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Abstract
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Cover Page Footnote
I am grateful to Harry Arthurs, David Bell and Donald Fyson, as well as to the Osgoode Society's 2016 Legal History Workshop chaired by Mary Stokes and to the editors of this Douglas Hay festschrift, for helpful commentary on an earlier version of this essay.

Special Issue
Law, Authority & History: A Tribute to Douglas Hay

Musings and Silences of Chief Justice William Osgoode: *Digest* Marginalia about the Reception of Imperial Law*

G. BLAINE BAKER†

This article focuses on musings and silences in the margins of Canadian Chief Justice William Osgoode's late-eighteenth-century law library, to understand the role he assigned to Westminster-based imperial law in the transmission of British justice to the colonies. It concludes that this role was limited, mostly by Osgoode's greater commitment of time and energy to legislative and executive branches of government than to the judiciary, and by his sometimes cavalier impatience with English courts and legal commentators.

Cet article se penche sur les méditations et les silences laissés par le juge en chef canadien William Osgoode dans les marges des ouvrages de sa bibliothèque juridique à la fin du XVIIIe siècle. L'objectif est de comprendre le rôle qu'il attribuait au droit impérial de Westminster dans la transmission de la justice britannique aux colonies. L'article conclut que M. Osgoode a joué à cet égard un rôle limité, notamment parce qu'il consacrait plus de temps et d'énergie aux pouvoirs législatif et exécutif qu'au système judiciaire et qu'il manifestait une impatience, parfois désinvolte, face aux commentateurs juridiques et aux tribunaux anglais.

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† Faculty of Law (Emeritus) McGill University; Faculty of Law (Visiting) University of Toronto. I am grateful to Harry Arthurs, David Bell and Donald Fyson, as well as to the Osgoode Society's 2016 Legal History Workshop chaired by Mary Stokes and to the editors of this Douglas Hay festschrift, for helpful commentary on an earlier version of this essay.

WILLIAM OSGOODE RETURNED FROM British North America to England in 1801, after two years as Chief Justice of Upper Canada (1792–94) and seven years as Chief Justice of Lower Canada (1794–1801).[1] He was also a member of the Executive Council (advisor to the Lieutenant-Governor) and Speaker of the Legislative Council (the upper house of the Assembly) in both provinces. In addition to leaving behind his surname for later use on the Law Society of Upper Canada's headquarters, an Ontario law school, a Toronto Transit Commission station, and a Carleton County township that is now part of Ottawa, Osgoode left some and perhaps most of his Canadian law library in Quebec City.[2] That collection consists of five folio-sized volumes of John Comyns' *Digest of the Laws of England* (about four thousand pages in all, although volume one of the six volume set is missing), each of which retains Osgoode's heraldic bookplate as well as his annotations.[3]

1. See generally Peter Burroughs, "William Osgoode" in *Oxford Dictionary of National Biography,* vol 4 by Leslie Stephen (Oxford: Oxford University Press, 2004) at 274 [ODNB]*;* SR Mealing, "William Osgoode" in *Dictionary of Canadian Biography*, vol 7 by FG Halpenny & Jean Hamelin (Toronto: University of Toronto Press, 1987) at 557 [*DCB*].
2. Osgoode was not involved in the creation or management of any of the landmarks that bear his name. See generally Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997* (Toronto: University of Toronto Press, 1997) at 13–64; Michael Horn, *York University: The Way Must be Tried* (Montreal: McGill-Queen's University Press, 2009) at 130–73; Osgoode Township Historical Society and Museum, *Glimpses of Osgoode Township: 150 Years of History, 1827–1977* (Vernon, Ont: Osgoode Township Historical Society and Museum, 1977); Toronto Transit Commission, *University Subway* (Toronto: TTC, 1963) at 17-18.
3. John Comyns, *A Digest of the Laws of England* (New York: Collins & Hannay, 1824) [Comyns]. Osgoode's highly-legible handwriting and distinctive literary style were verified by a comparison of the Comyns annotations with his correspondence in Library and Archives Canada and the Public Archives of Ontario. See William Osgoode, Ottawa, Library and Archives Canada [LAC] (MG 23 HI10); William Osgoode Fonds, Toronto, Public Archives of Ontario (F 552, Container B240697 706711). See also ARM Lower, ed, "Three Letters of William Osgoode, First Chief Justice of Upper Canada" (1965) 57 Ontario History 181; William Colgate, ed, "Letters from the Honourable Chief Justice William Osgoode: A Selection from his Canadian Correspondence, 1791-1801" (1954) 46 Ontario History 77 at 149. See generally Tom Davis, "The Practice of Handwriting Identification" (2007) 8:3

Relatively little is known about Osgoode's Canadian secondment. As a result, one goal of this article is to add to those limited recollections through scrutiny of his legal musings and silences in the margins of a mid-eighteenth-century English institutional work. It will be seen that Osgoode tended not to enthuse about judicial decision making or Westminster-based common law, which raises questions about his conception of the role of judges and court-made law in the early transplantation of English justice to the Canadas. When adjudicative law did attract his attention, Osgoode sometimes treated it cavalierly. He was, by contrast, very interested in executive and legislative law making, including its prudential and symbolic aspects. The image of Osgoode that emerges from this study will, I hope, complement the one presented in a collection of social correspondence received by Osgoode and co-edited for publication by Douglas Hay a quarter-century ago.[4] This article should also help to bring forward, albeit incrementally, Hay's pioneering work on military and criminal justice in post-Conquest Quebec.[5]

In addition to Osgoode's bookplate, his copy of Comyns' *Digest* bears ownership markings of the Literary and Historical Society of Quebec and those of McGill College. The Literary and Historical Society was founded in 1824, which means that there was at least a twenty-three-year hiatus between Osgoode's departure from Lower Canada and the Society's acquisition of his law books.[6] There are few ways to inquire into the collection's whereabouts during that gap in time, but it contains no marginalia other than Osgoode's annotations. It can also be said that his copy of Comyns' *Digest* could not have been housed on

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The Library: The Transactions of the Bibliographical Society 251.

