recorder of London, but the recorder's primary purpose in any case was to legitimate the proceedings of a court of record

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[68] Bindon, "Hudson's Bay Company Law", 51. To her credit, Bindon also mentioned that the title of Recorder also suggested the variety of legal functions that the appointee was supposed to perform. She cited the different roles played by Recorders in mayor's courts in England and colonial courts in America, although she did not pursue either in any depth.

[69] Simpson to Barclay (HBC Secretary, London), 8 October 1853; D. 4/74, fo. 23 [HBCA, PAM].

[70] Giles Jacob, *A New Law Dictionary*, 7th ed. (London: Henry Lintot, 1756).

presided over by borough officials. The recorder, except in a few cases — such as the city of Norwich — was an officer of the corporation selected by the elected officials, and was not himself an elected representative of the corporation. Although the primary functions of the recorder were overseeing judicial proceedings and acting as a legal advisor to the corporation, the recorder often held administrative and legislative posts as well, as in London, Leeds, and Berwick on Tweed.[71] The Company's choice of the title 'recorder' precisely followed this model. The structure of the courts that it created relied on magistrates of summary jurisdiction to handle petty crimes and claims, and the 'supreme court' consisted of the governor and council. The addition of a recorder to the supreme tribunal added the weight of legal authority to the Court of Assiniboia, and the recorder was expected to act as the 'mouth of the court' in delivering sentences and judgments, which would be essential to maintaining a court of record.

Adam Thom and the Sources of Law for Assiniboia

Adam Thom believed himself the bringer of law to a wilderness wild. Upon his arrival at Red River, Thom set about the business of placing the law of Rupert's Land upon proper footing. He began by assessing the present state of its judicature, and drew up proposals for comprehensive civil and penal codes for Rupert's Land. As councillor of Assiniboia, he revised the local laws there and consolidated them into a 'code'. Alexander Ross noted with distaste that

> nor was our legal associate much less independent of control with regard to our local enactments, whether such enactments professed to provide for the indigeneous peculiarities of this secluded colony, or to modify and modernize our imported code. It was the Recorder that penned them: it was the Recorder that

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[71] Sidney and Beatrice Webb, *English Local Government*, 6 vols. (Longmans: New York, 1908), II: 323.

> argued them through the Council in a masterly manner; it was the Recorder that interpreted them, so as to make their inevitable generalities fit particular cases. In these respects, he may be said to have always had his own way — less would not satisfy him; and this often raised up difficulties between himself and his colleagues.[72]

Alexander Ross had the fortunate gift of hindsight when he set down to write the history of Red River in the 1850s, and his personal dislike for Thom influenced his analysis of Thom's involvement in the judicial reforms of the 1840s. By the time Adam Thom left the bench for good in 1850, much of the settlement shared Ross's sentiments. Simpson wrote Thom to tell him that the Métis would not have him in court, as they believed that "every case in which you took a part was decided, not according to law or to its merits, but by your dictum".[73] Simpson, in a blunt and displeased manner, informed Thom that if he returned to his duties, then he did so at his own risk, because "[Major Caldwell was] on a condition to protect the fort only [and] the preservation of peace generally throughout the settlement was beyond his power, or, to use his own words, that he could not be answerable for your life".[74] Dr. John Bunn wrote Simpson to inform him that Thom was universally hated in the settlement despite his demotion to court clerk. Bunn concluded that Thom's recall — the only option — was "the price that must be paid for so much peace as his presence disturbs - his want of tact is so far as I can see his principal failing - he promotes animosity while he purposes to confer benefit".[75]

The demonization of Thom's character by his contemporaries, perhaps, has led many to over-estimate Thom's influence in determining the law of Assiniboia. Thom was almost universally hated and despised at Red River, and many of his contemporaries believed that he manipulated the law as he pleased while he served

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[72] Ross, *Red River Settlement*, 383.

[73] Simpson to Thom, 3 July 1850; D. 4/42, fo. 27d [HBCA, PAM].

[74] Simpson to Thom, 3 July 1850; D. 4/42, fo. 27d-28 [HBCA, PAM].

[75] Dr. John Bunn to Simpson, 4 August 1851; D. 5/31, fo. 220 [HBCA, PAM].

as recorder in the General Quarterly Court. While this was undoubtedly true, Thom had little lasting impact on the law of Assiniboia. Contrary to the assertion of a few modern scholars, the Company frustrated Thom's plans to comprehensively codify the civil and criminal law of Rupert's Land.[76] In addition, the laws Thom did pass into effect in 1841 for Assiniboia (the 'local code') had largely been determined before he arrived. Thom did not bring the law to Assiniboia; he merely refined the laws he found already there.

One of Thom's tasks in proposing penal and civil codes for Rupert's Land was to discover the sources of law that would constitute the backbone of the laws already in force. Thom reasoned that, with the exception of a few local regulations for Assiniboia, the Company had never exercised its power of legislation — therefore the laws in force remained the laws of England on 2 May 1670. Thom then set out to discover what the laws of 1670 were. He began by looking at the last session of parliament convened before the granting of the royal charter to the Company. This raised several problems as Thom waded through technical questions as to whether he should include the statutes in force, or merely in existence, in 1670. He decided to take the statutes that were in existence — if not necessarily in force — as perpetual law for Rupert's Land, although he specified that temporary statutes (i.e., time limited) in 1670 were also temporary in Rupert's Land, regardless of whether or not parliament renewed them or gave them perpetuity at a later date. As for the common law, Thom straightforwardly declared that "it was introduced, so far as it was applicable, precisely in the state in which it existed in England, according to the decisions of the Judges, its interpreter and, in a great measure, its authors, on 2nd May 1670".[77]

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[76] Bindon, "Hudson's Bay Company Law", 57. Most scholars have followed Bindon's erroneous conclusion that the London directors accepted Thom's proposed codes "without alteration".

[77] Adam Thom, *Observations on the Law and Judicature of Rupert's Land*, 1840; E. 16/1, fo. 89 [HBCA]. [Hereafter: Thom, *Observations*.]

Thom proceeded to discuss the applicability of the common law of England according to the rules laid down by Sir William Blackstone and the interpretation of statutes according to the rules of Sir Fortunatus Dwarris. Laws were eliminated as 'inapplicable' based on their dependence on particular circumstances in England. Thus, revenue laws could not apply and were not in force in Rupert's Land. Thom eliminated the distinction of civil privileges based on religion or tenure of property; the laws associated with those distinctions could never apply to a new colony of small standing with very little by way of a landed class. Regarding the religion issue, Thom observed "that the most important of the original plantations, such as Pennsylvania and the Provinces of new England were founded on anti-ecclesiastical principles and with anti-ecclesiastical views".[78] He never developed this slightly provocative point or explained why this distinction should be dropped. Thom excluded several other categories of law as irrelevant. Poor laws could not apply, as Thom claimed there was no class of 'paupers' in Rupert's Land. On similar grounds, laws connected with highways and bridges could not apply because Rupert's Land lacked the extensive infrastructure present in England. Thom followed Dwarris's and Blackstone's exclusion of police laws, bankruptcy laws, and corporate laws in Rupert's Land.

After completing the list of excluded laws, Thom turned to the question of what laws to transplant to Rupert's Land. Relationships at law followed the rigid common law model:

> In every state of civilized society, there must be husband and wife, parent and child, guardian and ward, master and servant, debtor and creditor, seller and buyer: Hence the applicability of all the general laws affecting and enforcing their respective relations and any relations arising therefrom.[79]

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[78] Thom, *Observations*: E. 16/1, fo. 91-91d [HBCA, PAM].

[79] Thom, *Observations*: E. 16/1, fo. 92 [HBCA, PAM].

Concerning the civil and criminal law, Thom's assessment was terse and extremely broad: "all men must profess life, liberty and more or less property; Hence the applicability of all general laws professing to protect them from injury or violence. This, however, is to be Taken with some restrictions".[80] The restrictions Thom mentioned were essentially various steps taken to mitigate the harshness of the penalties in the English criminal law. In a letter to Simpson, Thom explained his view that "nothing can be more vague than the criminal law of England, as it exists, whether in theory or in practice, among us. I take my version of it from 1670 in theory; but in practice reason and equity compel me sometimes to admit modern ameliorations".[81] His proposed penal code for the colony echoed this sentiment: "the primary object of these provisions is to mitigate the criminal law of England with respect to such offences as are most likely to be committed in Rupert's Land".[82]

Thom's proposed civil code followed the general formula of excluding rules he felt too impractical and, for the most part, of avoiding any description of what the laws in 1670 actually were. As a civil 'code' it faded into obscurity: it was never adopted by the council of Assiniboia, and London cautioned Thom to "follow the regulations laid down by the Charter of judging all persons...according to the laws of his Kingdom and to execute justice accordingly".[83] The London directors rejected outright Thom's abridged penal code and complained that portions of it were "obscurely expressed".[84] Thom, upset that his codes had been rejected, wrote to Simpson and complained of "the moral impossibility of

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[80] Thom, *Observations*; E. 16/1, fo. 92 [HBCA, PAM].

[81] Bindon, "Hudson's Bay Company Law", 56-7.

[82] Thom, *Proposed Penal Code for Rupert's Land*, 1840; E. 16/1 fo. 27 [HBCA, PAM].

[83] Smith (HBC Secretary) to Thom, 19 March 1842; A. 6/25, fo. 172-72d [HBCA, PAM].

[84] *Ibid.*

enforcing in this country the criminal Law of England, whether written or unwritten, whether of 1670 or of 1842".[85]

But Thom's complaint had a much more self-interested grounding than mitigating the terrors of the common law. In 1840 he had written the London directors informing them that — if they did not legislate for the colony — the General Quarterly Court of Assiniboia would have to mitigate the law on its own. Thom suggested that the Company import the law of 1840 and pass specific rules to mitigate it, in order to avoid leaving "too much of discretionary despotism to the local tribunals", which would be a "dangerous alternative".[86] After the rejection of his penal and civil codes in 1842, Thom pointed out that mitigation of penalties by his "co-equal" colleagues was "purely arbitrary and discretionary, a mere emanation of untechnical conscience".[87] Underlying this argument was a warning to the London directors: for the Company to maintain control in Red River, it had to provide strict rules to prevent the local authorities from gaining too much discretionary power. Thom intimated to Simpson that if the London Committee refused to pass legislation on this issue, then he hoped it would allow him "to do prospectively in our legislative capacity, what we are now compelled to do retrospectively on the bench".[88] Even with the court firmly under his control. Thom saw a real danger in allowing the local authorities in Red River too much discretionary power.

The imperial acts he cited as in force related primarily to trade and navigation, although there were several provisions concerning debt and bankruptcy that applied to Rupert's Land. 5 George II, c. 7 specified that any affidavit made

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[85] Thom to Simpson, 4 August 1842; D. 5/7, fo. 158d [HBCA, PAM].

[86] Thom to Simpson, 29 May 1840; D. 5/5, fo. 282 [HBCA, PAM].

[87] Thom to Simpson, 4 August 1842; D. 5/7, fo. 159 [HBCA, PAM].

[88] *Ibid.*

in Great Britain had legal force in colonial courts, and allowed colonists to use their colonial lands as bonds or specialties in the case of debt. Two more statutes — 6 George IV, c. 16, s. 63 & 64 and 1 & 2 Victoria, c. 110, s. 37 — bound debtors "in whatever quarter of the empire situated" to their creditors. 4 George III, c. 34 prohibited paper money in the colonies as legal tender, presumably for the payment of debts in England. While this caused Thom to question the legality of the Company's notes in Rupert's Land, he held that "where both debtor and creditor are residents of Rupert's Land, the Court may perhaps rationally and safely hold that there is in every local contract a tacit understanding that the notes aforesaid are to be received as Cash".[89]

With the sources of his law thus determined, Thom avoided an explanation of what laws were actually in force in Rupert's Land. Rather he confined himself "to the more useful and practicable task of shewing generally what the law of Rupert's Land is not[,] compared with the law of England of the present day".[90] Thom dealt with technical but important areas, such as the legal interest rate of money, inheritance laws, and rules for the appearance of witnesses. In some cases, reason and equity compelled him to adopt laws and rules enacted after 1670. For instance, in the early eighteenth century, statute dissolved the "absurd, iniquitous and unhuman" rule that excluded defendants from swearing in their witnesses in capital cases, and Thom concluded that "we may safely neglect [the rule] as unfit for any British colony".[91] The antiquated benefit of clergy existed in Rupert's Land, although Thom explained that "the law of Rupert's Land still withholds it from women and from persons unable to read".[92] Although Thom

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[89] Thom, *Observations*; E. 16/1, fo. 94-94d [HBCA, PAM].

[90] *Ibid.*, fo. 95.

[91] *Ibid.*, fo. 97d.

[92] *Ibid.*, fo. 98d. Benefit of clergy allowed offenders to read from the Book (i.e., the Bible) and thus save themselves from the gallows. It applied mainly to property crimes, almost all of which were

explained benefit of clergy, he never once dealt with wager of law. Wager of law was an option available for debtors whose creditors had no sealed bond but still sued for debt. The debtor could deny the debt and 'wage his law' by producing a specified number of oath-helpers to testify that the debtor's denial was credible, which at common law was considered sufficient proof against the debt's existence.[93] It is not clear why Thom chose to discuss benefit of clergy but not wager of law. Other contrasts with the contemporary law of England existed. Accessories in Rupert's Land could only be tried if the principal had been tried. Debtors suffered the most from the old laws: creditors could still jail their debtors before trial, and — even in the most flagrant cases of dishonesty on the part of the creditor — jail their debtors after judgment.

Thom's *Observations* laid out the sources of law for Rupert's Land, but it avoided a clear expression of what that law was. Since London disapproved of his attempt to codify civil and penal laws, there was no easy way to determine what laws existed in Rupert's Land. Thom did, however, consolidate various regulations passed by council in a 'local code' that the council passed and adopted as law on 25 June 1841.[94] It consisted of sixteen sections and was roughly organized into two portions. The first section, 'General Provisions', listed the general rules for interpreting the local laws. It specified the jurisdiction of the laws and gave several rules for the prosecution of public wrongs. Prosecutors were allowed to testify as witnesses and to split any fines levied on the defendant with the Court. The rules also negated leniency for accessories to any crime: "whoever may have assisted, or seconded, or advised, or ordered, or authorized the

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punishable by death. Incidentally, Thom was wrong: benefit of clergy applied to women in some cases after the statute of 21 Jac. I. c. 6 (1623). See J. M. Beattie, *Crime in the Courts of England 1660-1800* (Princeton: Princeton University Press, 1986), 141-143.

