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Book Review

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**Book Review: Flesh and Pulse - Sir John Beverley Robinson: Bone and Sinew of the Compact, by Patrick Brode**

# FLESH AND PULSE

*Sir John Beverley Robinson: Bone and Sinew of the Compact.* By Patrick Brode. Toronto: Published for the Osgoode Society by the University of Toronto Press, 1984.

Reviewed by DeLloyd J. Guth\* and F. Murray Greenwood\*\*

The life of the law, before logic or experience, has to be in the lives of its actors. And because Canadian law is common law, a court-centred, judge-made law, the focus must be on our judges and lawyers. We have become adept students of the cases but we are only beginning to study the actors, by way of biography and autobiography. Congratulations, then, to Patrick Brode for restoring flesh and pulse to one of this country's skeletal giants in the law.

The autobiographer will have the insider's memory, usually both selective and self-exculpatory, to set alongside harder evidence, be it desk diaries or piles of files. The biographer, however, starts only with an outsider's curiosity, matched by a feeling and hope that the subject-person *ought* to be important. Either way, after months of research and re-writing, it becomes difficult not to think that the person deserves a book-length study.

For Sir John Beverley Robinson there can be no doubt: son of a Virginia loyalist who fled to Canada, he defended his monarch at Queenston Heights, then prosecuted "traitors" in Upper Canada in 1814, continued to impose as austere jurisprudence as attorney-general in the 1820s, and served thirty-three years as Chief Justice, strictly construing his monarch's common law until retirement in 1862 and death in 1863. The very land on which Osgoode Hall still stands was his. He sold six acres out of his private park in 1828 to the Law Society for £1000, and Patrick Brode computes that as overvalued by five times the going price for similar real estate in Toronto.<sup>1</sup> Some might conclude that the Law Society of Upper Canada's very beginnings were on an inflated base!

After graduating in 1807 from Dr. John Strachan's prestigious Cornwall Grammar School for the Anglican élite, Robinson articulated in

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<sup>1</sup> Patrick Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto: University of Toronto Press, 1984) p. 167.

the York law office of Solicitor-General D'Arcy Boulton. For the next few years he poured over Blackstone's *Commentaries*, learned the arcane twists of procedure and cultivated the leading families of the law. Through the patronage of Chief Justice Thomas Scott and of Justice William Dummer Powell, Robinson secured appointment as acting Attorney-General in 1812 at the ripe old age of twenty-one. After the war and short stint, while absentee Solicitor-General, at Lincoln's Inn, London, Robinson was appointed Attorney-General (1818). He sat in the Assembly from 1821 to 1830, when he was named Chief Justice, Speaker of the Legislative Council and President of the Executive Council. In accordance with the Imperial Government's attempts at constitutional conciliation, Robinson resigned from the Executive Council in 1831 but remained a political confidant of Governors until well into the 1840s. He was not appointed to the Legislative Council after the union — which he publicly deplored — but remained Chief Justice until 1862 when, shortly before his death, he was appointed first President of the Court of Error and Appeal. Robinson was created a Baronet of the United Kingdom in 1854 and acted as the first Chancellor of the University of Trinity College, Toronto. In 1817 he had married Emma Walker of Middlesex and they had eight children, including the outstanding barrister, Christopher Robinson.

This biography divides into sixteen chapters, offering a largely novel perspective on the political history of Upper Canada. The outstanding issues — Gourlay's banishment, the alien question, responsible government, the 'established' Church of England, and the union of Canada are of course presented from Robinson's viewpoint and this is a definite plus. The reader obtains a coherent ideological picture of the Family Compact and, more important, the experience of examining these central issues in their legal dress, an approach too often neglected by political historians. Sprinkled throughout the book are revealing details on the legal profession and on such matters of concern to the Compact as social relationships, patronage and intermarriage.