4. See Douglas Hay & Ruth Paley, eds, *Friends of the Chief Justice: The Osgoode Correspondence in the Archives of the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, 1990). None of those letters were from Osgoode and none were written to him during his time in Canada, although the editors' introduction to that collection was useful to this study.
5. See Douglas Hay, "Civilians Tried in Military Courts: Quebec, 1759-1764" in Frank Murray Greenwood & Barry Wright, eds, *Canadian State Trials*, vol 1 (Toronto: University of Toronto Press, 1996) 114; Jean-Marie Fecteau & Douglas Hay, "Government by Will and Pleasure Instead of by Law: Military Justice and the Legal System in Quebec, 1775-1783" in *ibid*, at 129; Douglas Hay, "The Meanings of the Criminal Law in Quebec, 1764 to 1774" in Louis A Knafla, ed, *Crime and Justice in Europe and Canada* (Montreal: Wilfrid Laurier University Press, 1981) 77.
6. See generally Ginette Bernatchez, "La société littéraire et historique de Québec, 1824-1890" (1981) 35:2 Rev d'histoire l'Amérique Française 179; Claude Gallarneau & Maurice Lemire, eds, *Livre et lecture au Québec (1800-1850)* (Québec: Institute québécois de recherché sur la culture, 1988). See also Michael Eamon, "'An Extensive Collection of Useful and Entertaining Books': The Quebec Library and the Transatlantic Enlightenment in Canada" (2012) 23:1 J Can Historical Assoc 1.

its way to the Literary and Historical Society in other venerable libraries like those of the Quebec City or Montreal Bar, the Institut canadien, or the Law Society of Upper Canada, since those collections did not come into existence until the second-quarter of the nineteenth century.[7] And the few extant auction, war claims, and estate catalogues of that period (which, admittedly, do not always specify whose goods were inventoried), make no reference to Osgoode's books.[8] Similarly, library accession records do not show how or when the *Digest* was moved from the Literary and Historical Society to McGill. It can, however, be said that there are no additional Osgoode books in McGill's Law Library or at the Literary and Historical Society, and that there are only two other publications in McGill's 220,000 volume legal collection that show passage through the Society's library.[9]

Osgoode was a parsimonious but nonetheless pedantic book annotator. He was therefore unlike later, textually voluble Canadian legal scribblers such as Robert Mackay, Marie Lacoste Gerin-Lajoie, or Albert Mayrand.[10] Indeed, authors

7. See generally Gilles Gallichan, "La bibliothèque du Barreau du Québec: L'émergence d'une institution" (1993) 34:1 C de D 125; Marechal Nantel, "The Advocates' Library and the Montreal Bar" (1934) 27:3 Law Libr J 85; Yvan Lamonde, "Bibliothèque de L'Institut canadien de Montréal" (1988) 41:3 Rev d'histoire l'Amérique française 335; RA McCormick, "The Libraries of the Law Society" (1972) 6 L Soc'y Gaz 55.
8. See *e.g. Catalogue des livres de jurisprudence, qui sont vendus par encan chez Burns et Woolsey, à Québec, mardi le 22 décembre 1801* (Quebec: John Neilson, 1801) [*Catalogue des livres*]; War of 1812 Losses Claims, LAC (RG1, E3 56); *Catalogue of the Valuable and Extensive Library of the Late Honourable Chief Justice Sewell* (Quebec: GD Balzaretti, 1842)[*Catalogue of the Valuable and Extensive Library*]; Christine Villeux, "La bibliothèque du juge en chef James Stuart, 1853" in Yvan Lamonde & Gilles Gallichan, eds, *L'histoire de la culture et de l'imprime* (St. Foy, QC: Laval University Press, 1996) 186.
9. See G Blaine Baker et al, *Sources in the Law Library of McGill University for a Reconstruction of the Legal Culture of Quebec, 1760-1890* (Montreal: McGill University and Montreal History Group, 1987) 107, 64–269. A 2015 search of the Literary and Historical Society's current library in Quebec City's Morrin Centre was the basis for the text's conclusion about a dearth of Osgoode's books there. A similar 2001 search of the Montreal Bar Library also turned up no volumes relevant to this essay. It seemed unnecessary to examine the Quebec City Bar Library, since no Osgoode books have surfaced in content-and-provenance-sensitive studies of that collection by above sources. See Gallichan, *supra* note 7; Lamonde & Gallichan, *supra* note 8; Veilleux, *infra* note 24. Compare Linda K Tesar, "Forensic Bibliography: Reconstructing the Library of George Wythe" (2013) 105:1 Law Libr J 57; Alan Gribben, "Private Libraries of American Authors: Dispersal, Custody, and Description" (1986) 21:2 J Library History 300.
10. Compare Peter F McNally & Christina M Boyle, "Judge Robert Mackay's 1882 Catalogue of Books" (1998) 10 Fontanus 65; Nicholas Kasirer, "*Apostolat juridique*: Teaching Everyday Law in the Life of Marie Lacoste Gérin-Lajoie (1867-1945)" (1992) 30:2 Osgoode Hall LJ 427; Angela Fernandez, "Albert Mayrand's Private Library: An Investigation of the Person, the Law of Persons, and Legal Personality in a Collection of Law Books" (2003) 53:1 UTLJ 37.

and publishers rarely managed to slip a misplaced semi-colon or typographical error past Osgoode. He would sometimes read or flip through dozens of pages without marking any passages, and then correct a date, a litigant's initial, or a page number.[11] Osgoode highlighted,[12] modified lightly,[13] or downplayed his legal sources,[14] but he did not index or cross-reference them for later use or easy access.[15] On other occasions, perhaps much of the time, the modern reader's attention is attracted by the "dogs that don't bark" in the book's margins, as in Sherlock Holmes's crime-mystery.[16] Indeed, there is a sense in which this article is all about John Lange's seminal historical "silences" or Holmes' quiet dogs insofar as significant parts of it describe what Osgoode appears not to have done during his Canadian career.[17] In any case, the Chief Justice seemed mostly interested in the law of governmental structures, processes, and, in lesser measure, criminal justice and the law related to transfers of real or immoveable property.