[93] Wager of law was abolished in 1833, although it was a dead letter well before then. See S. F. C. Milsom, *The Historical Foundations of the Common Law* (London: Butterworths, 1969), 292-94.

[94] Minutes of Council, 25 June 1841; E. 16/2, fo. 29-40 [HBCA, PAM].

committing of any offence, shall be held to have committed it himself".[95] The only rule for civil litigation was a provision allowing plaintiffs to sue, unless otherwise expressly stated, for damages above and beyond any specified fine. The next eight sections, excluding one section on the Maintenance of Prisoners, intermixed regulations that amounted to public wrongs — horse-taking, fires, and intoxicating (i.e., giving or selling alcohol to) Indians — with private wrongs — trespassing pigs, hay rights, and wandering stallions. The last seven sections covered matters directly regulated by the governor and council: distillation, roads and bridges, custom duty, courts of law, and the police. The last two headings — 'Duration & Effect' and 'Publication' — put the regulations into effect forever or until appealed and, in keeping with the council's policy in previous years, ordered the regulations to be made public.

A few scholars have attributed this 'local code' of 1841 to Thom,[96] but the local council had passed most of the laws included in the code before Thom arrived. Thom did not bring the law to Assiniboia; rather, he refined the laws that were already there. The portion of the code devoted to fires, pigs, and horse-taking (theft) merely refined the resolutions passed by council in 1832.[97] The section that authorized settlers to seize stray stallions was slightly revised; the new law required that the settler put the stallion in the custody of "the nearest constable, private or serjeant" to prevent settlers using the law as a "pretext for taking horses to ride or drive".[98] The laws prohibiting the sale of alcohol to Natives was originally passed by council in 1836,[99] and was substantially modified

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[95] *Ibid.*, fo. 29d-30.

[96] Bindon, "Hudson's Bay Company Law", 57-59; Stubbs, *Four Recorders of Rupert's Land*, 42. Dale Gibson correctly pointed out that Thom merely consolidated existing regulations in 1841: Gibson, "Company Justice", 273.

[97] Minutes of Council, 4 June 1832; E. 16/2, fo. 1-2d [HBCA, PAM].

[98] Minutes of Council, 25 June 1841; E. 16/2, fo. 32d [HBCA, PAM].

[99] Minutes of Council, 13 June 1836; E. 16/2, fo. 13d [HBCA, PAM].

in 1840.[100] The council had passed in 1838 all the relevant laws that appeared in the 1841 code concerning fence-breaking cattle.[101] The portion of the code that dealt with courts and the general procedure for trials (e.g., the framing of writs, issuing summons, petty courts and their summary jurisdiction, and the payment of jurors and witnesses) was taken almost verbatim from the resolutions of 1837 and 1839.[102]

Of these resolutions, several did bear Thom's mark. Although the resolutions against the sale of liquor to Indians were in place before his arrival, Thom increased the penalties in 1840 despite "reluctance of some members of the council to sanction the new resolutions on the subject of supplying the Indians with beer".[103] The language of the code clearly reflected a legal vocabulary. For instance, the 1832 resolution concerning fires simply specified fires "at a distance exceeding fifty yards from his house" as unlawful. While lighting fires off one's property was strictly prohibited, it was permitted "in cases where such fires may have been lighted through absolute necessity, of which the council alone be competent Judges".[104] In the 1841 code, Thom added technical language to the regulations governing fires (besides increasing the distance), making it illegal to set fire to "any hay-stack, of which every part shall be more than a hundred yards distant from the nearest point of its owner's house or adjacent out-houses". Moreover, he specified a procedure for exceptions: "after verdict but before judgment, the president of the Court may remit the whole fine, as well the prosecutor's half as the other, merely by certifying in writing, on the back of the

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[100] Minutes of Council. 8 June 1840; E. 16/2. fo. 27d [HBCA. PAM].

[101] Minutes of Council. 15 June 1838; E. 16/2. fo. 17-17d [HBCA. PAM].

[102] Minutes of Council. 16 June 1837; E. 16/2. fo. 15d [HBCA. PAM]. Minutes of Council. 4 July 1839; E. 16/2. fo. 22-22d [HBCA. PAM].

[103] Thom to Simpson. 27 July 1840; D. 5/5. fo. 293d [HBCA. PAM].

[104] Minutes of Council. 4 June 1832; E. 16/2. fo. 1-1d [HBCA. PAM].

Clerk's notes of the evidence, that the offender is morally guiltless".[105] Virtually Thom's only achievement was the clarification of subtleties within the 'local code'. Its substance had largely been determined before his arrival.

The consolidated list of laws that Thom proposed and the council of Assiniboia accepted was not a code; it was, more properly, a collection. It lacked the comprehensiveness of a code, and in fact only reiterated (or refined the language of) laws passed by council in previous years. Only seven sections dealt with personal actions, and all were trespasses, and all were subject to public fines. The wronged individual was expected to bring the suit and could mix the public prosecution with a damages claim appropriate to a civil action. Thom's collection of laws also failed as a 'code' because it provided no stipulations for deciding any actions that fell outside of the list of laws passed in 1841. Contracts, tortious wrongs like assault and negligence (except where provided for in the collection), debt, felonies, and misdemeanors were covered by Thom's assertion that all judgments would conform to the laws of England on 2 May 1670. This was, perhaps, the largest legal fiction ever imposed on Assiniboia.

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[105] Minutes of Council, 25 June 1841; E. 16/2, fo. 30 [HBCA, PAM]. [Emphasis in original.]

Chapter 5

Law and Equity in the Court of Assiniboia

The reform of the judicature in 1835 and 1839, and Thom's attempt to lay out strict rules for judicial process in 1840 and 1841, revealed the Company's intent to turn the General Quarterly Court of Assiniboia into a court of record in the Company's territories. The Company also entertained, at least initially, the goal of using the court to issue legal decisions and opinions to reinforce its territorial and jurisdictional claims. Adam Thom pressed this course of action in 1848 when he ordered the court clerk to record his lengthy opinion that the Court of Assiniboia had jurisdiction over a murder committed on the Peace River.[1] Thom's argument detailed the chartered claims of the Hudson's Bay Company and denied Canada's jurisdiction.[2] It was largely (and admittedly) a recapitulation of his charge to the Grand Jury in 1845, which was published in London in 1848.[3] Moreover, the famous *Hudson's Bay Company v. Sayer* was a case purposely prosecuted to establish *de jure* the rights of the Company.[4] Oddly enough, the jury's verdict of guilty and the court's granting of mercy meant that the Company's monopoly, while valid *de jure*, was not enforceable *de facto*.

When Thom left the bench in 1850 amidst considerable controversy, the Company abandoned its hopes of using the court as an instrument to further its jurisdictional and territorial claims, or to protect its fur trade monopoly. Despite

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[1] Peace River ran through the Great Slave Lake and then dumped into the Arctic under the name of the Mackenzie River. It was not within the territorial boundaries of Rupert's Land, but was within the scope of their trading license.

[2] *Case of James Calder* (17 August 1848), General Quarterly Court of the District of Assiniboia [Hereafter: GQCA]; MG2 B41. Book 1, pp. 100-114. Provincial Archives of Manitoba: Winnipeg. Manitoba [Hereafter: PAM].

[3] Adam Thom, *Charge Delivered to the Grand Jury of Assiniboia, 20th February 1845* (London: Printed by E. Couchman, 1848).

[4] *HBC v. Sayer* (17 May 1849), GQCA; MG2 B41 Book I, pp. 151-154 [PAM].

this significant change in attitude, the period from 1844 to 1854 offered little change in the court records and indicated that Thom did not bring much law with him. The legal fiction that the laws of Rupert's Land were those of 1670 England had no bearing on the type of 'law' that the court dispensed; it handled questions of possession and suits over debt in much the same way with or without Thom and his fictive 1670 reception date. It would continue that way throughout Major Caldwell's administration, until Francis Johnson arrived in 1854 to assume the position of recorder. During Johnson's brief tenure as recorder from 1854 to 1858, the court began to practice law, and the bench began to take an active part in the quarterly grind of business that the court managed. After his departure, the court returned to its previous role as a dispute mediator.

The court never had the opportunity to become a supreme tribunal in the way Thom or the Company might have envisaged. There were no lawyers in Red River — save Recorder Thom and, after his departure, Recorder Johnson — and most of the settlers were of mixed Native and English or Scottish descent, none of whom had any intricate knowledge of the English common law. The bench could not expect to receive formal pleadings or hear appeals to authorities like Bracton, Coke, Blackstone, or even English case law. Instead, the Quarterly Court acted as a fact-finding forum where adversaries could air their disputes and have them judged by their peers on the jury. The bench's main purpose, then, was to filter evidence to the jury, if this task was necessary. Most of the rules of evidence in the colony must have come from Burn's manual for JPs, and the most delicate question always concerned the admissibility of witnesses. However, when Thom arrived he stated that "every ground of exclusion [of witnesses], but intellectual

incapacity, must, to a certain extent, be swept away".[5] Although this was a portion of the civil code that Thom proposed and the Company rejected, the court rarely attempted — or at least rarely recorded attempts — to exclude witnesses based on any pre-set criteria. The prevailing notion, therefore, was to allow all facts into the court for the jury to reason through.

The court mixed procedure at common law and equity. Proceedings began by writ, and writs were uniform throughout the District of Assiniboia. Despite Thom's claim to follow the procedural laws of 1670, litigants did not have to define their action by writ before trial: there were no separate writs for different actions, such as debt, detinue, trespass, or covenant. Once in court, both parties stated their cases and then called in witnesses to support their claims. To avoid the possibility of perjury, witnesses were not allowed to attend the initial pleadings or the testimonies of other witnesses. The first witness in a civil suit was the plaintiff, duly interrogated by the court. Plaintiffs and defendants examined and cross-examined each other's witnesses, and this was supplemented by direct interrogation by the bench which exercised "the jurisdiction of courts of Equity, so far as such jurisdiction [was] founded on the power of examining parties themselves on oath".[6] After all evidence was presented, the president of the court (usually the recorder, or in his absence the governor of Assiniboia) summed up the evidence and directed the jurors on legal issues. The jury brought in the verdict, and the court issued its subsequent judgment.

The court followed this generally sound procedure throughout its existence. The court records, however, focused mainly on the evidence (predominantly oral) brought before the court, and the clerk of the court rarely recorded the instructions

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[5] Adam Thom, *Proposed Civil Code for Rupert's Land*: 15 October 1840; E. 16/1, fo. 16, Hudson's Bay Company Archives, Provincial Archives of Manitoba: Winnipeg, Manitoba [Hereafter: HBCA, PAM].

[6] Thom, *Proposed Civil Code*, 15 October 1840; E. 16/1, fo. 7 [HBCA, PAM].

given to the jury or the reasons given for judgment. The clerk recorded Thom's instructions on occasion — particularly when the rights of Thom's employer were at stake — but judgments were practically never recorded, except to note that the court 'concurred with the jury'. Considering that Thom never explained the laws of England of 1670, and that the court did not create a record of judgments that could act as authoritative precedents for future litigants, Thom's attempt to set down strict rules for the court was largely a failure. While he served on the court, he could have things his way, but he left nothing in the way of a permanent record to guide the court in the years after his departure.

For all the Company's expectations of the recorder of Rupert's Land and the General Quarterly Court of Assiniboia, the court embarked on a different course after Governor Colvile ordered Adam Thom to stay away from the court in 1851. It was, above all, a forum for the many different people of Red River to bring their disputes for resolution. The court did not strictly practice 'English law'. Instead, disputes were presented to the jury on the basis of simple principles, sometimes derived from the code and other times derived from common reason. The court clerk did not record judgments that reflected rules; instead, he focused on the evidence necessary to prove the existence of a contract, or the title to a horse, etc. The legal historian, thus, must survey the evidence litigants brought before the court, and find what evidence was necessary to prove their cases. For instance, in all actions of breach of contract and debt on the contract brought before the court, I have found only one reference to 'consideration' as a doctrine, and even then it was stated as a fact and not as a point of contention.[7] In light of this, one must conclude that consideration was not an important element of contracts at Red River. The court considered the intent behind the contract and the

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[7] *MacDermot v. MacKenney & Co.* (18 February 1869), GQCA; MG2 B41, Book III, p. 162 [PAM].

fair treatment of the people involved as more important than the strict construction of a written document. Its role was revealing. The court let in practically every form of evidence and interrogated plaintiffs, defendants, and witnesses: it was clearly a fact-finder for the jury. The jury's role, once the court had allowed in evidence and summed it up for the jury, was that of truth-finder.

From Recorder Thom to Recorder Johnson: 1844-1854

Adam Thom served as recorder of Rupert's Land until 6 December 1850, and continued to serve as clerk of the court until his departure from the settlement on 20 September 1854. The extant Quarterly Court Records began in 1844, which leaves six years' worth of court cases under Thom for the historian to review. During his tenure as recorder the court heard mainly criminal cases, although civil actions became more and more numerous in the 1850s. Many of the civil actions during that time fell under various sections of the 1841 'local code', which was revised in 1851. As a source of law, the code was paramount. However, as a collection of local laws the code never specified — or attempted to specify — the rules governing the law of obligations, whether contractual or tortious. When civil cases arose under Thom, neither the litigants nor the court explicitly stated the rules of law they followed. In many cases, the jury openly relied on principles of equity to decide cases.

The local code for Red River provided the bare essentials for personal duties in Red River. For instance, *Marcellais v. Ploofe* concerned the death of a horse that fell through a hole made in the ice by the defendant, and therefore

technically constituted a trespass.[8] However, Baptiste Marcellais brought his suit under the regulations specified in the 34th paragraph of the local code, which specifically dealt with holes left in ice. According to the resolution, holes in the ice had to be "marked by a 6-foot pole, or else [the person who made the hole was] liable for damages".[9] The only exception provided in the code was that "anyone wantonly removing the pole"[10] was held liable for any damages concerning the hole for the first twenty-four hours. The plaintiff called three witnesses, two of whom testified that the horse did in fact fall in the hole. The witnesses were unsure as to whether the hole had been marked: one saw several sticks lying flat on the ice rather than erect, another could not tell if the sticks were there at all, and the last witness testified that "about an hour after the horse was drowned, he was told by his wife of the occurrence, [and] he looked at the hole which was pretty large, but saw no sticks or poles whatever".[11] The defense also called three witnesses, two of whom testified that they had seen the sticks marking the hole still standing after the unfortunate incident.