As Brode emphasizes, Robinson was no neophyte to using the common law for political ends but he was also a stickler for both the reality and appearance of legality. As acting Attorney-General during the War of 1812, he had stood tall for the rule of law, despite pressure from the military who wished, without legislative authority, to indulge in mass round-ups of suspected traitors, summary executions by courts martial, and seizures of grain in areas where the courts were sitting. Brode's Robinson meticulously insured that proper procedures were followed in the 1814 treason trials held at the so-called "Bloody Assize" of Ancaster. But the author goes too far in leaving the impression that

there were no abuses at all. Two American soldiers — the Hartwell brothers — were deemed traitors because they had families in Upper Canada. This broad interpretation of local allegiance owed by foreigners — an exception to the general rule of allegiance — derived its authority from an extra-judicial opinion of the Judges of England (1707). Such an opinion was not binding, as Lord Camden, C.J., made unmistakably clear in *Entick v. Carrington*. But such reasoning can continue to be open to numerous objections.<sup>2</sup> Brode also does not mention another prisoner, Aaron Stevens, executed on the sole basis of an out-of-court confession. The sufficiency of such a confession had become a moot point in the writings of the treason jurists, and it was still considered so by Justice James Macauley in the Upper Canada state trials of 1838.

Brode offers a careful assessment of the Rebellion trials in which Robinson was involved, but he might at times have deepened the analysis. The author presents a balanced treatment — including a mild criticism of the Chief Justice — for the trial of Hamilton's radical lawyer, Charles Durand. While travelling from Toronto to Hamilton by stagecoach, Durand had been arrested by armed rebels and had supposedly advised Mackenzie to attack the defenseless city of Toronto immediately. Brode's tentative thesis, that the accused may have been innocent, can be further supported by contemporary documents, including a letter by Durand in the Mackenzie-Lindsey Papers (Archives of Ontario), which indicate that the major Crown witness (Shafter) lied on a central point and that Durand had told Mackenzie he wanted nothing to do with the latter's attempted coup. The author also exhibits good judgment in exonerating Robinson from a charge of distorting the evidence in the trial of John Montgomery's Tavern. He also gives the Chief Justice full marks for disqualifying himself at the trial of Dr. Thomas Morrison — a key Mackenzie supporter in Toronto, deeply implicated in the Rebellion — because of mutual antipathy in past politics. In pointing to Robinson's courageous, well-reasoned stand — maintained in the face of opposition from the British Law Officers — Brode correctly concludes that, without special statutory provision, American 'brigands' invading the province owed no allegiance and could not be tried for high treason.

To these latter points, supportive of Robinson's essential integrity, the author might have added others. In the Durand trial, for example, Robinson rejected the Crown's legal argument, that written advocacy of rebellion with simple intent to publish, but no actual publication, constituted treason. And Robinson's opposition to enforcing fully the

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<sup>2</sup> 10 Cambridge L.J., 1948, 61-63.

antiquated doctrine of perpetual allegiance probably saved the life of the Irish-American 'General,' E.A. Theller. On the other hand, Robinson's summing-up could often be blatantly one-sided and his *Lawless Aggressions Act* of 1838 permitted the trial of civilian Upper Canadians by courts martial. In his charge to the Grand Jury (March 1838), moreover, Robinson defined "compassing" or plotting the Queen's death under Edward III's Statute of Treasons (1352) as including a mere *conspiracy* to rebel (which was *not* levying war), despite the fact that the object of the alleged conspiracy, Queen Victoria, had her residence more than 4,800 km. from Toronto. In short, Robinson's record in the treatment of security cases — both as acting Attorney-General and as Judge — was a mixed one; but he was far more sensitive to the rule of law than most of the judges and colonial law officers of the time. Robinson's integrity in security cases — indeed in political cases generally — provided a revealing contrast to the ultra-royalist approach on his fellow Loyalist and near-contemporary, Jonathen Sewell, who acted successively as Attorney-General for Lower Canada (1795-1808) and Chief Justice of that province (1808-1838).