Contrary to the views of traditional historians of the reception of metropolitan law in colonial settings, intact bodies of statutes and case law do not generally reserve trans-Atlantic seats for themselves when a local legislature purports to make reception a legal fact of life by writing on the pages of its statute books.[18]

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11. See *e.g.* Comyns, vol 3, *supra* note 3 at 43; Comyns, vol 4, *supra* note 3 at 183, 307, Comyns, vol 5, *supra* note 3 at 260; Comyns, supp vol, *supra* note 3 at 436.
12. See *e.g.* Comyns, vol 4, *supra* note 3 at 239, 243, 307, 308, 355; Comyns, vol 5, *supra* note 3 at 15, 18, 46, 55.
13. See *e.g.* Comyns, vol 3, *supra* note 3 at 512; Comyns, vol 4, *supra* note 3 at 17, 41, 285, 292, 310, 333; Comyns, supp vol, *supra* note 3 at 14, 362, 375.
14. See *e.g.* Comyns, sup vol, *supra* note 3 at 13, 207, 358.
15. There are also several insertions of scrap paper in the collection, sometimes with lengthy commentary. One of them is a half-page of quotations on "citizenship" from Cicero that were reproduced by Osgoode and annotated by him. See Marchamont Nedham, *The Excellencie of a Free State* (London: Millar & Cadell, 1656). See Comyns, vol 4, *supra* note 3 at 237. See also Comyns, vol 2, *supra* note 3 at 279; Comyns, vol 4, *supra* note 3 at 301.
16. See Arthur Conan Doyle, "Silver Blaze" in *The Memoirs of Sherlock Holmes* (London: J Murray, 1892) 1.
17. See generally John Lange, "The Argument from Silence" (1966) 5:3 History & Theory 288.
18. Compare Elizabeth Gaspar Brown, "British Statutes in the Emergent Nations of North America: 1606-1949" (1963) 7:2 American J L History 95; JE Cote, "The Reception of English Law" (1977) 15:1 Alta L Rev 29; William R Lederman, "The Extension of Governmental Institutions and Legal Systems to British North America in the Colonial Period" in William R Lederman, ed, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law, and Federal System of Canada* (Toronto: Butterworths, 1981) 63. The companion comparative-law literature provides neither contextualized nor persuasive accounts of reception processes, either. Compare H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 5th ed (Oxford: Oxford University Press, 2014); Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish

It therefore seems important to attempt to reconstruct the colonial libraries into which imperial legal doctrine sometimes migrated, and to attend closely to commentary or silence by lawyers and others who were involved in that migration. Conventional legal actors and formal law libraries were, perhaps naturally, joined by popular understandings of high, low and informal law, and by poetry and song, as vehicles for that trans-Atlantic normative migration.[19] Osgoode's engagement with late-eighteenth-century Canadian social and institutional life, reflected in his Comyns notations and omissions (and the mediation of those realities by a leading English legal text), provides a window on these migration processes and is therefore a major focus of this article. Osgoode's status as Upper Canada's inaugural, and Lower Canada's second, Chief Justice make this study particularly promising. As will be seen, however, there is at least a little ahistoricism in the presumption that a late-eighteenth-century British colonial chief justice would have been engaged primarily in judicial activities or consumingly interested in imported English common law.

I. INTELLECTUAL HISTORY AND BOOK ANNOTATIONS

The history of books has come into its own as a vibrant aspect of Anglo-American cultural studies in the last quarter-century.[20] Writing about law library acquisitions and use has, in turn, been a significant part of that new interest in published material.[21] The results of research on law book owners' marginal notes and other

Academic Press, 1974)

19. See generally Kathleen Lord, "Representing Crime in Words, Images, and Songs: Exploring Primary Sources in the Murder of Melisa Masse, Montreal, 1895" (2010) 43:86 Histoire Sociale/Social History 429; Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass: Harvard University Press, 2004) 15–72; Greg Marquis, "Doing Justice to British Justice: Law, Ideology, and Canadian Historiography" in W Wesley Pue & Barry Wright, eds, *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 43.
20. See generally Adrian Johns, *The Nature of the Book: Print and Knowledge in the Making* (Chicago: University of Chicago Press, 1998) 1-57; David D Hall, "On Native Ground: From the History of Printing to the History of the Book" in David D Hall, ed, *Cultures of Print: Essays in the History of the Book* (Amherst, Mass: University of Massachusetts Press, 1996) 15; Thomas R Adams & Nicolas Barker, "A New Model for the Study of the Book" in Nicolas Barker, ed, *A Potencie of Life: Books in Society, Clark Lectures, 1986-1987* (London: British Library, 1993) 5.
21. See generally Daniel J Hulsebosch, "An Empire of Law: Chancellor Kent and the Revolution in Books in the New Republic" (2009) 60:2 Ala L Rev 377; Eric H Reiter, "Imported Books, Imported Ideas: Reading European Jurisprudence in Mid-Nineteenth-Century Quebec" (2004) 22:3 L & Hist Rev 445; Karen Baston, *Charles Areskine's Library: Lawyers and their Books at the Dawn of the Scottish Enlightenment* (Leiden, NL: Brill, 2016).

textual insertions have been slower to appear, but guidance and inspiration on those fronts now exists.[22] And, as might be expected, there is a substantial companion literature in the humanities and natural sciences on interpretive theories applicable to book annotations and marginal silences.[23]