The resolution of this issue, if strictly construed, should have turned on the language of the 34th resolution of the 1841 code. The court, however, declined to interpret the code for the jury and left the jurors to decide whether the defendant was liable for the death of the horse. The evidence presented in the case was strictly oral, and the witnesses offered by both sides attested to the presence of the sticks marking the hole. This was enough to satisfy the jury that the defendant had

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[8] *Marcellais v. Ploofe* (15 May 1845), GQCA: MG2 B41, Book I, pp. 20-22 [PAM]. The word 'trespass' at common law meant a personal wrong. See S. F. C. Milsom, *The Historical Foundations of the Common Law* (London: Butterworths, 1969), 244.

[9] Minutes of the Council of Assiniboia, 25 June 1841: E. 16/2, fo. 35-35d [HBCA, PAM].

[10] *Ibid.*

[11] *Marcellais v. Ploofe* (15 May 1845), GQCA: MG2 B41, Book I, p. 21 [PAM].

indeed marked the hole and was thus not fully liable. However, the jurors relied on their common reason to determine the verdict:

> The Jury having deliberated brought in a Verdict of finding for the Plaintiff Thirty shillings of damages and the costs of suit, the Jury stating that the fact of the hole having been so unreasonably large as to admit the horse was the main ground on which their Verdict rested; And the Court decreed accordingly.[12]

The original action had been for £9 — the value of the drowned horse. The jury reduced the award to 30s., 1/6 the value of the original claim, because the hole was 'unreasonably large'. It was an equitable compromise that deemed the defendant liable, but not for the full damage of the drowned horse.

Most civil actions were trespasses and covered everything from tortious assault to defamation to the question of land title. One of the more interesting cases involved Andrew MacDermot against Baptiste Fanyant, Pierre Poitras, Louison Morin, and Pascal Breland. MacDermot complained that the named parties had continually trespassed upon his land and cut down timber without his permission. Pascal Breland spoke for the defendants. He admitted (as did all the defendants) to cutting wood on the land in question, but denied that the Hudson's Bay Company's grant to MacDermot was valid on the principle that the land in question belonged to the Natives and had not been purchased by Selkirk. MacDermot claimed £5 of damages, but stated that "his object in raising the action [was] not so much the obtaining of reparation for the injury already done to his property as the establishing of his title and securing of the lot in question from trespass in future".[13] For the defense, Pascal Breland explained that "as Half-Breeds, they had a right to do what they had done, but that on these points they had some doubts and had therefore allowed the case to come before the Court".[14]

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[12] *Ibid.* p. 22.

[13] *MacDermot v. Breland et. al.* (18 Feb 1847). GQCA: MG2 B41. Book I. p. 64 [PAM].

[14] *Ibid.*

The two parties both agreed to the 'wrong' in question, and both stated that the reason for the case was not to redress a trespass *per se*, but to finalize in court MacDermot's title to the land. The court admitted two forms of evidence:

> The register of lands granted in R.R.S. by the Hudson's Bay Company was then produced and sworn to by Mr. Governor Christie: And on reference to the lot No 1092 it appeared that it had been granted to the Plaintiff.
>
> There was also produced the Indenture between the Native Chiefs and the Earl of Selkirk, to whose rights in the premises the Hudson's Bay Company had succeeded; and on reference to the terms of the Deed, it clearly appeared that the Plaintiffs lot was comprehended within the limits of the District or County sold by the Native Chiefs to the Earl of Selkirk.
>
> The Jury found the Defendants liable to the Plaintiff for five shillings of damages and costs and the Court discerned accordingly.[15]

The court had used two proofs, both deeds. The only witness was Governor Christie, who appeared solely to swear to the authenticity of the Company's land register. So long as the matter concerned both a land grant and the original sale of the land from the Natives to Selkirk, the deeds were incontrovertible evidence if sealed. The court had found the best evidence available, and applied the proof to come up with a competent legal resolution: the settlement of the ownership of land. The jury's reduction of the fine was probably a matter of form: MacDermot had to claim at least £5 worth of damages to bring the trial to the Supreme Court, and the jury undoubtedly felt that a nominal payment by the defendants, plus the costs of the case, would remedy the trespass.

Only a handful of debt and contract cases came before the General Quarterly Court, either because no one felt the need to litigate contracts or the petty courts were handling the business sufficiently. The absence of any petty court records prevents the further examination of this question. Whatever the reason, Adam Thom did not have the opportunity to decide cases in contract or to

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[15] *Ibid*, pp. 64-65.

explain contract law to jurors. Consequently, there was no clear statement of the law governing debt or contracts during this period.

Andrew MacDermot brought the first case of debt before the court in 1845.[16] MacDermot had allegedly issued a draft of £50 for the delivery of certain goods to Samuel Hughes in the autumn of 1844. Hughes refused to pay the draft, as his uncle [unnamed] had received the goods and he had understood that he was to pay only in the event of his uncle dying on the voyage. MacDermot called two witnesses to back his claim, one who testified to the authenticity of the draft and another who had seen the defendant with "a considerable quantity of goods with him" the following night. The jury found the defendant liable for the debt and the costs of the suits.

The court clerk did not record any legal judgment from which to draw a rule; rather, the clerk was concerned with recording the evidence that was required to prove a debt. If the action had been pleaded at common law according to the law of 1670, the action would have been an action for *indebitatus assumpsit*, one of the actions that sprung from trespass 'on the case'.[17] This form of action required a special form of pleading, proof of the promise (*assumpsit*) and a demonstration of consideration. MacDermot, understandably, was not concerned with adhering to pleading forms, and — as far as the records indicate — neither was Adam Thom. To prove the existence of the debt, MacDermot had to prove the validity of the draft and demonstrate that he had completed his part of the bargain. MacDermot brought parol evidence[18] on his behalf to prove that he had,

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[16] *MacDermot v. Hughes* (21 Aug 1845), GQCA: MG2 B41, Book I, pp. 35-37 [PAM]. At least the first case since the extant records of the court that begin in 1844.

[17] Brian Simpson, *A History of the Common Law of Contract*, 2nd ed. (Oxford: Clarendon Press, 1987), 303-313.

[18] 'Parol evidence' was verbal evidence that accompanied or preceded a written contract. According to the law of 1670, parol evidence was only allowed when the contract in question was not under seal — no oral evidence could contradict, or even supplement, a covenant or a bond under seal.

in fact, delivered the goods and the defendant had received them — moreover, the witness to the draft, Mary MacDermot, testified that she had heard the obligation explained to the defendant and that the defendant seemed to understand.

MacDermot's suit brought clear issues related to the manner of business in Red River before the General Quarterly Court. Very few actions of debt — or breach of contract — surfaced between 1844 and 1854. Many actions brought before the court were never argued. For instance, Donald Murray sued Louis Gagnon for a debt of £6 4d. in 1851, but the defendant did not appear and the judgment went by default.[19] In addition, contracts among the Red River settlers — whether for an expected service or employment — were not normally written. In 1845, Adam Thom noted in council that "in the absence of a written agreement, the best evidence is commonly to be found in the heads of the parties themselves". His solution was to allow the plaintiff in all cases to summon himself as a witness, and "that Adam Thom, John Bunn and Alexander Ross Esquire shall be commission for examining each [of the] parties [according to the principles of] Equity".[20] The findings of the commission went straight to the jury alongside the parties' testimony as evidence. The insertion of a commission based on equitable principles into a court of law spoke volumes for what type of law the court meant to administer. The concern was with finding the intent behind the contract in question and subsequently enforcing that through the court, not with clarifying the doctrine of consideration or even defining a 'contract'. The court functioned as a fact-finder, a truth-seeker, and on occasion an arbitrator, not an instrument for bringing the laws of England — as they stood in 1670 or otherwise — to Rupert's Land.

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[19] *Murray v. Gagnon* (21 Aug 1851), GQCA; MG2 B41, Book II, p. 4 [PAM].

[20] Minutes of the Council of Assiniboia, 3 April 1845; E. 16/2, fo. 47d [HBCA, PAM].

The Company removed Thom as recorder on 6 December 1850.[21] Although he never attended court as a judge again, Thom continued to serve as clerk, and sat on the Law Amendment Committee appointed by the council in 1851. In the report, prepared by Thom, Dr. John Bunn, and Louis LaFleche, the committee addressed the issue of the 1670 reception date for the laws of England:

> the laws of England of that date, independently of their inherent and essential inferiority, are difficult, nay, generally speaking, impossible, to be ascertained, more particularly in such a wilderness as this. We have, therefore, suggested the substitution of the laws of England, as existing at such a date as would render nearly every legal publication in the Settlement a work of authority. Hitherto, the inconvenience of so obsolete a rule of decision has been in a great measure, nominal; but if Mr. Thom is, henceforward, to give formal opinions in writing, he must either shock the common sense of the community, with antiquated absurdities in all their naked deformity, or assume to himself a responsibility, or, rather an authority, which ought not to fall to the lot of any individual whatever.[22]

The report exposed the cumbersome legal fiction that had been imposed on Red River. Adam Thom virtually admitted that he had no real idea what the laws of 1670 were. Furthermore, the prospect of deciding legal issues with such an outdated law would "shock the common sense of the community", something that Thom excelled in but apparently had no wish for continuing. The new local code adopted in 1851 declared in its 34th resolution that the laws of Red River were those at the accession of Queen Victoria, at least "till some higher authority, or this council itself, shall have expressly provided, either in whole or in part, to the contrary".[23] The committee doubted the council's authority, notwithstanding its position as a local legislature, to alter the date of reception. The whole issue was "merely declaratory of the subordinate position of the Governor and Council of

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[21] Stubbs, *Four Recorders of Rupert's Land*, 40. Eden Colvile handed the deed of revocation on 10 April of the following year. Colvile to London, 4 June 1851; E. E. Rich, ed., *Eden Colvile's Letters, 1849-1852* (London: The Hudson's Bay Company Record Society, 1956), XIX: 58.

[22] Minutes of Council, 1 May 1851, in Oliver, *The Canadian North-West*, 369-70.

[23] *Ibid.*, 370.

Assiniboia".[24] It was resolved on the grounds of expediency and the power of the council of Assiniboia, even in its subordinate position to the imperial parliament (and to the Company), to reform the laws of Assiniboia.

The new code, for all its magic in altering the laws in force from those of 1670 to those of 1838, had no effect on how the court decided civil cases. As an example, on 19 February 1846, Adam Thom presided over *Morin v. Richard* in an action to determine the ownership of a horse. The analogous action available at law in 1670 was either detinue or trover, although the recorder never framed the action as such. Instead, the defendant and the plaintiff each stated their cases and produced witnesses to prove their claims. Nothing remarkable came before the court in the way of proof, nor did the court's clerk record the specific testimony given by either side. The case was decided when the jury, "after long deliberation and minute inspection of the horse found that it was the Plaintiff's[,] and the Court accordingly ordained the Defendant to deliver it up and also to pay the costs of suit".[25] The verdict depended above all on the jury's own inspection of the evidence relative to the claims of the parties.

On 17 February 1853, after Thom's removal from the bench, William MacDonald brought a suit against Joseph Maximilian Genton for a horse he claimed was his own but was in the defendant's possession. The case was slightly more intricate than the one seven years earlier, but still turned on the jury's examination of the evidence at hand. The plaintiff claimed that he had lost the horse nearly four years earlier. He identified the marks of the horse, and divulged that he "endeavoured to burn the horse with a ring in the neck before turning him out but the ring got cold before [he] got to the horse & only singed the hair".[26] He

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[24] *Ibid.*

[25] *Morin v. Richard* (19 Feb 1846), GQCA: MG2 B41, Book I, p. 49 [PAM].

[26] *MacDonald v. Genton* (17 Feb 1853), GQCA: MG2 B41, Book II, p. 37 [PAM].

had heard that the defendant was in possession of the horse and went to the defendant's home to claim it; there he had a conversation with the defendant's brother and later the defendant himself. According to the plaintiff, the defendant's brother admitted that the plaintiff had identified the marks of the horse correctly and further admitted that the horse belonged to the plaintiff. The defendant, however, refused to deliver up the horse. The defendant claimed that he had indeed found the horse, and had walked up and down the settlement with it looking for its owner, but to no avail. When interrogated he revealed that when "his brother told him that people were come about the horse, [he] told them if they could give the marks and swear to the horse they should get it". However, the defendant claimed in court that the plaintiff swore to a brand, and therefore he "said if the horse has been stamped show it, they said it had been stamped in the neck, but when the neck was shaved no mark could be seen". The defendant also swore that the horse was only approaching four years of age. Witnesses were called to testify to the general marks, and the plaintiff called one witness who corroborated the initial conversation between the plaintiff and his brother. Three witnesses testified that the horse was approaching four years old, and one testified that the horse was almost five.

The case did not involve a disputed ownership. The defendant openly admitted that he had found the horse, but also contended that he had in good faith tried to locate the owner. Furthermore, he was not satisfied with MacDonald's claims to the horse. The court's task, then, was to determine whether the plaintiff (MacDonald) was the true owner of the horse. Without a brand, the admitted proofs were the horse's markings and age. The court made no attempt to instruct the jury, and "Doctor Bunn summed up the evidence on both sides [and] left the case in the hands of the Jury to determine". The jury returned the verdict for the plaintiff, but also ordered MacDonald to pay the defendant 30s. for taking charge

of the horse and 15s. for keeping him. The award for the defendant was a restitution for stabling and feeding the horse based on the local code.[27] The verdict for the plaintiff established MacDonald's title to the horse.

MacDonald's title to that same horse was challenged by Pascal Breland at the Quarterly Court's next sitting on 19 May 1853. Breland raised an action against Walter Bourke for the horse that MacDonald had won in court and had consequently sold to Bourke. The plaintiff claimed that he had lost the horse three years before and identified the marks and a brand on the horse's left thigh. Corroborating witnesses all testified that the horse was in fact the plaintiff's. For the defense, William MacDonald appeared and gave the same testimony he had at the court's last session. His corroborating witness, Morisson MacBeath, also appeared and gave the same testimony. Other witnesses were called to testify for the defense, mainly to support MacDonald's testimony regarding the age of the horse. Maximilian Genton was called, and he testified — exactly as he had at the last session — that the horse was only four years old. Two more witnesses came forward to testify that, to the best of their knowledge, the horse was only rising four years. Dr. Bunn summed up the evidence for the jury who retired, and "after a considerable time returned the following verdict — that with reference to the age of the horse as well as the Brand & other marks it should be given to the Plaintiff as his horse".[28]

Breland's successful suit revealed the court's role as the fact-finder, and the jury's role as the truth-determiner. In terms of authority, the record of the previous sitting was never admitted as evidence, nor was the verdict of the previous jury considered a proof. In his testimony, William MacDonald stated that the horse in question was "the same horse that this Court had awarded to him last

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[27] Minutes of Council, 1 May 1851, in Oliver, *The Canadian North-West*, 374.