One of the most perceptive portions of the book reviews Robinson's common law decisions as "Lord Chief Justice." We see him, time after time, ignoring local custom or conditions and rejecting American modernisms in order to apply British precedent. Thus, the myriad technicalities of pleading, as practised in the courts at Westminster, were continually infused into the law of the colony, at the same time that they were evaporating in the State of New York. The facilitating of *laissez-faire* capitalism by the courts of the United States found little echo in Robinson's judgments: parol evidence was to be largely excluded in cases dealing with commercial paper; seals were to be affixed to corporate contracts on pain of nullity (until 1859, when recent British precedent allowed a change); state licensed monopolies — ferries for example — were to be protected against competition; and the usury laws had to be enforced. In Robinson's priorities, the invisible hand of Adam Smith took second place to the public interest, as represented by the common law, the Crown and Parliament.

Where there was no governing precedent, Robinson occasionally ignored the thrust of British doctrine to tailor the law to the local, largely frontier, situation. Thus in *Dean v. McCarty* (1864), the Chief Justice recognized the vital economic importance of rapid settlement in rejecting strict liability where necessary land clearing operations, such as burning slash, damaged a neighbour's property. After *Rylands v. Fletcher* (1868), however, Robinson's judgment was reversed by the Ontario Court of Appeal (1882). As Brode shows, *Dean v. McCarty* was something of

an aberration. Long after the American courts had abandoned it, Robinson, for example, clung to the doctrine of waste, which inhibited the improvement of landed property, including forested acres by tenants.

The author agrees with Professor Risk's characterization of Robinson the judge as an uncreative positivist and one who exhibited striking deference to authority.<sup>3</sup> Brode adds an important nuance: the lack of creativity grew naturally out of, and was explicitly grounded in, deference to the common law, Crown and Parliament. The insights and concrete examples furnished by the chapter on Robinson's judgments will be valuable not only to legal historians, but to students and teachers interested in the frontier thesis, the Loyalist tradition, the evolution of the mixed economy, and the general ideological question of deference to authority in Canadian history.

Only a few matters of fact require more care than Brode provides. He could emphasize more strongly that Robinson and the "Tories" could indulge significant law reform because their 'home' model and their legalism offered a base for an idealism that most constitutional liberals lacked, and often scorned. Slavery offered a case in point: In both Canada's, it had been mainly local 'Tories,' like Colonel Simcoe, who led the fight to abolish it in the 1790s. Ironically, Robinson's father had opposed this, supporting loyalists who brought their slaves north. And at the end of his career, Robinson's strict legalism drove him into a widely unpopular decision to return John Anderson, a fugitive Missouri slave living in Brantford, to his 'owner.'<sup>4</sup> Again Brode's narrative on the 1833 *Capital Punishment Act* should have taken stronger notice of contemporary law reform in England, where the 1820s had already witnessed the dismantling of much that was medieval of the common law. That context helps explain the Canadian reduction for capital offences from about 125 to about fifteen, but that *Act* hardly "defined the penal laws"<sup>5</sup> which remained something of a jumble. Similarly, it is rather misleading to state without explanation that after the Rebellion "eight-three Upper Canadians"<sup>6</sup> received transportation for life to Van Dieman's Land. In truth, seventy-eight were Americans, which fact no doubt defused the whole episode's volatility in Upper Canada's politics, identifying the devil as coming from the outside!

With this biography, the Osgoode Society continues to give the lead in Canadian legal history. And each member of the Law Society of Upper

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<sup>3</sup> 27 U.T.L.J., 1977, 431.

<sup>4</sup> Brode, *supra*, note 1 at 264.

<sup>5</sup> Brode, *supra*, note 1 at 184.

<sup>6</sup> Brode, *supra*, note 1 at 202.

Canada ought to be proud of this fact and of the consistently high quality in scholarship produced by their patronage. They also should know that what we continue to know, about our legal and illegal past, depends entirely on the evidence we secure for survival. That is why the Bencher's archives at Osgoode Hall needs vigorous, vigilant support. Patrick Brode could not have written this book without the Robinson papers at the Archives of Ontario, as well as related manuscript collections (and paintings) at Osgoode Hall, the Metropolitan Toronto Library, and the Public Archives of Canada. What the author adds to research skill is a careful, vivacious pen and an innate ability to tell a good story well. The book is a pleasure to read and a model for future legal biography.