A little is also known about the contents of *circa* 1800 British North American law libraries, especially those of public office holders.[24] Primary and secondary sources about those collections can usefully be read alongside emerging studies of the history of local legal scholarship.[25] And there is a growing secondary literature on early United States law book importation and publishing.[26] Descriptions of the contents and use of specific American law libraries during the antebellum

22. See *e.g.* Daniel R Coquillette, "The Legal Education of a Patriot: Josiah Quincy, Jr." (2007) 39:2 Ariz St LJ 317; Fernandez, *supra* note 10; MH Hoeflich, "The Lawyer as Pragmatic Reader: The History of Legal Common-placing" (2002) 55:1 Ark L Rev 87.
23. See *e.g.* Sylvia Brown & John Considine, *The Spacious Margin: Eighteenth-Century Printed Books and the Traces of their Readers* (Edmonton: University of Alberta Libraries, 2012); HJ Jackson, *Marginalia: Readers Writing in Books* (New Haven: Yale University Press, 2001); Ann Blair, "Annotating and Indexing Natural Philosophy" in Marina Frasca-Spada & Nick Jardine, eds, *Books and the Sciences in History* (Cambridge, UK: Cambridge University Press, 2000) 69.
24. Compare William H Laurence, "Acquiring the Law: The Private Law Library of William Young, Halifax, 1835" (1998) 21:2 Dal LJ 490; Christine Veilleux, "Le livre a Québec, 1760-1867: Les gens de justice et leurs ouvres" (1993) 34:1 C de D 93; Shirley Elliott, "The Library of Richard John Uniacke, 1753-1830: Attorney General of Nova Scotia" (1957) 21 Bulletin Maritime Library 258.
25. Compare Sylvio Normand, "Les débuts de la littérature juridique québécoise, 1767-1840" in G Blaine Baker & Donald Fyson, eds, *Essays in the History of Canadian Law: Quebec and the Canadas* (Toronto: University of Toronto Press, 2013) 96; Vivienne Denton, "Canadian Law Publishers: A Look at the Legal Publishing Industry in Canada" in Martha Foote, ed, *Law Reporting and Legal Publishing in Canada: A History* (Kingston, Ont: Canadian Association of Law Libraries, 1997); Donald W McLeod, "William Cameron Chewett and W.C. Chewett & Company of Toronto, Printers and Publishers" (1982) 21 Papers Bibliographic Society Can 1.
26. See *e.g.* MH Hoeflich, *Legal Publishing in Antebellum America* (Cambridge, UK: Cambridge University Press, 2010); Morris L Cohen, *Bibliography of Early American Law* (Buffalo: State University of New York Press, 1998); Herbert A Johnson, *Imported Eighteenth-Century Law Treatises in American Law Libraries, 1700-1799* (Knoxville, Tenn: University of Tennessee Press, 1978).

period are also available.[27] Parallel British studies are beginning to appear, but are not yet legion.[28]

It can nevertheless be said that institutional works like digests and abridgments were the pre-eminent form of seventeenth and eighteenth-century British legal literature, and it is therefore unsurprising that they dominated that jurisdiction's law book production and law libraries during that period.[29] American authors like Zephaniah Swift, Nathan Dane, and James Kent also began to produce local derivations of that European form at the outset of the nineteenth century.[30] British North American institutionally styled legal writing more or less followed suit, taking account of the colonies' smaller populations and more limited markets for legal literature.[31] Near-comprehensive and sometimes exhaustive descriptions

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27. See *e.g.* Kurt X Metzmeier & Peter Scott Campbell, "Nursery of a Supreme Court Justice: The Library of James Harlan of Kentucky" (2008) 100:4 Law Libr J 639; Robert Feikema Karachuk, "A Workman's Tools: The Law Library of Henry Adams Bullard" (1998) 42:2 Am J Leg Hist 160; Michael H Harris, "The Frontier Lawyer's Library: Southern Indiana, 1800-1850, as a Test Case" (1972) 16:3 Am J Leg Hist 239.
28. But see Ian A Gadd, "The Learned Press: Law and Medicine" in Ian A Gadd et al, eds, *The History of Oxford University Press,* vol 1 (Oxford: Oxford University Press, 2014) ch 15; Simon Eliot & Christopher Stray, "History, Law, and Literature" in *ibid*, vol 2, ch 13; H Kay Jones, *Butterworth, History of a Publishing House* (London: Butterworth-Heinemann, 1997) 3–174; MW Maxwell, "The Development of Law Publishing, 1799-1974" in John Burke & Peter Allsop, eds, *Then and Now, 1799-1974* (London: Sweet & Maxwell, 1974) 121.
29. See *e.g.* Thomas Wood, *An Institute of the Laws of England* (London: ER Nutt & R Gosling, 1720); Matthew Bacon, *A New Abridgment of the Law* (London: ER Nutt & R Gosling, 1736-59); Charles Viner, *A General Abridgment of Law and Equity* (Aldershot, UK: G Strahan & T York, 1791); William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-69). See also notes 30 and 31 *infra*.
30. See *e.g.* Zephaniah Swift, *A System of Laws of the State of Connecticut* (Windham, Conn: John Byrne, 1795-96); Nathan Dane, *A General Abridgment and Digest of American Law* (Boston: Cummings, Hilliard & Co, 1823); James Kent, *Commentaries on American Law* (New York: O Halstead, 1826). See generally MH Hoeflich, "American Blackstones" in Wilfred F Prest, ed, *Blackstone and his Commentaries: Biography, Law, History* (Oxford: Hart, 2009) 181; John H Langbein, "Chancellor Kent and the History of Legal Literature" (1993) 93:3 Colum L Rev 547; Andrew Johnson, "The Influences of Nathan Dane on Legal Literature" (1963) 7:1 Am J Leg Hist 28.
31. See *e.g.* Beamish Murdoch, *Epitome of the Laws of Nova Scotia* (Halifax: Joseph Howe, 1833); Henry Des Rivières Beaubien, *Trait sur les loix civiles du Canada* (Montreal: L Duvernay, 1832); WC Keele, *The Provincial Justice* (Toronto: Upper Canada Gazette, 1835); Robert Alexander Harrison & James Lukin Robinson, *A Digest of all Cases Determined in the Queen's Bench and Practice Courts for Upper Canada, from 1823* (Toronto: Henry Rowsell, 1852); Alexander Leith, *Commentaries on the Laws of England Applicable to Real Property: Adapted to the Present State of the Law in Upper Canada* (Toronto: WC Chewett & Co, 1864). See generally Michel Morin, "Blackstone and the Birth of Quebec Distinct Legal Culture" in Wilfred F Prest, ed, *Re-interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Oxford: Hart Publishing, 2014) 105; Philip Girard, *Lawyers and*