[28] *Breland v. Bourke* (19 May 1853), GQCA: MG2 B41, Book II, p. 48 [PAM].

February and which came to him by the decision of the Jury".[29] The jury gave the previous judgment no weight in its ensuing decision. MacDonald's proofs were sufficient to prove his case in February. However, Breland (the new plaintiff) had better proofs at his disposal, particularly the presence — however faint — of a brand he gave the horse.

The court's adopted position of fact finder and dispute mediator sometimes allowed it to skirt legal boundaries to redress wrongs. In 1851, Andrew MacDermot brought a personal action that had a rather odd outcome. He sued Louison Sayer, purportedly

> in consequence of the great increase of persons engaging with a number of individuals to go on the trip to York Factory by which means they obtain advances for the performance of the contracts they enter into without the intention of fulfilling them. In the Present case the Defent. Louison Sayer had engaged to him for one or two trips & had received upwards of four pounds in advance. He had afterwards engaged to John Inkster and had been advanced & after that he had engaged to the Honble Hudsons Bay Company & had obtained £4 in advance.[30]

The action skirted the boundary of a public or private wrong. MacDermot raised it as a civil suit, and the clerk recorded it as such. However, the jury found Sayer guilty of "engaging to obtain money under false pretences" and the sentence — one month's imprisonment and securities for his debts — reflected this combination of a public and a private action.[31] MacDermot had not presented information against Sayer in a public prosecution, neither had the court ordered his arrest under any relevant statute nor processed an indictment. The statutes against cheats were all listed in Burn's *Justice of the Peace*, which was available to Major William Caldwell (the governor of Assiniboia and president of the court from

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[29] *Ibid.*, p. 46. MacDonald referred to *MacDonald v. Genton* (17 Feb 1853), GQCA: MG2 B41, Book II, pp. 37-39 [PAM].

[30] *MacDermot v. Sayer* (20 Feb 1851), GQCA: MG2 B41, Book I, p. 245 [PAM].

[31] *Ibid.*, p. 246.

1850 to 1854).[32] The jury's verdict once again reflected the court's role as a fact-finder, and also its pursuit of justice in contravention to established common law procedure.

Another case brought before the court accentuated the reliance on matters of fact, rather than law, to settle questions of debt. In *Corrigan v. Fidler*, on appeal from a petty court, the court's task was to settle an account concerning the sale of several kegs of beer. The court accepted at face value the separate testimonies of the witnesses and the statements of accounts that they provided. After "Doctor Bunn summed up the whole & pointed out the discrepancies", the jury returned this verdict: "we unanimously find that Alban Fidler's account is correct deducting for Sour Beer & beer drank".[33] The court did not even attempt to address a single legal issue; instead, it asked the jury to arbitrate the dispute over whether the sum of 13 shillings and 6 pence should be deducted from the account for unusable fungibles. The jury was more than just the unfettered judge of fact; it was the sole judge of the case, both in fact and law.

Other cases prior to Johnson's appointment as recorder reaffirmed the jury's position, and the relative weakness of the court in deciding matters of law. On the 17th of February, 1853, Baptiste Goulet sued Joseph Delonais for a debt of £7. Goulet had sold a mare to Delonais for the £7 in question, but the payment was to be made on three separate occasions. The first payment consisted of a three year old heifer worth £3, the second payment of £1 due the following summer, and the remaining £3 was due after the boats arrived at Port Nelson (York Factory). Although the defendant had delivered the heifer, the plaintiff complained that the heifer was supposed to be three years old and was only two, and therefore sought

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[32] Richard Burn. *The Justice of the Peace, and Parish Officer*. 16th ed., 4 vols., (London: A. Strahan and W. Woodfall, 1788), I: 335-6. [Hereafter Burn. *Justice of the Peace*.]

[33] *Corrigan v. Fidler* (17 Feb 1854), GQCA: MG2 B41, Book II: p. 36 [PAM].

the entire £7. Doctor Bunn summed up the evidence to the jury and they returned a verdict in favor of the plaintiff for the full amount of £7, with an additional £1 in costs. The opportunity lay for the court to ascertain the legality of the contract, the possibility of a set-off and thus a reduction of the debt, or the fraudulent nature of the contract based on the horse's health. Instead, the question was put to the jury and tried strictly on the merits of the facts.

In one case, Caldwell and the bench did make a legal decision. The court dismissed *Thibeault v. MacDermot* because the plaintiff tried to admit notes that had not been endorsed by the defendant. However, in the vast majority of cases brought before the court between 1850 and 1854, the court limited itself to a forum for dispute resolution, and left these disputes for the jurors to resolve. Under Thom, several official opinions had been issued and the clerk of the court recorded on several occasions that Thom had instructed the jury, even if the instructions themselves were not recorded. However, the vast majority of cases Thom decided, particularly civil cases, were left to the jury to decide with little intervention from the bench. As for Caldwell, he later apologized for turning the court into little more than a "court of equity", and explained that he did little more than preside over the court and sum up evidence for the jurors.[34] *Flett v. LaRonde* illustrated the general incapacity of the court under Caldwell:

> The Plntf in this case was acting by power of attorney and stated that the defendant was due £6 to the party he represented being the balance of a sum of £15.
>
> The defendant acknowledged the debt but said it was to be paid in kind and not in cash.
>
> Plntf. stated that by the note of hand signed by Defent he might have paid in kind provided he had paid the balance now sought by 7 June past but not having done so it was cash he had to pay.
>
> Defendt denied that there was any stated time for the payment in kind.

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[34] Report from the Select Committee of the House of Commons on Hudson's Bay Company. 1857. Cited in Stubbs. *Four Recorders of Rupert's Land.* 50.

The President left it to the Jury to decide whether the Debt should be now paid & whether in Cash or in Kind.
The Jury after a short consultation returned a verdict for the Plaintiff.
To be paid in cash.
The bench decided that it be paid in 10 days with costs.
Paid immediately in Court.[35]

Simply put, the court should have interpreted the contract, or at least entered the 'note of hand' referred to by the plaintiff into evidence. But the President 'left it to the Jury to decide'. Such was the court under Major Caldwell.

Francis Johnson's tenure as Recorder: 1854-1858

The Company declined to fill the vacant position on the bench immediately after Thom's dismissal, but on 3 February 1854 it gave Francis Godschall Johnson the commission for recorder. He was a bilingual lawyer with fifteen years of courtroom experience and a good reputation for arguing cases before juries. Far from being the partisan that Thom was, Johnson offered solid experience and dignity to the position, something the Company needed if it was to gain the faith of both British authorities and the Métis inhabitants of Red River.[36] Johnson served on the court as recorder for only four years, but during his tenure the court took on a new role. No longer just a fact-finder, the court became an actively functioning judiciary that interpreted the law for jurors, giving them a legal framework to try the facts of the case.

The court clerk recorded many instances in which Recorder Johnson took an active part in the judicial proceedings. *Courtelle v. Madame La Superieuse* involved an agreement between the two whereby Courtelle had "given himself up to Defendant with all his property, to be Boarded and Lodged &c &c during his

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[35] *Flett v. LaRonde* (18 August 1853). GQCA: MG2 B41. Book II. pp. 53-54 [PAM].

[36] Stubbs. *Four Recorders of Rupert's Land*. 51-53.

Life".[37] Courtelle claimed that he had reserved a mare to himself, and claimed the mare now that he had been turned out of doors. The Rev. Lafleche, the defendant's attorney (legal representative but not a professional lawyer), presented a contract before the court which the recorder interpreted. The clerk of the court reported that:

> The Revd Lafleche here handed to the bench a written contract entered into by both parties and it stated to the satisfaction of the Recorder that by the said document that there could not be any reservation of any kind as it was not therein expressed, but on the contrary, therefore he the Recorder summed up the Evidence and the Jury returned a Verdict for Defendant.[38]

Although the clerk's record did not give the full extent of Johnson's involvement, this was certainly more than Caldwell had been able to provide during *Flett v. LaRonde* one year earlier.

Johnson also intervened in Donald Murray's suit against William Bird. Murray had previously rented a parcel of land to Bird, and Bird had recently erected a fence which encroached on Murray's lot. Bird claimed that he had been given a plot of land by his father, and

> had put up his fence in the old place in which it was in the time of Cha[rle]s McKay the original proprietor and by admeasurement he had not more land than his father had given him and that there was sufficient marks there to bear him out in what he stated viz. a tree at the River and a Stone at the base line and he followed these marks.[39]

A jury was sworn and evidence was presented. William Inkster had surveyed the land and presented his survey to the court. It allegedly proved that the defendant's fence had indeed encroached on the plaintiff's land. James Knight appeared to testify that the original proprietor's (i.e., Charles MacKay's) fence had not stood where the defendant's fence presently stood, and that the present fence "evidently

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[37] *Courtelle v. La Superieuse* (17 August 1854). GQCA: MG2 B41. Book II. p. 74 [PAM].

[38] *Ibid.*, p. 75.

[39] *Murray v. Bird* (19 November 1857). GQCA: MG2 B41. Book II. p. 103 [PAM].

encroaches on Plaintfs land"; Charles Haywood corroborated Knight's testimony. One witness appeared to testify that the fence had been placed correctly according to the position of the last fence, and the fence-builder — Peter Fidler — testified merely to substantiate that he had in fact used the stone and the tree as marks to build the fence. The best witness to testify for the plaintiff was in fact the defendant, who "deponed that he thought the present line took away from Plaintiff's Lot".[40]

The parties had brought two types of evidence to the court. Peter Fidler and William Inkster presented evidence to prove that the fence had indeed been built, and testified as to whether the fence had been placed correctly according to their independent standards. Peter Fidler had no knowledge of the original boundary lines, but appeared solely to testify that he had built the fence according to the markers presented by the defendant; William Inkster presented a report based on his survey and an assessment of the lots in the area. The remainder of the witnesses were householders who came to testify where the original fence had stood. David Mitchel deponed that he had lived in the area for 18 years, and Charles Haywood and James Knight had all known the original proprietor and had seen the fence. Their testimony did not rely on Inkster's survey, nor did the parties call them for the purpose of backing up the written evidence. Instead, they appeared to testify to the boundary lines as they remembered them. The jury found for the plaintiff.

At that point Johnson intervened and refused to pass judgment. The clerk recorded his declaration in shorthand: "judgement deferred till next court in the mean time the line to be run by the Surveyor and both parties to appear to receive Judgement".[41] The evidence was sufficient for the jury to come to a verdict, but

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[40] *Ibid.*, p. 104-05.

[41] *Ibid.*, p. 105.

Johnson was apparently not convinced that the court could pass judgment on such meager evidence. William Inkster was appointed the official surveyor for the court, and on 21 May 1858 the two parties appeared and Inkster presented his survey:

> Called upon to draw the boundary line between Dond. Murray, and Willm Bird. In order to determine the exact bearing of the lines in this vicinity I set the Compass at the foot of one formerly drawn by Mr Taylor the original Surveyor. and found it to bear exactly S71 Et: I then proceeded to the tree agreed upon in Court as the former boundary between Dond. Murray and Wm Bird and setting my compass there, drew a line bearing in the same direction as the other viz S71 Et.[42]

This satisfied the recorder, and Johnson ordered the clerk to record judgment that went against the defendant and also determined the boundary line between the two parties.

Johnson's influence was readily felt in the court. During his tenure as recorder, he made the court into something more than a public forum for dispute resolution and fact finding. The court became a judge of the law, and the recorder's task was to interpret the law and leave only questions of fact for the jury. For instance, in *MacKay v. MacKeiver* the plaintiff claimed a horse due on an unwritten contract. The price amounted to a number of goods delivered to the defendant's wife, but the defendant denied that a contract had existed. After hearing the evidence, Johnson "summed up the evidence and stated that the Plaintiff had failed to prove his title to the horse inasmuch as the horse had never been delivered to Plaintiff nor had he ever fed or stabled him but for the articles he had furnished to the Defendant he left to the Jury to decide".[43] The jury found for the plaintiff and the court ordered the defendant to pay for the goods, but the horse remained the plaintiff's.

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[42] *Murray v. Bird* (21 May 1858), GQCA; MG2 B41, Book II, pp. 110-111 [PAM].

[43] *MacKay v. MacKeiver* (19 August 1858), GQCA; MG2 B41, Book II, p. 118 [PAM].

The Last Years of the Court: 1858-1870

After Johnson resigned his commission and left for Montreal, the General Quarterly Court of Assiniboia suffered a series of humiliating incidents that called into question the ability of the Hudson's Bay Company to keep law and order among the inhabitants of Red River. They were sensational affairs, made even more so by the partisan accounts of the trials printed in the *Nor'-Wester*, Red River's first newspaper. In all fairness to the court, they represented only a handful of the cases; the court continued to settle the normal run of civil and criminal suits. However, the incidents proved that the court lacked sufficient coercive authority to back its judicial decisions.

The first incident was the sordid Corbett affair. The Grand Jury returned a true bill of indictment before the court on the 19th of February 1863 against the Reverend Griffith Owen Corbett. He was indicted for feloniously attempting "to procure the miscarriage of Maria Thomas" on five different occasions. Maria Thomas, a young servant girl of Corbett's, testified for two full days before the court about the number of times that Corbett had induced her to sleep with him, and vividly recounted the five occasions he had attempted to abort what he feared was his child. The whole trial lasted nine days, and consisted mostly of witnesses testifying about Corbett's affair with Maria Thomas, or Maria's alleged affairs with other men. The trial probably would not have garnered as much attention if the Reverend Owen Corbett had not been such a well-respected member of the community. Corbett's position undoubtedly influenced the jurors, who found him guilty but recommended mercy. The court was not impressed, as the clerk noted:

> The prisoner on being asked why sentence should not be passed replied that he throws himself on the mercy of the court

Sentence - To be imprisoned Six Months without Labour or Confiscation of Property.[44]

Six months might seem a light sentence for someone who had been convicted of a felony, but in Red River it was considered a harsh penalty.

Corbett's friends immediately campaigned for his release. Some 420 residents signed a petition asking Governor Dallas to remit Corbett's sentence. Dallas referred the petition to Recorder Black who curtly dismissed it.[45] Less than a month later, a number of Corbett's friends stormed the prison and released him. James Stewart was arrested as a ringleader in the jailbreak, but was also broken out of jail two days later. In preparing for the possibility of Stewart's forced release, Governor Dallas had a ready force of constables at his disposal, sworn in for the occasion. He neglected to confront the jailbreakers, however, for fear of bloodshed. "Another weighty reason", added Governor Dallas, "was the danger to be apprehending from the surrounding Indian Tribes, should the inhabitants of the Settlement be divided against themselves in open warfare".[46] The council decided not to make any more attempts to arrest Corbett, Stewart, or any member of the mob who had broken them free.

The governor and council of Assiniboia lacked sufficient coercive power to back its judicial authority, and the Company could not remedy the problem. The magistrates for the District of Assiniboia addressed Governor Dallas in a petition following Corbett's release, and complained that "the arm of the civil power [has been] paralysed by the absence of any material basis to rest it on".[47] At least three more incidents between the Corbett jailbreak of 1863 and the Riel Rebellion in 1869 proved that the Company could not deal with settlers who thumbed their

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[44] *The Queen v. Griffith Owen Corbett* (19 February 1863), MG2 B41, Book III, p. 10 [PAM].

[45] Stubbs, *Four Recorders of Rupert's Land*, 152.

[46] Minutes of Council, 28 April 1863, in Oliver, *The Canadian North-West*, 523.

[47] *Ibid.*, 524.

noses at the court.[48] However, despite the lack of sufficient coercive authority to back the judicature, the magistrates informed Governor Dallas in their 1863 petition that

> we have witnessed among the people such manifestations of attachment to order that we are led to believe in the existence of a very general and earnest determination to uphold the authority of the law, and under these circumstances we are brought to the conclusion that, notwithstanding of these outrages...we can still go on, as formerly, with the general administration of Justice in our Courts.[49]

One must not overemphasize the several incidents of lawlessness to conclude that the Court of Assiniboia was unsuccessful during the 1860s. The magistrates did go on, and the court continued to hear suits and resolve disputes much as it had before. In fact, the number of civil suits before the court dramatically increased during the 1860s, indicating that most settlers regarded the court as a competent authority and were willing to take their disputes to the courthouse for resolution.

With Johnson's departure, the court lost its legally trained recorder and thus the last real mouthpiece of the English common law. From 1858 to 1869 the court continued its role as a forum for fact-finding, and used the jury to render largely equitable decisions based on the merits of the case rather than any established rules of evidence. Dr. Bunn, who acted as recorder from 1859 to 1861, had no legal training whatsoever, and Recorder Black — 1862 to 1870 — had clerked in a solicitor's office in Scotland for seven years. One of the advances made during this time was the passage of another consolidated collection of local laws, which resembled in form the collection of 1851. The council made several new additions, including one that made it unlawful for any freighter or owner of a boat to employ anyone as a boatman without a written contract that specified the dates of employment, the wages, and the expected service.[50] It was one of the most

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[48] See Stubbs, *Four Recorders of Rupert's Land*, 163, 168.

[49] Minutes of Council, 28 April 1863, in Oliver, *The Canadian North-West*, 526.

[50] Minutes of Council, 8 & 11 April 1862, in Oliver, *The Canadian North-West*, 497-98.

definite declarations of law that the council ever made, particularly because it clearly defined what was unlawful in Red River.

The revised collection of laws was just as incomplete as the last, and the court's vast majority of business dealt with issues not covered by local regulations. The court left the resolution of these legal issues as well as matters of fact to the jury. On 19 May 1863 Philibert Laderaute brought an action against Louis Riel for a horse in the defendant's possession that the plaintiff claimed as his own. The clerk did not record the initial pleadings of either the defendant or the plaintiff, but testimony revealed this as another case of a lost horse, initially claimed by the defendant and subsequently claimed by the plaintiff. Twenty-two witnesses appeared to testify, and the main issue of contention in the case turned on two marks that each party claimed identified the horse as his own. The plaintiff claimed he had cut the left ear of the colt, and the defendant claimed he had branded the colt's thigh. Nine witnesses appeared for the plaintiff, most of whom identified the colt by its natural and artificial marks as the plaintiff's. The remainder of the witnesses identified the colt, by the brand and the natural marks, as the defendant's.

The mass of witnesses presented contradictory evidence. Two witnesses for the plaintiff claimed that the defendant's colt did not have a white mark on its face — they were contradicted by nearly all of the defendant's witnesses, except two who could not remember if the defendant's colt had a white forehead or a white nose. The biggest points of contention, however, were the artificial marks. Witnesses testified that the plaintiff claimed to have cut the ear of the foal, not to have cut a portion of the ear off. One witness claimed that he had "asked Plaintiff if he had cut the piece out of the Ear [and] he said no".[51] Likewise, the plaintiff

[51] *Laderaute v. Riel* (19 May 1863), GQCA: MG2 B41, Book III, p. 25 [PAM].

claimed that the alleged brand was not clear, but most probably just a scar. The clerk did not record whether the jurymen inspected the horse themselves, but they returned a verdict for the plaintiff and against Riel.

The clerk did not record any reasons for the jury's verdict, but it most likely stemmed from the colt's cut ear, which was a clear mark regardless of the defendant's insistence on the plaintiff's initial wording (i.e., a cut ear versus a portion of the ear cut off). The brand, even by the plaintiff's witnesses' accounts, was not entirely clear. In deciding the case, the jury searched for the best evidence to find the original owner. The evidence, though, relied completely on marks rather than on any previous possession — neither party seemed interested in proving that they had in fact stabled or fed the colt, or used it in any manner that might prove prior possession. The plaintiff merely had to produce a better claim than the defendant to win the horse in court.

One year later another case over the ownership of a horse appeared.[52] The defendant had taken the horse on the plains, advertised for the owner in the *Nor'-Wester*, and bought it after being satisfied that the horse belonged to Joseph Whiteway. Whiteway proved the ownership of the horse to the plaintiff by shaving its thigh and showing a brand that, though unclear, resembled the 'W' that Whiteway used. The plaintiff claimed the horse primarily on the basis of its age, which Toutsaint Voudre and Francois Carrier attested to after examining its teeth. Four witnesses corroborated their testimony. The defendant's position largely relied on Joseph Whiteway's claim as the original owner, but Whiteway did not appear at the trial. The defendant's witnesses all corroborated the defendant's story about the brand and Whiteway's claim. On the basis of this evidence, the jury concluded that the horse be delivered up to the plaintiff and that the defendant

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[52] *Berand v. Gunn* (19 May 1864), GQCA; MG2 B41, Book III, pp. 46-48 [PAM].

pay the costs of the suit. The jury's verdict was odd in light of the proof that the plaintiff provided. Although the age of the horse was a significant matter and had been considered a good proof in previous cases, the presence of the brand, even if faint, should have been enough to render a favorable verdict for the defendant. In essence, there was no burden of proof: one party merely had to establish a better claim than the other.

The court entertained more cases of debt during the 1860s, and was faced with considerably more documentary evidence than it had before. As in the earlier years of the court, most cases of debt were never argued because the defendant did not appear, and the court awarded default judgments to the plaintiff. Many of the more complicated cases went to the bench for arbitration. With the increase in debt litigation came an increase in written evidence and a subsequent decline in oral evidence in contracts. In *Schultz v. Dumais*, for instance, the whole suit was raised over a bill signed by the defendant for £18 9s. 8d. Schultz claimed £45 in his action (the remainder for damages), but the court only awarded him the costs of the debt.[53] In *MacKenney v. MacDermot* the main evidence presented was an account which allowed MacDermot a set-off. The bench mitigated the argument and mediated an agreement over the interest on the bill and the amount of the setoff.[54]

In the cases over debts, two things stood out consistently. The bench, more often than not, arbitrated the dispute rather than judged it according to strict law. In *MacKenney v. MacDermot*, the court clerk recorded that Mr. Bannatyne, legal agent for Mr. MacDermot, "finally agreed to allow the Interest on McKenneys bill, on the condition that one years Interest at the same rate as that charged, in McKinley's bill should be paid on the sum of the two items in McDermots bill

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[53] *Schultz v. Dumais* (22 November 1867), GQCA: MG2 B41, Book III, p. 129 [PAM].

[54] *MacKenney v. MacDermot* (18 February 1869), GQCA: MG2 B41, Book III, p. 158 [PAM].

which McKenney had agreed to accept". The verdict accordingly went to the defendant for the agreed upon amount and costs of the suit. Besides this tendency to arbitrate, the court — in cases where it had to pass judgment rather than arbitrate — was generally reluctant to award damages above and beyond the debt itself. Schultz had claimed over £26 of damages from Dumais, but the court awarded him only the amount specified on the bill. The court did award damages on some occasions; Alexander Ross sued Augustine Gaudris for breach of contract (debt and damages) and won his suit, although Ross had two written contracts that specified monetary penalties to aid his cause.[55]

To risk a broad generalization, nearly every court of law in the history of the common law or civil law system served as a forum for dispute resolution, and as a place where evidence could be presented and problems peacefully resolved. In the common law courts, the evidence filtered through a rigid system of rules meant to apply equally in every case, hence the law 'common' to all. The institutional division of law and equity in England, and its formalization into two distinct judicial systems with their own procedures and remedies limited the amount of fact-finding and truth-seeking accomplished in the common law courts. In this respect, the Court of Assiniboia was never a true common law court and, by Adam Thom's own admission, required a healthy dose of equitable principles. Its primary function was to resolve disputes among the inhabitants of Red River, and the court achieved this function by allowing practically every form of evidence available to come before the court and leaving the determination of the case to the

[55] *Ross v. Gaudris* (19 November 1868), GQCA: MG2 B41, Book III, pp. 142–44 [PAM].

jurors. Such a system necessarily rejected a consistent set of rules to apply in every case, outside of what was established in the local code of 1841.

In cases involving disputed possession — roughly corresponding to the action of trover at common law — the court followed general principles that deviated from the common law. Much of this derived from Red River's particular geographical and social circumstances. Horses often strayed, and usually did not turn up for years. When they did, the original owner had to prove possession without the benefit of an official chattel's register that might have recorded his horse's markings, both natural and artificial. The finder's right over the horse was greater than any other's right except the original owner. If the original owner sued for ownership of the horse, his limited source of evidence amounted to a proof *in personam* as opposed to *in rem* — this was enough for the jury to find the person with the better claim, instead of the absolute claim, to ownership. The court did not even pretend to grant the ownership by its judgment *in rem*, as William MacDonald found out in 1853 when he sold a horse the jury awarded him to Joseph Genton.

In debt and contract cases, the court, rather than relying on the form of the contract, sifted through evidence to find the intent behind the contract. The General Quarterly Court of Assiniboia acted more as a local arbitrator on disputed accounts, and referred most of the difficult cases to arbitration. In cases where debts were clearly owed and proved by endorsed bills or accounts, the jury took that evidence over oral evidence to the contrary, although the court was generally unwilling to grant damages above and beyond the debt.

The General Quarterly Court of Assiniboia as an institution was the only regularly convening court in Rupert's Land, and it always had the potential to become a court of record. As the legal organ of the governing corporation and with the presence of a legally-trained recorder, it had the legitimate authority.

Likewise, since the disputes of the settlers were settled by the declaration of the jury, the court had the ability to declare local customs and register the judgments as authorities for the aid of future litigants. The court never pursued such a course of action. Instead, the court acted as an arbitrator and as a public forum for dispute resolution that actively searched for all possible evidence to determine suits.

Chapter 6

Conclusion

The Hudson's Bay Company came to North America as a commercial enterprise — an incorporated collection of merchants aspiring to exploit the fur trade on the shores of Hudson's Bay. The merchants who had subscribed to the voyage of the *Nonsuch* applied to Charles II for a charter of incorporation primarily to secure the traditional privileges granted to explorers who established new trades. They received incorporation and, in addition, territorial rights over 'Rupert's Land' — a vast tract of land larger than Europe itself. The merchants adventurers trading to Hudson's Bay were no longer just merchants, they were governors of new dominions of England.

The romantic story that accompanies the merchant adventurers' expeditions, the exploits of the 'Caesars of the Wilderness' (Pierre Radisson), and the signing of the royal charter, ignores the charter's legal history. English monarchs had used charters for centuries to legitimate local and commercial governances. By the fourteenth and fifteenth centuries, these charters had achieved a consistent legal form, and the facets common to all became the building blocks of 'corporateness'. Merchants in the sixteenth and seventeenth centuries exploited this idea, promising new wealth for the English crown in return for corporate and monopolistic privileges over foreign trade. These merchants were also aware of their position as governors of commerce, and their grants of privileges carried obligations. Failing to fulfill those obligations could and did bring down the wrath of parliament. The Hudson's Bay Company shouldered the responsibilities of a governor of trade and of Rupert's Land — these obligations influenced many of its actions throughout the eighteenth and nineteenth centuries.

The Company carried the responsibility of transplanting the laws of England to Rupert's Land with its grant of criminal and civil jurisdiction. Geography and internal circumstances set the borders for this responsibility — as the lawful governor of Rupert's Land, the Company only had to bring the laws that applied to Rupert's Land's particular situation. During the Company's first century on the shores of the Bay, it only had to provide government for a small number of its servants. No other British subjects took up residence in Rupert's Land, and the Natives were not considered British subjects. The Company brought with it the traditional laws governing the master-servant relationship at common law, and exercised its legislative power to frame resolutions governing the relationship between Company servants and the Natives with whom they traded furs. Throughout the eighteenth century, chief factors relied on their personal authority to maintain order, and the resident governors in Rupert's Land rarely exercised the power of criminal and civil jurisdiction granted by the charter.

In 1811, the Company planted its first colony. Selkirk's enterprise required a more regular method of dispensing justice, but conflict with the North West Company during the first decade of settlement complicated the establishment of a formal judicature. Even after the two companies merged in 1821 under the deed poll, the small but growing colony still had no regular judiciary: the governor exercised his authority with his councillors, swore in constables when needed, and either arbitrated disputes or left them to determine their own course. Thus, when George Simpson, governor of Rupert's Land, authored the judicial reforms at Red River in 1835, he had no judicature to build on. The charter was the basis of authority for the courts he created, but he looked outside of Rupert's Land to the English courts for the appropriate model. The reforms of 1839 built on Simpson's first model, and the corporate Company created another corporate officer whom it

intended to be the mouth of the Quarterly Court of Assiniboia, its legal organ in Rupert's Land.

Adam Thom, the first recorder of Rupert's Land, brought with him ambitious plans for law in Rupert's Land. Because overbearing personality earned him the hatred of nearly everyone in Assiniboia and the annoyance of all the London directors, scholars have overestimated his influence in bringing law to Rupert's Land. Thom laid down the guidelines for the transplantation of law by describing which laws of England to exclude, and which imperial statutes were in force, but he avoided any clear statement of the law governing Assiniboia or Rupert's Land. The London directors frustrated his attempt to codify the civil and penal laws of the country. His work on the local 'code' of Rupert's Land was largely limited to collecting and revising laws already passed by the council of Assiniboia.