of legal rules or sources, without synthesis or induction but with alphabetic organization, were defining features of institutional works.[32] These works generally had wide margins, which accommodated annotations like Osgoode's scribblings, and were often used for teaching and learning as well as for full-service legal research (rather than the preliminary readings of modern legal digests that typically lead to more detailed sources such as monographs or case law). Early abridgements are sometimes said to have facilitated the subsequent and more epistemically ambitious production of topic-specific and doctrinally abstract legal treatises.[33] The better view is probably that a variety of forms of late-eighteenth and early-nineteenth-century Anglo-American legal literature—like manuals, institutional works, treatises, statutory consolidations, and codes—co-existed in a mutually reinforcing rather than evolutionary relationship.[34] Comyns' *Digest* was, however, typical of that time and place insofar as it went through a Law-French draft, together with one American and six English-language British

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Legal Culture in British North America: Beamish Murdoch of Halifax (Toronto: University of Toronto Press, 2011) at 152-82; Peter Oliver, ed, *The Conventional Man: The Diaries of Ontario Chief Justice Robert A. Harrison, 1856-1878* (Toronto: University of Toronto Press, 2003) at 15-18; Sylvio Normand, "Une analyse de la doctrine en droit civil québécois" (1982) 23:4 C de D 1009 at 1013-16.

32. See generally Wilred F Prest, "Law Books" in Michael F Suarez & Michael L Turner, eds, *The Cambridge History of the Book in Britain*, vol 5 (Cambridge, UK: Cambridge University Press, 2009) 791; Robert B Robinson, "The Two Institutes of Thomas Wood: A Study in Eighteenth-Century Legal Scholarship" (1991) 35:4 Am J Leg Hist 432; John W Cairns, "Blackstone, An English Institutist: Legal Literature and the Rise of the Nation State" (1983) 4:3 Oxford J Leg Stud 318.

33. See *e.g.* AWB Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48:3 U Chicago L Rev 632; Charles M Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport, Conn: Greenwood Press, 1981) 3-22, 201-213; Roscoe Pound, *The Formative Era of American Law* (Boston: Little, Brown 1938) 138-72.

34. See generally Philip Girard, "'Of Institutes and Treatises': Blackstone's *Commentaries*, Kent's *Commentaries*, and Murdoch's *Epitome of the Laws of Nova Scotia*" in Angela Fernandez & Marcus D Dubber, eds, *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford: Hart Publishing, 2012) 43; G Blaine Baker, "Story'd Paradigms for the Nineteenth-Century Display of Anglo-American Legal Doctrine" in *ibid*, 82 at 82; David Sugarman, "Legal Theory, the Common Law Mind, and the Making of the Textbook Tradition" in William L Twining, ed, *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) 26.

editions between 1740 and 1826.[35] The 1762–67 and 1822 British and the 1824–26 American editions of the *Digest* were sometimes said to have been its preferred iterations, and it generally received better professional reviews than its competitors.[36] The 1762–67 English edition of Comyns would have been the most recently published when Osgoode acquired it as a student-at-law, a newly minted barrister, or as a judicial appointee bound for Canada.

It is possible that Comyns' *Digest* was Osgoode's whole Canadian law library, although one might have expected also to have found in that collection a smattering of local and imperial statutes, commonplace and precedent books, a law dictionary or similar word-book, and a handful of early legal treatises.[37] Offering a conclusion on that issue would, however, be rash, since there is little mention of law books in Osgoode's correspondence, and parallel points of reference like descriptions of other local privately-held law libraries of the day are scarce.[38] Although the availability of related scholarship tempts one to make comparisons between the library of a chief justice and those of colonial magistrates (who seem to have worked routinely from a single legal text or set of texts), differences in education, working conditions, and responsibilities make these comparisons inapt.[39] At the other end of the bibliographical spectrum, relatively

35. See Comyns, *supra* note 3; S Kyd, ed, (Dublin: Luke White, 1785); S Kyd, ed, (London: Strahan & Woodfall, 1792); Samuel Rose, ed, (London: Strahan, 1800); Anthony Hammond, ed, (London: Butterworth, 1822); Anthony Hammond & T Day, eds, (New York: Collins & Hannay, 1824-26), (Philadelphia: Laval & Bradford, 1824-26). See generally Mike Macnair, "Sir John Comyns" in *ODNB, supra* note 1; JM Rigg, "John Comyns" in Leslie Stephen, ed, *Dictionary of National Biography*, vol 11 (London: Smith, Elder, & Co, 1887) 464.
36. See *e.g.* JG Marvin, *Legal Bibliography* (Philadelphia: T & JW Johnson, 1847) 218-19. For Comyns' competitors, see *supra* note 29.
37. Compare the contents of colonial libraries described in Laurence, *supra* note 24; Villeux, *supra* note 24; and, Elliott, *supra* note 24.
38. But see John White Papers, LAC (MG 23, H15); *Catalogue des livres*, *supra* note 8; *Catalogue of the Valuable and Extensive Library*, *supra* note 8; Villeux, *supra* note 24. There is also reference to Osgoode's use of a "Rough Agenda Book" from the English Assize Court for Hertfordshire, 1788 to 1791. See DB Read, *Lives of the Judges of Upper Canada or Ontario, from 1791 to the Present Time* (Toronto: Rowsell & Hutchinson, 1888) 20; William Osgoode Fonds, Provincial Archives Online (F552, Container B240697). That precedent book has not been annotated.
39. Compare Jim Phillips, "A Low-Law Counter-Treatise: Absentees to Wreck in British North America's First Justice of the Peace Manual" in Fernandez & Dubber, *supra* note 34 at 202; John A Conley, "Doing it by the Book: Justice of the Peace Manuals in Eighteenth-Century America" (1985) 6:3 J Leg Hist 257; Larry M Boyer, "The Justice of the Peace in England and America from 1506 to 1776: A Bibliographic History" (1977) Q J Library Congress 315.