Litigants in the General Quarterly Court of Assiniboia had no clear statement of the law at their disposal, but they definitely had notions of what was fair and just. In the civil actions in the court, litigants based their arguments on these simple principles, and the court allowed all the facts to go to the jury for their decision. The court records, moreover, did not reflect a desire to define the rules of Assiniboia's law; instead, they revealed what evidence was necessary to win actions. Behind this evidence lay the fundamental rules that governed life in Assiniboia — rules based largely on equitable principles. The court encouraged arbitration, either independent of or conducted before the bench, and demonstrated considerable flexibility in its sentencing and judgments. The court had successfully blended law and equity in Assiniboia, and provided a public forum for the settlers at Red River to bring their disputes for resolution.

Postscript

Historiography and Assiniboia's Legal History: Questions for the Future

Assiniboia's legal history remains largely an unwritten chapter in the larger legal history of the Canadian West. Other historical topics in Assiniboia have received more interest and attention. Abundant political, social and cultural histories deal with topics such as the Métis in Red River, the fur trade in the Canadian West, and Louis Riel's provisional government in 1869-70, at the end of the Hudson's Bay Company's reign in Rupert's Land. For the most part, however, Manitoba's pre-Confederation legal history has been surveyed but not analyzed. Contemporary historiography has explored some of the questions left unanswered by previous historians, and has laid the foundation for a more intensive review of the sources available for interpretation. But fundamental questions remain unasked. There is no magical prescription for the writing of Red River's legal history, and I do not promote any one 'type' of legal history (e.g., comparative or doctrinal) over another. However, if the legal historian turns his or her attention to the fundamental task of understanding law as it was practiced in the General Quarterly Court, it will open the door to a better understanding of the cultural, social, and economic history of Rupert's Land.

The earliest accounts of life and law in Red River appeared as narratives, written by men who had lived and worked in the settlement. Alexander Ross was the first — and in many ways, the best — historian of Red River.[1] He served as sheriff of Assiniboia, managed the short-lived Volunteer Corps during its existence, collected customs for the colony, dutifully acted as a magistrate, and

[1] Alexander Ross, *Red River Settlement* (Minneapolis: Ross and Haines, Inc., 1957; originally published 1856).

governed the local gaol. Given his position of influence and his penchant for public service, he had quite a bit to say about law. Ross's account, written in the 1850s, told the story of a colony that prospered because of the determination of men to overcome the wilderness. It charted the progress of the colony rather than its decline, as other authors would later tell the story. Importantly, it came before the 1860s and the several incidents of lawlessness that irreparably damaged the later credibility of the Company's authority. For a narrative of those years, one must turn to Joseph James Hargrave.[2] Although not nearly as politically active as Ross had been, he settled at Red River in 1861 and remained for seven years.

Both accounts were anecdotal. Neither had a real teleological purpose. Ross's history passed judgment on the various men he worked with and the institutions established by the Company; his account was far from dispassionate. However, he died before annexation by Canada became a serious issue: his history did not (indeed, could not) consciously seek to explain away the 1869 rebellion or prepare Red River for Confederation. Hargrave's narrative was built around the years 1861-1868, when he was a resident of Red River. In fact, he "endeavoured to render the first part of the book preparatory"[3] so as to contextualize the events of the 1860s. Remarkably, Hargrave did not play 'connect the dots' with the several lawless incidents (Corbett and Stewart, 1863; Desmarais, 1866; Schultz 1868) during his stay, to conclude that the Company had no authority or that the Settlement was a powder keg ready to explode. Instead, he passed judgment on the geographical circumstances that made Red River "a small colony utterly isolated from the other British possessions on the continent".[4] The main threat to Red River was not a lack of respect for law or authority, but its position "seventy

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[2] Joseph James Hargrave, *Red River* (Narol, Manitoba: 1977; first printed 1871).

[3] Hargrave, *Red River*, 102.

[4] *Ibid.*, 95.

miles [distant] from the territories of the greatest power in America", and the Sioux, "a class of dangerous barbarians who, when pressed by American troops, take refuge in British territory, whose presence in times of war gives great uneasiness to an unarmed population".[5]

To these two early anecdotal accounts of life in Red River can be added one more: the Reverend Roderick MacBeath's story of the Selkirk settlers.[6] MacBeath, admittedly writing well after the fact, wanted to tell the story of the "peculiar life and customs characteristic of those who for nearly half a century, apart from the rest of the world, fought and conquered the difficulties of settlement in a wilderness wild".[7] It was the "unwritten chapter in the history of his birthplace".[8] These three authors have contributed to our contemporary understanding three invaluable, first-hand accounts of all facets of life in nineteenth century Assiniboia. For the legal historian, these several books are indispensable: they provide the basis for a literary picture of the proceedings in the General Quarterly Court, something that the court's minute book does not provide. As with any other anecdotal source, they must be carefully scrutinized for biases and possible inaccuracies, particularly considering Alexander Ross's involvement in public life and the Company. Likewise, Hargrave spent most of his time with the 'men of influence' within the Settlement, and his narrative comes squarely from that perspective.

The first actual histories of the 'Canadian' North West and of Red River came from men who both participated in its events and studied its past. Most of the narratives that emerged in the late-nineteenth and early-twentieth century told

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[5] *Ibid.*

[6] R. G. MacBeath, *The Selkirk Settlers in Real Life* (Toronto: William Briggs, 1897).

[7] MacBeath, *The Selkirk Settlers in Real Life*, 10.

[8] *Ibid.*

the story of "a fur trade slowly yielding ground to agricultural colonization".[9] It was a larger story in which the small colony at Red River played a small part. Alexander Begg's *History of the North-West* sketched a cursory narrative of the larger events in Red River preceding Confederation.[10] It was and is a remarkable history and a compelling narrative, supplemented by his other accounts of life in the North West and the Red River rebellion.[11] Begg had visited Red River on several occasions before 1870, and was fascinated with the Red River troubles and Louis Riel. His assessment of life in 1860s Red River, much like my own, revealed two different pictures. On the one hand, Red River's government lacked sufficient power to enforce the law among inhabitants; on the other, the large majority of settlers seemed content and law-abiding.

Begg made no attempt to reconcile these two conflicting perspectives. Instead, he focused on explaining how the Company's authority — once indisputable over much of the North West — fell into decline and virtually vanished before the eve of Confederation. It was not a difficult narrative to trace. The prosecution in 1849 of Pierre Guillaume Sayer for trading furs against the Hudson's Bay Company's monopoly spelled disaster when the jury's verdict of guilty could not be enforced; the court subsequently granted Sayer mercy and he left the courtroom a free man amidst cries of "Le commerce est libre".[12] Unable to enforce its trading monopoly, the Company was further humiliated when it could not enforce a six-month prison sentence against the Reverend Owen Corbett in 1863. Even more humiliating, the Company did not (perhaps could not) take any

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[9] A. S. Morton, *A History of the Canadian West to 1870* (London: Thomas Nelson & Sons Ltd., 1939), vii.

[10] Alexander Begg, *History of the North-West*, 3 vols. (Toronto: Hunter Rose & co., 1894). Volume I is devoted to pre-Confederation History.

[11] Alexander Begg, *The Creation of Manitoba, or A History of the Red River Troubles* (Toronto: A. H. Hovey, 1871).

[12] Begg, *History of the North-West*, I: 272-73.

further actions against either Corbett or the men who lawlessly broke him out of prison.[13] Schultz's refusal to abide by the court's decision, and his forcible resistance to Sheriff MacKenney's seizure of his goods in 1868 revealed what had long been the condition of the Company's authority, at least in Begg's history: no authority whatsoever.

Despite this negative assessment of the Company's rule, Begg offered several observations on the state of the law and judicature of Red River in the aftermath of the Sayer trial. After describing the judicial and political structure of the court, Begg concluded that

> the progress of the settlement and the institutions established for the regulation of law and order all indicate a more advanced state of affairs among the settlers on the Red River, a greater degree of confidence in themselves, and more independence of feeling.[14]

The court may not have possessed enough coercive authority to enforce its decisions on Corbett, Stewart, or Schultz, but this was insignificant to a law abiding community. In the 1860s, when 'agitators'[15] challenged the Company's authority and thumbed their noses at the decisions of the General Quarterly Court, Begg observed that "In point of fact, the settlement was never more contented than at the time we are writing about, and...the settlers, as a rule, were law-abiding, and the condition of the community, on the whole, satisfactory".[16] Begg had very little to say about what law governed the Settlement and how it was practiced in the General Quarterly Court, merely observing that it was "well adapted for purposes of fair arbitration in simple cases", even if "liable to abuse, owing to its summary

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[13] *Ibid.*, 351-52.

[14] *Ibid.*, 327.

[15] This is Begg's word.

[16] Begg, *History of the North-West*, I: 362.

character, and absence of preliminary and other necessary arrangements customary with regular courts of law".[17]

Begg's history was a political narrative with simple purposes. He wanted to explain the Red River rebellion, and was content to find his explanation in the erosion of the Hudson's Bay Company's authority. He titled Chapter XX, the narrative of events for the 1850s and early 1860s, "The Decline of the Hudson's Bay Company's Authority", and ended by deliberately anticipating the Company's position on the eve of Confederation:

> The officers of the Hudson's Bay Company realized the unsatisfactory position they occupied as rulers, and events, which we will relate in a subsequent chapter, soon proved how powerless they were, and caused them to openly express a desire to be relieved from the responsibility.[18]

Begg's narrative, moreover, lacked any substantial analysis of the Company's position during the 1840s and 50s, particularly when the Company seemed so active in Red River's affairs. The dynamic at work in Begg's history was perennially external: pressure from Canada for the annexation of Rupert's Land, pressure from the British government for the further settlement of the North West, and even pressure from 'agitators' within the Settlement for the end of the Company's rule. The Company, according to Begg, wanted out — the external pressures were far too great and the rewards far too slight.

During the first half of the twentieth century, historians of the Canadian North West sought to explain how the Company rule ended and the dominion of Canada began. George Bryce's *History of Manitoba*, while a beautifully written and illustrated text, was essentially an antiquarian's history.[19] Arthur Morton offered a new interpretation of the political history of Rupert's Land: the Hudson's

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[17] *Ibid.*, 369.

[18] *Ibid.*, 328.

[19] George Bryce, *A History of Manitoba: Its Resources and People* (Toronto and Montreal: The Canadian Historical Company, 1906).

Bay Company had succeeded, until 1857 in quietly and wisely ruling the colony, but the decision of the House of Commons in that year, to transfer eventual ownership of Rupert's Land to Canada, led to "a decline in the authority of the Governor and Council in Assiniboia.... The result was increasing chaos, culminating in the disturbances under Louis Riel which marked the transfer of Rupert's Land to Canada".[20] Once again, an essentially political narrative enveloped law as a subsidiary instrument of the legislative council. Morton mentioned law and the General Quarterly Court in passing, but — like Begg — he drew the court into a larger narrative that explained how Rupert's Land 'drifted' into Confederation.

These early political narratives of Western Canadian history never addressed law specifically because they held to larger themes and resisted technical specialization. In the past thirty years, however, a few scholars have begun to uncover the sources available for interpreting a legal history of Red River. Much of this ground breaking work has been, of necessity, expository. Roy St. George Stubbs gave a cursory look at the law in Red River through the biographies of the Company's recorders.[21] Louis Knafla wrote the first survey of Western Canada's legal history in a book he edited.[22] Knafla's survey is particularly helpful because it set Assiniboia alongside the western prairies and British Columbia, allowing for a larger perspective on the development of law in Assiniboia. He also presented several conceptual themes (e.g., the common law as municipal law, the prerogative and the problem of sovereignty, and the 'ancient constitution' of England) that help the historian of Assiniboia to understand larger

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[20] Morton, *A History of the North-West to 1870*, 852-53.

[21] Roy St. George Stubbs, *Four Recorders of Rupert's Land* (Winnipeg: Peguis Publishers, 1967).

[22] Louis Knafla, "From Oral to Written Memory: The Common Law Tradition in Western Canada" in Knafla, ed., *Law & Justice in a New Land* (Toronto: Carswell Co. Ltd., 1986). [Hereafter: Knafla, "The Common Law Tradition".]

common law themes in the English common law tradition. It is a much more useful survey for the historian of Assiniboia than Macleod's *Law and Order on the Western-Canadian Frontier*, which contextualized Red River as one of many stories on the Western frontier.[23]

Dale Gibson's recent survey of the legal institutions in Assiniboia is currently the best available.[24] He discussed the relevant sources of authority for the Hudson's Bay Company's courts, namely the charter of 1670 and the Canada Jurisdiction Acts of 1803 and 1821. His narrative covered the whole of Red River's history under the Hudson's Bay Company. In addition to covering the major events and personalities, Gibson detailed the council's legislation and judicial reforms. This survey, while it provided a readable and comprehensive overview of the work of the council of Assiniboia, did not address the General Quarterly Court records except to discuss the handful of the 'big' cases that have garnered the most attention over the years. Gibson's and Knafla's surveys presented a readable narrative of the legal history of Assiniboia, but they were expository rather than analytical, and raised more questions than they ever answered.

Hamar Foster and Desmond Brown both engaged the legal uncertainties of Rupert's Land from a top-down, constitutional perspective.[25] Of the two, Hamar

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[23] R. C. Macleod, "Law and Order on the Western-Canadian Frontier", in John MacLaren, Hamar Foster and Chet Orloff, eds., *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina: Canadian Plains Research Center, 1992). Macleod's survey delivered what it promised: interpretations of the Hudson's Bay Company's general management of its territories, the coming of the Royal Canadian Mounted Police and the maintenance of order on the Canadian Prairies. He had little to say about Red River beyond a cursory biography of Adam Thom, and so I have not dealt with him at length in this essay.

[24] Dale Gibson, "Company Justice: Origins of Legal Institutions in Pre-Confederation Manitoba", *Manitoba Law Journal*, XXIII (1996), now in *Canada's Legal Inheritances*, eds. DeLloyd J. Guth and W. Wesley Pue (Winnipeg: Canadian Legal History Project, 1996)

[25] Hamar Foster "Long Distance Justice", *American Journal of Legal History*, XXXIV (1990). Desmond Brown, "Unpredictable and Uncertain: Criminal Law in the Canadian North West Before 1886", *Alberta Law Review*, XVII (1979).

Foster's article more accurately analyzed the content and effect of the two Canada Jurisdiction Acts passed by the imperial parliament, although one has to take his notion of a 'legal vacuum' with a grain of salt. There were customs, both Aboriginal and European, that existed in Rupert's Land before the advent of legal machinery to resolve disputes. This, however, hardly complicates his cogent analysis of the effect of the two Canada Jurisdiction Acts. Foster successfully demonstrated that the Acts merely papered over the fissures, and that the notion of 'long distance justice' — justice in Rupert's Land administered by either the Canadian courts or the English courts — was largely a fiction. Desmond Brown provided a constitutional survey of the criminal law in the Canadian West, and confined his sources solely on the reading of the statutes and other constitutional documents. He drew his conclusion that the criminal law was 'unpredictable and uncertain' without one reference to an actual criminal case. Brown's article is important, though, because it sorted out the confused theories about the administration of law in the Canadian West during the nineteenth century.[26]

What these surveys do provide is a starting point for future scholars who wish to explore Assiniboia's legal history. Stubbs' biographical survey of the recorders of Rupert's Land brought into his narrative account a sample of the cases that came before the General Quarterly Court and explained the legal content of those cases. Gibson's work gives the best contextual background to the court, even though a glance at his footnotes reveals a lack of first-hand familiarity with the resources available in the Hudson's Bay Company Archives (or at least an unwillingness to cite those sources). Knafla's work contextualizes the whole history of Assiniboia in the larger picture of 'Western Canadian' legal history. When it comes to the precision of historical interpretation, though, these works fall

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[26] Brown drew the important distinction between theory and practice. See Brown, "Unpredictable and Uncertain: Criminal Law in the Canadian North West Before 1886", 507-08.

short. For instance, whether one believes in Stubbs' apology for Adam Thom as "a man whose positive qualities...out-measured his defects",[27] or agrees with Knafla that Thom was a racist and "had neither a good grasp of the law in general nor of English law in particular",[28] one searches in vain in those pages for a dispassionate analysis, based on all the available evidence, of Thom's legal contributions to the colony.

Better and more comprehensive analysis has emerged, most notably Kathryn Bindon's monograph on Adam Thom and Russell Smandych's and Karina Sacca's paper on criminal law courts in Assiniboia. I have dealt with much of their work in Chapter IV of my thesis, and I will not repeat my analysis here.[29] However, I will comment briefly on how these authors have dealt with the subject of 'law' in Red River. Bindon was more concerned with 'order' than 'law' in Red River. The Company, in her view, had much to gain from instituting a regularized judiciary that would protect its monopoly against free traders within the settlement. The actual 'law' that the court administered was only of nominal importance; Thom's activities and the Company's motives were Bindon's subjects, and the targets of her analysis. "The law", wrote Bindon, "successfully withstood Thom's personality".[30] But Bindon gave no indication what 'the law' really was. Bindon's otherwise excellent essay contained several erroneous conclusions: particularly her incorrect assertion that Thom's proposed penal code and temporary civil code were accepted by the London directors without alteration.

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[27] Stubbs, *Four Recorders of Rupert's Land*, 44.

[28] Knafla, "The Common Law Tradition", 38.

[29] For instance, Kathryn Bindon's study of Adam Thom is currently the best available. Bindon, "Hudson's Bay Company Law: The Institution of Order in Rupert's Land", in David Flaherty, ed., *Essays in the History of Canadian Law, vol. I* (Toronto: The Osgoode Society, 1981).

[30] *Ibid.*, 78.

Her uncontested mistake has led many to overestimate Adam Thom's influence in determining the law of Assiniboia as practiced in the General Quarterly Court.

Russell Smandych and Karina Sacca have completed a survey of criminal law in the Hudson's Bay Company courts.[31] The body of the article engaged the period between the founding of the colony (1811) and the end of Andrew Bulger's governorship (1823). The article provided some useful anecdotes extracted from the Selkirk and Bulger papers that illustrated the Company's administration of criminal justice at Red River until 1823. The latter half of Smandych's and Sacca's article analyzed Adam Thom's role in writing the law of Assiniboia, and how this was used as a "tool of colonialism".[32] The last portion of their paper covered the period coinciding with the General Quarterly Court's surviving records (1844-1872). A comprehensive analysis of the General Quarterly Court was "not possible in this paper", explained Smandych and Sacca: "alternatively, we focus on describing the cases that came before the court that involved aboriginal people".[33] With their limits defined, Smandych and Sacca outlined a quantitative profile of the cases before the court involving Aboriginals, but deliberately left the interpretation of the cases in the General Quarterly Court to future debate.[34] This portion sought mainly to prove that Aboriginal peoples were being brought into the Western legal system imposed by the Company.

What remains is the need to produce a solid account of 'law' in Assiniboia that begins with the General Quarterly Court Records.[35] Smandych and Sacca

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[31] Russell Smandych and Karina Sacca, "From Private Justice to State Law: The Hudson's Bay Company and the origin of Criminal Law Courts in the Canadian West to 1870" (Manitoba Law Annual, 1996: in press).

[32] Smandych and Sacca, "From Private Justice to State Law", 43.

[33] *Ibid.*.

[34] *Ibid.*, 48-49.

[35] General Quarterly Court of the District of Assiniboia; MG2 B41-3, Provincial Archives of Manitoba, Winnipeg, Manitoba [PAM].

have analyzed the source quantitatively, but what is required to uncover 'law' in Red River is a probing textual reading. Admittedly, the court clerk took down the information in a minute book as best he could, but did not transcribe the cases in their entirety. As a result, many of the litigants' legal arguments went unrecorded, as did the recorder's instructions to the jury.[36] Still, the court's minute book lays down fairly comprehensively all the evidence before the court and gives the jury's verdict. Within lies the implicit understanding of what constituted a legal, public 'duty' at Red River. In cases over debt and contract, one can find what type of contractual relationships existed at Red River (sometimes oral, sometimes written) and what the court felt was a sufficient contractual obligation at common law. Concerning crime, the preponderance of prosecutions involving the illegal sale of liquor to Natives (an infraction of the local code) speaks volumes about what the court, and thus the council, believed was the primary threat to the public interest.

Interpreting the General Quarterly Court Records should be done in the context of the legal sources available to the colonists in their isolated community. The Company and the settlers consistently cited Burn's manual for the justice of the peace, Blackstone's *Commentaries* and Tomlin's *Law Dictionary* as their guidebooks; undoubtedly they served as the primary source of legal knowledge for the colony. The settlers, mostly Scots and Métis, brought with them notions of law different from English jurisprudence. This knowledge must accompany a reading of the sources — as well as a basic understanding of Scots law and French law. At least, the legal historian should be sensitive to the differing legal traditions among the various inhabitants of Red River.

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[36] For instance, Hargrave reported that Recorder Black's charge to the jury in the Corbett trial took no less than four hours: the General Quarterly Court records stated that he merely "summed up the evidence".

The minutes of the council of Assiniboia[37] and Adam Thom's various writings on law and judicature in Rupert's Land[38] supplement the court records. The local code of 1841, located in the minutes of the council of Assiniboia, provides insight into what manner of laws the council felt a need to specify and make public. What they left out is perhaps more instructive and rarely commented on. Hidden in these files are also copies of the commissions issued to the governor of Assiniboia, councillors of Assiniboia, and justices of the peace.[39] Besides offering a full account of the powers and expectations of the several offices, those commissions give solid indications of what type of models the Company used to build its government in Red River. Bindon and Gibson both wrote institutional histories, and both relied on other types of supporting evidence to back their claims. Gibson relied almost solely on Oliver's reproduction of the minutes of council.[40] Bindon supported her analysis with selections from correspondence — another invaluable source of evidence. Letters contained in the Hudson's Bay Company Archives and the Provincial Archives of Manitoba — Simpson's correspondence[41], the reports to and instructions from the London Committee[42], and the personal letters of the Ross family[43] — all shed light on both the Company's intents and the feelings circulating in Red River about the Company's governance. The *Nor'-Wester*, Red River's first newspaper, offered extensive comment on the cases brought before the General Quarterly Court from

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[37] E. 16/2 and E. 16/3 [HBCA]. E. 16/3 is an incomplete set, and the minutes from 1849 to 1870 are scattered among the reports to the London Committee.

[38] E. 16/1 [HBCA].

[39] Council of Assiniboia. Miscellaneous Papers; E. 16/4 [HBCA].

[40] E. H. Oliver, *The Canadian North-West: Its Early Development and Legislative Records*, 2 vols. (Ottawa: Government Printing Bureau, 1914). The Minutes of Council are in Volume I.

[41] Simpson correspondence outward: D.4; Simpson correspondence inward: D.5 [HBCA].

[42] A. Series MSS [HBCA]. Much of the official reports for this time are contained within the Simpson correspondence, in D. 4 and D. 5 [HBCA].

[43] Ross Papers [PAM].

1858 to 1870, and also contained small reports on the cases held at the petty courts. Since the petty court records did not survive, or at least are not located in the Provincial Archives of Manitoba, the *Nor'-Wester* is an indispensable, if problematic, source. The *Nor'-Wester* was an openly partisan paper whose editors had political ends, and it should be read with care.

The legal historian ignores these supplementary sources at his or her peril. But the bulk of the work already done that utilizes these sources has focused primarily on the Company's designs (Bindon, Smandych and Sacca, and Gibson) or the larger story of the 'drift' of Rupert's Land into Confederation (Begg and Morton). The litigants in the General Quarterly Court regarded these as peripheral issues — they were in court to enforce contracts, collect debts, and prove that the horse in the defendant's immediate possession belonged to the plaintiff. With the exception of people like Dr. John Schultz who continually railed about the total absence of justice in the court, litigants continued to use the court as a public forum throughout the 1860s.[44] To conclude, based on Schultz and his accounts of the trials in the *Nor'-Wester*, that the Company manipulated the court to further its own ends eschews solid historical inquiry. Who litigated in the court? French names appeared as plaintiffs and defendants, and a careful study of who actually appeared as litigators in the court has yet to be attempted. Were the decisions of the jury accepted? With the exception of the so-called major events of the 1860s (Corbett, Stewart, and Schultz) many people entered the court and had judgment passed on them by a judge and jury. Investigators have yet to examine whether unsuccessful defendants complied with the court's judgment regarding small actions for debt and possession of chattels. If explored, it would address the still

[44] Stubbs, *Four Recorders of Rupert's Land*, 166.

unanswered question of whether the court was successful in the eyes of Red River's community.

These questions deserve answers, and an understanding in their own right. Until we know for sure whether the Métis community participated actively in the court and accepted its authority we cannot make broad assertions about the Métis' emerging cultural identity, as opposed to the Company's rule.[45] Until we know what was the customary form of contractual relationships, or what the community believed were legal obligations, we cannot begin to place Red River in a comparative framework with other colonial societies. Much of this research will be 'in the box'; that is, the historian will necessarily have to examine the records case by case to discover what legal rules and jurisprudence lay behind the jury's verdicts and the court's judgments. The records do not contain written judgments that indicate rules of law, but the records do reveal what evidence was required for litigants to win actions. The historian's task is to pick through the records and discover what assumptions the litigants brought into the court, to discover what the bench and the jury believed was the law. This does not in any way devalue a comparative methodology or a social history. It only suggests that, before such histories are attempted, the legal historian tackle the immediate question: what law governed Assiniboia (and for that matter, Rupert's Land)?

I do not feel particularly qualified to make broad methodological prescriptions for the future study of Red River's legal history.[46] The current historiographical debate over Assiniboia's legal history is somewhat sterile, primarily due to the small number of active scholars dealing specifically with the

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[45] Kathryn Bindon, for instance, suggested that Adam Thom provided the first symbol of oppression that the Métis defined themselves against. I think she is right, but it speaks nothing for the Métis and their involvement in the court after Thom. Bindon, "Hudson's Bay Company Law", 77.

[46] For an excellent introductory essay on methodologies for Canadian legal history, see David H. Flaherty, "Writing Canadian Legal History: An Introduction", in David Flaherty, ed., *Essays in the History of Canadian Law,vol. I.*

subject of law. However, in the past thirty years active scholarship has laid much of the groundwork for a more complete legal history of Red River. Once the fundamental questions have been answered, scholars will be able to introduce a responsible comparative methodology with Canadian, American, and other colonial legal histories. There is much work to be done.

Bibliography

Works Cited:

Archival Sources

Hudson's Bay Company Archives [HBCA], Winnipeg, Manitoba.

Section A. London Office Records

London Correspondence Outward — H. B. C. Official
A. 6/9, 1755-60.
A. 6/25, 1838-1842.

Section B. Post Journals and Records

B. 3/a/4, Albany Post Journal, 1712-1713.
B. 3/a/47, Albany Post Journal, 1754-1755.
B. 3/z/2, Albany Post Miscellaneous Items, 1694-1870 .
B. 135/a/27, Moose Post Journal, 1754-1755.
B. 239/a/2, York Post Journal, 1715-1716.

Section D. Sir George Simpson Correspondence.

Correspondence Book Outward (General),
D. 4/23, 1837-38.
D. 4/42, 1850-51.
D. 4/74, 1853-54.

Official Reports to the Governor and Committee in London.
D. 4/101, 1834.

Correspondence Inward (General).
D. 5/4, 1831-37.
D. 5/5, 1838-40.
D. 5/7, 1842.
D. 5/31, 1851.

Section E. Governor and Council of Assiniboia

E. 16/1, Adam Thom, *Proposed Penal Code; Proposed Civil Code; Observations on the Law and Judicature of Rupert's Land*, 1840.

E. 16/2, Minutes of the Council of Assiniboia, 1832-1849.
E. 16/3, Minutes of the Council of Assiniboia, 1849-1862.
E. 16/4, Council of Assiniboia — Miscellaneous Papers.

Provincial Archives of Manitoba [PAM], Winnipeg, Manitoba.

General Quarterly Court of Assiniboia
MG2 B41, Court Minutes, 21 November 1844 - 20 May 1872.
MG2 B47, Commission for Justice of the Peace.

Printed Primary Sources

Bacon, Matthew. *A New Abridgment of the Law*. 7th ed. 8 vols. London: A. Strahan, 1832.

Blackstone, William. *Commentaries on the Laws of England*. 4 vols. Chicago and London: University of Chicago Press, 1979. First published in 1765.

Carr, Cecil T. *Select Charters of Trading Companies*. London: Selden Society, vol. 28, 1913.

Charters, Statutes, Orders in Council, Relating to the Hudson's Bay Company. London: Hudson's Bay Company, 1931.