little is known about legislative and other public law libraries in early British North America.[40] Indeed, the first published catalogues of those collections were compiled several decades after Osgoode's departure from Canada.[41] It is therefore unclear what items Osgoode might have been able to borrow from local institutional libraries to complement his private holdings. A four-thousand-page law library would, it seems, have been spartan but acceptable by prevailing colonial standards. And that collection proabably did not contain more than one set of legal abridgements. Comyns' *Digest* was very likely the centerpiece, if not the entirety, of Osgoode's library.

II. OSGOODE'S CANADIAN TRAIL

William Osgoode was educated in Britain at the Methodist Kingswood School in Bath, and then at Christ Church College, Oxford (Bachelor of Arts, 1772; honorary Master of Arts, 1777). His correspondence shows that he was fluent in Latin and French (presumably aided by a year in France as a law student), and had some familiarity with Greek. Osgoode was admitted to practice as a barrister at Lincoln's Inn in 1779, where his training would have been more social than academic or scientific.[42] He is said then to have worked sporadically as an equity draftsman in London.[43] Osgoode's Upper Canadian chief justiceship commenced on December 31, 1791 and, a life-long bachelor and only child, he appears to have lived with Lieutenant Governor John Graves Simcoe's family at "Navy Hall" in the old provincial capital of Newark (later known as Niagara-on-the-Lake) during much of that tenure. As noted by his leading biographer, Osgoode suffered from seasickness, which presumably presented transportation challenges

40. But see Galichan, *supra* note 7; Margaret Murphy, "The Nova Scotia Legislative Library: The Early Years" (1992) 17:1 Can L Libr Rev 11; LS Hansen, "On Foot Forthwith: A Brief History of the Creation and Development of the Fredericton Law Library" in Eric L Swanick, ed, *Hardness, Perseverance, and Faith: New Brunswick Library History* (Halifax: Dalhousie University School of Library and Information Studies, 1991).
41. See *e.g.* Lower Canada, *Library Lower Canada Legislative Council* (Quebec: John Neilson, 1822); Lower Canada, *Library of the House of Assembly. Lower Canada* (Quebec: John Neilson, 1825); *Catalogue of Law Books in the Library at Halifax, Michaelmas Term, 1835* (Halifax: JS Cunnabell, 1835); Canada, *Catalogue of Books in the Legislative Assembly of Canada* (Kingston: Library of the Legislative Assembly, 1842).
42. See generally John Hamilton Baker, *Legal Education in London: 1250-1850* (London: Selden Society, 2007); David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford: Oxford University Press, 2000) 107-148; William Twining, *Blackstone's Tower: The English Law School* (London: Stevens, 1994).
43. See generally Mealing, *supra* note 1.

for him in a period when most Canadian settlement hugged the shores of the Great Lakes-St. Lawrence waterway, and travel was largely by boat.[44] Courts had been established in 1788 for Quebec's four western districts (Hesse, Nassau, Mecklenburg and Lunenburg, which were renamed Western, Home, Midland, and Eastern when Quebec was divided into Upper and Lower Canada), and that judicial infrastructure was reformed in 1794 with the introduction of Upper Canadian Courts of Common Pleas, King's Bench, and Appeal.[45] But there are scant primary records of the workings of those old Quebec or Upper Canadian courts and, perhaps due in part to his difficulties with water travel, there is little mention in secondary source material of Osgoode's participation in them during his tenure as Chief Justice.[46] It may be that intermediate tribunals (like the district courts and courts of requests) were busier than Osgoode's courts, which would help to account for his relative absence from Upper Canada's fragmentary judicial records.[47] Studies of conflict resolution in other North American colonies have described regular resort to informal and non-judicial forums for dispute

44. See *ibid.* For descriptions of judicial "circuit-riding" in neighboring jurisdictions during similar periods, see generally Jim Phillips & Philip Girard, "Courts, Communities, and Communication: The Nova Scotia Supreme Court on Circuit, 1816-1850" in Hamar Foster, Benjamin L Berger & AR Buck, eds, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: University of British Columbia Press, 2008) 117; Joshua Glick, "On the Road: The Supreme Court and the History of Circuit Riding" (2003) 24:4 Cardozo L Rev 1753; AG Roeber, "Authority, Law, and Custom: The Rituals of Court Day in Tidewater Virginia, 1720-1750" (1980) 37:1 Wm & Mary Q 29.
45. See generally Donald Fyson, *The Court Structure of Quebec and Lower Canada, 1760-1860* (Montreal: Montreal History Group, 1994) 23-102; Margaret A Banks, "The Evolution of the Ontario Courts, 1788-1981" in David H Flaherty, ed, *Essays in the History of Canadian Law* (Toronto: University of Toronto Press, 1981) 492. For descriptions of the executive and legislative branches of Upper Canadian government, see generally Gerald M Craig, *Upper Canada: The Formative Years, 1784-1841* (Don Mills, Ont: Oxford University Press, 2013).
46. *Supra* note 38 at 19-22 (refers to several of Osgoode's King's Bench criminal cases in the Midland and Eastern Districts of Upper Canada, but no source of that material was provided and those decisions have not been located in the PAC or in LAC). For demonstration of Osgoode's relative absence from relevant secondary literature, see *e.g.* Paul Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Toronto: University of Toronto Press, 1986)14-35; William NT Wylie, "Instruments of Commerce and Authority: The Civil Courts in Upper Canada, 1789-1812" in David H Flaherty, ed, *Essays in the History of Canadian Law*, vol 2 (Toronto: University of Toronto Press, 1983) 3; William Renwick Riddell, *Michigan Under British Rule: Law and Law Courts, 1760-1796* (Lansing, Mich: Michigan Historical Commission, 1926) 265-357.
47. See generally Wylie, *supra* note 46; JH Aitchinson, "The Courts of Request in Upper Canada" (1949) 41:3 Ontario Historical Society 125. See also James Muir, *Law, Debt, and Merchant Power: The Civil Courts of Eighteenth-Century Halifax* (Toronto: University of Toronto Press, 2016) 41-151.

settlement. On a similar model, some of Upper Canada's early courts may not have been prominent.[48] Yet several of Osgoode's brother superior court judges in both Canadas (including William Dummer Powell, William Smith, and James Stuart) did produce modest, surviving records of judicial and other conflict resolution activities.[49]

Osgoode is credited with the authorship of several foundational Upper Canadian statutes, namely its law on the reception of English jurisprudence, its *Marriage Act*, its *Juries Act*, and its first legislation on judicial law.[50] In a similar vein, he also drafted lengthy 1795 rules of civil procedure for the Judicial District of Quebec, legislation whose origin has not been widely recognized.[51] Part of the reason for that kind of statesmanship, which is inconsistent with modern divisions of democratic governmental power, is that an independent judiciary would not begin to emerge in the Canadas until the 1830s. In the result, Osgoode and his successors as chief justice (John Elmsley, Henry Allcock, Thomas Scott, William Dummer Powell, William Campbell, and John Beverley Robinson in

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48. Compare Carli N Conklin, "Transformed, Not Transcended: The Role of Extra-Judicial Dispute Resolution in Antebellum Kentucky and New Jersey" (2006) 48:1Am J Leg Hist 39; Bruce H Mann, "The Formalization of Informal Law: Arbitration before the American Revolution" (1984) 59:3 NYUL Rev 443. See generally William E Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825* (Chapel Hill: University of North Carolina Press, 1981).
49. Compare Evelyn Kolish, "Sir James Stuart" [Kolish, "Sir James Stuart"] in *DCB*, *supra* note 1 vol 8 at 842; Leslie Francie Stokes Upton, *The Loyal Whig: William Smith of New York and Quebec* (Toronto: University of Toronto Press, 1969); William Renwick Riddell, *The Life of William Dummer Powell: First Judge at Detroit and Fifth Chief Justice of Upper Canada* (Lansing, Mich: Michigan Historical Commission, 1924) 55-114.
50. See *Reception Act*, 32 Geo III, (1792), c 1 (UC); *Marriage Act*, 33 Geo III, (1793), c 5 (UC); *Juries Act*, 34 Geo III, (1794), c 1 (UC); *Judicature Act*, 34 Geo III, (1794), c 4 (UC). Osgoode is sometimes also credited with Upper Canada's *Act Against Slavery*, 33 Geo III (1793), c 7 (UC) and its *Law Society Act*, 37 Geo III (1797), c 13 (UC), but there is insufficient corroboration to adopt those attributions.
51. Canadian judges continued to draft rules of civil procedure as recently as the early-twentieth century, but the scope and novelty of Osgoode's work on that front place his rules beyond the norm. See William Osgoode et al, to Lord Dorchester (19 November 1795), LAC (RG 4 A1 at 20273-20288) [Osgoode to Dorchester]; [Lower Canada] Council Business (12 December 1795), LAC (RG 4 A1 at 20289-20291). See also *Orders and Rules of Practice in the Court of King's Bench, for the District of Quebec* (Quebec: Lower Canada Court of King's Bench, 1809). For lack of recognition of that aspect of Osgoode's Canadian work, see *e.g.* Evelyn Kolish, *Nationalismes et conflits de droits: le débat du droit privé au Québec, 1760-1840* (La Salle, Que: Hurtubise HMH, 1994) 77-125; Jean-Maurice Brisson, *La formation d'un droit mixte: l'evolution de la procedure civile de 1774 a 1867* (Montreal: Les Éditions Thémis, 1986) 58-59 (both of these skip over procedural reforms during the 1794-1809 period).

Upper Canada; and Henry Allcock, Jonathan Sewell, and James Stuart in Lower Canada) assumed legislative and executive duties as well as judicial ones.[52] The ambidextrous nature of those early roles apparently diluted their judicial dimension, but it also highlights the constitutionally transformative character of the local separation of judicial from other governmental powers. This seperation began with abolition of the Canadas upper legislative houses in the fourth and fifth decades of the nineteenth century (the Canadas Executive Councils were merged into a single, extra-legislative organ for the Province of Canada in 1841).

Long-tenured Quebec and Lower Canadian Chief Justice William Smith had been ailing for some time when Osgoode replaced him in 1794. While that appointment was plainly a promotion for Osgoode, it may have been in his sights from the beginning of his Canadian stay.[53] Modern commentary, such as it is, has emphasized the Chief Justice's role in Lower Canadian criminal justice, and in Executive Council debates about land tenure. Again, however, a respectable body of scholarship on the history of criminal justice for the 1794–1801 period when Osgoode occupied the apex of Lower Canada's court structure has little to say about his judicial presence in that field.[54] Historians' focus has been David McLane's 1797 prosecution for high treason, presumably because Osgoode's judgment in that case was reported in *Howell's State Trials* and released as a pamphlet by Lower Canada's King's Printer.[55]

Students of British North American legal history have, perhaps naturally, emphasized the decade and a half between the Conquest of 1759–60 and the enactment of the *Quebec Act*, as well as the mid-nineteenth-century period

52. See generally Edith G Firth, "John Elmsley" in *DCB*, *supra* note 1 vol 5 at 303; Frederick H Armstrong, "Henry Allcock" *ibid,* at 17; William NT Wylie, "Thomas Scott" in *ibid*, vol 6; SR Mealing, "William Dummer Powell" in *ibid*, at 605; RJ Morgan & Robert Lochiel Fraser, "Sir William Campbell" in *ibid*, at 113; Patrick Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto: University of Toronto Press, 1984); F Murray Greenwood & James H Lambert, "Jonathan Sewell" in *DCB*, *supra* note 1 vol 7 at 782; Kolish, "Sir James Stuart," *supra* note 49. See also *infra* note 85, and accompanying text.