Davies, K. G., ed. *Letters from Hudson Bay*. Volume XXV. London: The Hudson's Bay Record Society. 1965.

English Reports.

Ford, P. & G. Ford, eds. *Irish university Press Series of British Parliamentary Papers; Colonies, Canada*, vol. V. Shannon, Ireland: Irish University Press, 1971.

Hargrave, Joseph James. *Red River*. Narol, Manitoba: 1977. First printed 1871.

Herbert, William. *The History of the Twelve Great Livery Companies of London*. 2 vols. New York: Augustus M. Kelley, 1968.

Jacob, Giles. *A New Law Dictionary*. 7th ed. London: Henry Lintot, 1756.

Oliver, E. H., ed. *The Canadian North-West: Its Early Development and Legislative Records*. 2 vols. Ottawa: Government Printing Bureau, 1914.

MacBeath, R. G. *The Selkirk Settlers in Real Life*. Toronto: William Briggs, 1897.

Neville, Henry. *Plato Redivivus: or, a Dialogue Concerning Government*. London: printed for S.I., 1681.

Proceedings and Debates of the House of Commons, in 1621, Collected by a Member of that House. Oxford: Clarendon Press, 1766.

Reports of the House of Commons, volume II: report from the committee appointed to enquire into the state and conditions of the countries adjoining to Hudson's Bay. London: House of Commons, 1749.

Rich, E. E. *Eden Colvile's Letters 1849-1852*. Volume XIX. London: The Hudson's Bay Company Record Society, 1956.

Rich, E. E. *Letters Outward 1679-1694*. Champlain Society, Hudson's Bay Record Society Series, Volume XI. Toronto: Champlain Society, 1948.

Robson, Joseph. *An Account of Six Years' Residence in Hudson's Bay*. London: J. Payne, 1752.

Ross, Alexander. *Red River Settlement*. Minneapolis: Ross and Haines, Inc., 1957. First published 1856.

Smith, Adam. *An Inquiry into the Nature and Causes of the Wealth of Nations*. Edited by James E. T. Rogers. 2 vols. Oxford: Clarendon Press, 1880.

Smyth, Sir Thomas. *De Republica Anglorum*. Edited by Mary Dewar. New York: Harper & Row Publishers, 1974.

Statutes of the Realm. 11 vols. London: Reprinted by Dawsons of Pall Mall, 1963.

Stubbs, William. *Select Charters and Other Illustrations of English Constitutional History*. Oxford: Clarendon Press, 1884.

Substance of the Speech of Sir James Montgomery, Bart. in the House of Commons, on the 24th of June, 1819, on Bringing Forward his Motion Relative to The Petition of Mr. John Pritchard, of The Red River Settlement. London: Printed by J. Brettell, Rupert Street, Haymarket, 1819.

Thom, Adam. *A Charge Delivered to the Grand Jury of Assiniboia, 20th February, 1845*. London: E. Couchman, 1848.

Thorpe, F. N., ed. *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or heretofore forming the United States of America*. 7 vols. Washington D.C.: Government Printing Office, 1909.

Secondary Materials

Ashton, Robert. *The City and the Court 1603-1643*. Cambridge: Cambridge University Press, 1979.

Beattie, John. *Crime in the Courts of England, 1660-1800*. Princeton: Princeton University Press, 1986.

Begg, Alexander. *History of the North-West*. 3 vols. Toronto: Hunter Rose & Co., 1894.

Bindon, Kathryn, "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54", in David Flaherty, ed. *Essays in the History of Canadian Law*, vol. I.

Brenner, Robert. *Merchants and Revolution: Commercial Change, Political Conflict, and London's Overseas Traders, 1550-1663*. Princeton: Princeton University Press, 1993.

Brown, Jennifer. *Strangers in Blood: Fur Trade Families in Indian Country*. Vancouver: University of British Columbia Press, 1980.

_____, "The Track to Heaven: The Hudson's Bay Cree Religious Movement of 1842-43", in W. Cowan, ed. *Papers of the Thirteenth Algonquian Conference*. Ottawa: Carleton University, 1982.

Bryce, George. *A History of Manitoba: Its Resources and People*. Toronto and Montreal: The Canada History Company, 1906.

Bumsted, Jack, ed. *Candian History Before Confederation*. Georgetown, Ontario: Irwin-Dorsey Ltd., 1972.

Cockburn, J. S. *A History of English Assizes 1558-1714*. Cambridge: Cambridge University Press, 1972.

Daniels, Bruce C. *Town & County: Essays on the Structure of Local Government in the American Colonies*. Middletown, Connecticut: Wesleyan University Press, 1978.

Elton, G. R. *The Tudor Constitution*. Cambridge: Cambridge University Press, 1960.

_____. *The Tudor Revolution in Government*. Cambridge: Cambridge University Press, 1953.

_____, "The Rule of Law in Sixteenth-Century England", in Arthur J. Slavin, ed., *Tudor Men and Institutions: Studies in English Law and Government* (Baton Rouge Louisiana State Press, 1972.

Flaherty, David H. *Essays in the History of Canadian Law*. Vol. I. Toronto: The Osgoode Society, 1981.

Foster, Hamar, "Long Distance Justice", *American Journal of Legal History*, XXXIV (1990).

_____, "British Columbia: Legal Institutions in the Far West, from Contact to 1871", *Manitoba Law Journal*, XXIII (1996).

Gibson, Dale, "Company Justice: Origins of Legal Institutions in Pre-Confederation Manitoba", *Manitoba Law Journal*, XXIII (1996).

Gilbert, Arthur, "Military and Civilian Justice in eighteenth century England: An Assessment", *Journal of British Studies*, XVII (Spring 1978).

Gressley, Gene M., "Lord Selkirk and the Canadian Courts", in J. M. Bumsted, ed., *Canadian History before Confederation*. Georgetown, Ontario: Irwin-Dorsey Ltd., 1972.

Guth, DeLloyd J., "The Traditional Common-Law Constable: from Bracton to the Fieldings to Canada", in R. Macleod and D. Schneiderman, eds., *Police Powers in Canada*. Toronto: University of Toronto Press, 1994.

Guth, DeLloyd J., and W. Wesley Pue, eds. *Canada's Legal Inheritances*. Winnipeg: Canadian Legal History Project, 1996.

Hirst, Derek. *The Representative of the People?* Cambridge: Cambridge University Press, 1975.

Hurstfield, J., "Was there a Tudor Despotism after all?", *Transactions of the Royal Historical Society* (1967).

Keen, M. H. *The Laws of War in the Late Medieval Ages*. London: Routledge & Kegan Paul, 1965.

Kenyon, John. *Revolution Principles*. Cambridge: Cambridge University Press, 1977.

Knafla, Louis, "From Oral to Written Memory: The Common Law Tradition in Western Canada", in Louis Knafla, ed. *Law & Justice in a New Land*. Toronto: Carswell Co. Ltd., 1986.

_____. *Kent at Law 1602: Assizes and Sessions of the Peace*. London: HMSO, published in association with the Public Record Office, 1994.

McLaren, John, Hamar Foster and Chet Orloff, eds. *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West*. Regina: Canadian Plains Research Center, 1992.

Marshall, P. J., "Empire and Opportunity in Britain, 1763-1783", *Transactions of the Royal Historical Society* (1995).

Morris, Alexander. *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*. Saskatoon: Fifth House Publishers, 1991. Facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke.

Morton, A. S. *A History of the Canadian West to 1870*. London: Thomas Nelson & Sons Ltd., 1939.

Nenner, Howard. *By Colour of Law*. Chicago: University Press, 1977.

Price, W. H. *The English Patents of Monopoly*. Boston and New York: Houghton, Mifflin and Company, 1906.

Ray, Arthur J. *Indians in the Fur Trade: their role as trappers, hunters, and middlemen in the lands southwest of Hudson Bay 1660-1870.* Toronto: University of Toronto Press, 1974.

Rich, E.E. *The Hudson's Bay Company.* 2 vols. Toronto: McClelland and Stewart Ltd., 1960.

Scott, W. R. *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720.* 3 vols. Cambridge: Cambridge University Press, 1912.

Smandych, Russell and Karina Sacca, "From Private Justice to State law: The Hudson's Bay Company and the origin of Criminal Law Courts in the Canadian West to 1870", *Manitoba Law Annual* (1996). In print.

Smandych, Russell and Rick Linden, "Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800", *Canadian Journal of Law and Society*, XI (Spring 1996).

Simpson, A. W. B. *A History of the Common Law of Contract: The Rise of the Action of Assumpsit.* Oxford: Clarendon Press, 1987.

Steinfeld, Robert J. *The Invention of Free Labor.* Chapel Hill & London: University of North Carolina Press, 1991.

Stubbs, Roy St. George. *Four Recorders of Rupert's Land.* Winnipeg: Peguis Publishers, 1967.

Tait, James. *The Medieval English Borough.* Manchester: Manchester University Press, 1936.

Tout, T.F.*Chapters in the Administrative History of England.* 6 vols. Manchester: Manchester University Press, 1920. New York and London: Longmans, 1920.

Van Kirk, Sylvia. *"Many Tender Ties": Women in Fur Trade Society, 1670-1870.* Winnipeg: Watson & Dwyer, 1980.

Sidney and Beatrice Webb, *English Local Government.* 6 vols. Longmans: New York, 1908.

Weinbaum, Martin. *The Incorporation of Boroughs*. Manchester: Manchester University Press, 1937.

Works Consulted:

Archival Sources

Section A. London Office.

London Agenda Book — Meeting of Governor and Committee.
A. 4/17, 1837-39.
A. 4/18, 1839-41.
A. 4/19, 1841-42.

London Correspondence Outward — H. B. C. Official
A. 6/23, 1833-36.
A. 6/24, 1836-38.

London Locked Private Letter Book
A. 7/1, 1823-1846.

Legal Opinions solicited by the Hudson's Bay Company
A. 39/1, 1777-1807
A. 39/7, 1834-1870.

Section B. Post Journals

B. 3/a/13, Albany Post Journal, 1724-25
B. 3/a/14, Albany Post Journal, 1725-26.
B. 3/a/15, Albany Post Journal, 1726-27
B. 3/a/16, Albany Post Journal, 1727-28
B. 3/a/17, Albany Post Journal, 1728-29
B. 239/a/3, York Post Journal, 1716-17.
B. 239/a/4, York Post Journal, 1717-18.
B. 239/a/5, York Post Journal, 1718-19.
B. 239/a/6, York Post Journal, 1719-20.
B. 239/a/7, York Post Journal, 1720-21.

Section D. Sir George Simpson Correspondence.

Correspondence Book Outward (General),
D. 4/24, 1838.
D. 4/25, 1838-41.
D. 4/26, 1841.
D. 4/27, 1842-43.
D. 4/29, 1843.
D. 4/40, 1849-50.
D. 4/41, 1850.
D. 4/43, 1851.
D. 4/44, 1851-52.
D. 4/74, 1853-54.
D. 4/75, 1854-56.

Official Reports to the Governor and Committee in London.
D. 4/102, 1835.
D. 4/103, 1836.
D. 4/104, 1836.
D. 4/105, 1837.
D. 4/106, 1839.
D. 4/107, 1839.

Correspondence Inward (General).
D. 5/6, 1841.
D. 5/8, 1843.
D. 5/9, 1843.
D. 5/26, 1849.
D. 5/27, 1850.
D. 5/28, 1850.
D. 5/29, 1850.
D. 5/30, 1851.
D. 5/32, 1851.
D. 5/34, 1852.
D. 5/40, 1855.
D. 5/41, 1856.
D. 5/42, 1856.
D. 5/43, 1857.
D. 5/44, 1857.
D. 5/45, 1857.
D. 5/46, 1858.
D. 5/47, 1858.

Printed Primary Sources

Bumsted, J. M., ed. *The Collected Writings of Lord Selkirk: 1799-1820.* 2 vols. Winnipeg: Manitoba Records Society, 1984.

Halkett, J. *Statement Respecting The Earl of Selkirk's Settlement Upon the Red River, in North America; Its Destruction in 1815 and 1816; and the Massacre of Governor Semple and his Party. With observations upon a recent publication, Entitled "A Narrative of Occurrences in the Indian Countries," &c.* London: John Murray, 1817.

Secondary Materials

Brown, Jennifer and Jacqueline Peterson, eds. *The New Peoples: Being and Becoming Métis in North America.* Winnipeg: University of Manitoba Press.

Burley, E. I. "Work, Discipline, and Conflict in the Hudson's Bay Company, 1770-1870", Ph.D. dissertation, University of Manitoba, 1993.

Cockburn, J. S. and Thomas A. Green, eds., *Twelve Good Men and True: The CriminalTrial Jury in England, 1200-1800.* Princeton: Princeton University Press, 1988.

Cooper, Barry. *Alexander Kennedy Isbister: A Respectable Critic of the Honourable Company.* Ottawa: Carleton University Press, 1988.

Galbraith, John S. *The Little Emperor: Governor Simpson of the Hudson's Bay Company.* Toronto: Macmillan of Canada, 1976.

Gibson, Dale, "Scandal at Red River: The Judge and the Serving Girl", *The Beaver* (1990).

Green, L. C. and Olive P. Dickason. *The Law of Nations and the New World.* Edmonton: University of Alberta Press, 1989.

Knalfla, Louis A., ed. *Crime and Criminal Justice in Europe and Canada.* Waterloo, Ontario: Wilfrid Laurier University Press, 1981. Published for the Calgary Institute for the Humanities.

Laslett, Peter. *The World We Have Lost.* London: Cox & Wyman, Ltd., 1965.

Linder, Marc. *The Employment Relationship in Anglo-American Law: A Historical Perspective*. New York: Greenwood Press, 1989.

Maitland, F. W., "The Corporation Sole", *The Law Quarterly Review*, XVI (1900).

Maitland, F. W., "The Crown as Corporation", *The Law Quarterly Review*, XVII (1901).

Morton, A. S. *Sir George Simpson: Overseas Governor of the Hudson's Bay Company*. Published by Binfords-Mort for The Oregon Historical Society, 1944.

Robert, Rudolph. *Chartered Companies*. London: G. Bell and Sons, Ltd., 1969.

Thomas, Lewis G., ed. *The Prairie West to 1905: A Canadian Sourcebook*. Toronto: Oxford University Press, 1975.

Watson, Alan. *Legal Transplants: An Approach to Comparative Law*. Edinburgh: Scottish Academic Press, 1974.

Willie, Richard A. *"These Legal Gentlemen": Lawyers in Manitoba: 1839-1900*. Winnipeg: Legal Research Institute of the University of Manitoba, 1994.