53. See generally Upton, *supra* note 49 at 202-17.

54. Compare Louis A Knafla & Terry L Chapman, "Criminal Justice in Canada: A Comparative Study of the Maritimes and Lower Canada, 1760-1812" (1983) 21:2 Osgoode Hall LJ 245; Jean-Marie Fecteau, *Un nouvel ordre des choses: la pauvreté, le crime, et l'État au Québec, de la fin de de XVIII siècle á 1840* (Outremont, Que: VLB, 1989); Andre Morel, "La reception du droit criminal anglais au Québec" (1978) 13:2 RJT 449.

55. See *Trial of David McLane for High Treason* (1796), 26 Howell's State Trials 721 (Lower Canada) [*Trial of David McLane*]; *The Trial of David McLane for High Treason* (Quebec: W Vondenvelden, 1797). Compare F Murray Greenwood, "The Treason Trial and Execution of David McLane" (1991) 20:1 Man LJ 3 [Greenwood, "Treason Trial"]; Claude Galarneau, "David McLane" in *DCB*, *supra* note 1 vol 4.

leading up to grand law reform initiatives, such as the commutation of seigneurial land tenure and the codification of private law.[56] But enough work has been done on the content and application of private law during the intervening decades that Osgoode's shadowy historiographic presence in the civil courts gives pause.[57] Vulnerability to seasickness was not likely a cause of that low profile, however, since Lower Canada's 1794 division into two judicial districts (with resident judges in each of them) meant that Osgoode was not obliged to leave Quebec City frequently. There, as in Newark, he lived with successive provincial Lieutenant Governors and their families in the official quarters at Chateau St. Louis (to which he and his correspondents sometimes referred as the Castle of St. Lewis).[58] Osgoode maintained accommodations at the Chateau despite his periodically strained relations with Lieutenant Governors Guy Carleton, Robert Shore Milnes, and especially Robert Prescott.[59] The key point is, however, that the judicial dimension of the Chief Justice's role in Lower Canada appears to have been as recessive as it was in the upper province. Osgoode seems, moreover, to have done less legislative and managerial work in Quebec City than he did in Newark, perhaps due to policy and sometimes interpersonal differences with Carleton, Milnes, and Prescott. It also bears recollection that thirty years of foundational ordinances and statutes had been enacted during the British regime in Quebec and Lower Canada before Osgoode's time there, whereas Upper Canada's parliament had yet to convene when he arrived.

Osgoode was perennially concerned about alienation of the Crown's unsettled lands, primarily because he sought to create a buffer of Loyalist settlers, rather than one of absentee speculators, between New York, Pennsylvania, and the New England states on one hand, and Canada on the other. But sources depicting his non-judicial engagement with, and commentary on, property-ownership regimes are difficult to locate. This is so despite the fact that settlement issues were a *cause célèbre* in the Canadas for much of the century following the Conquest. After

56. See generally G Blaine Baker, "Quebec and the Canadas, 1760 to 1867: A Legal Historiography" in Baker & Fyson, *supra* note 25 at 3.
57. See *e.g.* F Murray Greenwood, "Lower Canada (Quebec): Transformation of Civil Law, From Higher Morality to Autonomous Will, 1774-1866" (1995) 23 Man LJ 132; Kolish, *supra* note 51; Brisson, *supra* note 51.
58. See *e.g.* "Osgoode to John King", October 27, 1795 [Osgoode to John King]; "Osgoode to Thomas Cary," 7 July 1798; "Samuel Gale [Secretary to Lieutenant-Governor Robert Prescott] to Osgoode," 6 June 1799, Colonial Office Archives [COA] (42: C13606) online: <http://heritage.canadiana.csa/view/oochihm.lac>.
59. See generally GP Browne, "Guy Carleton" in *DCB*, *supra* note 1 vol 5 at 141; Peter Burroughs, "Robert Prescott" in *ibid* at 690; Jean-Pierre Wallot, "Robert Shore Milnes" in *ibid*, vol 7 at 613.

about 1780, Portions of Quebec and Lower Canada were patented by the Crown in English free and common socage rather than in French seigneurial tenure, which resulted in a partially surveyed and incompletely conveyed checkerboard of ownership regimes.[60] There was a related current of opinion, which persisted into the 1850s, that grants from the Crown in freehold tenure carried with them England's Westminster-based common law for all ancillary legal purposes as well.[61] Osgoode was not adverse to the retention of seigneurialism in Lower Canada, but thought that the option of freehold ownership was important to attract British immigrants and to secure overseas investment in land-development projects. Part of his work in the Executive Council of Upper Canada had been based on similar premises.[62]

Political resistance to Osgoode's Loyalist-friendly positions on land-tenure issues seems to have piqued his disenchantment with colonial state building, and ultimately led to his leave of absence from Lower Canada's judiciary in 1801 at age forty-seven (which soon turned into a resignation). He had by then been dreaming for several years about "emancipation" from his Canadian "banishment" with a further judicial promotion to Nova Scotia, Bombay or Bengal, or a gubernatorial elevation in Jamaica or Good Hope.[63] Whether Osgoode chose to abort his foreign service vocation, or that career was discontinued by the Colonial Office, cannot be determined on the basis of surviving records. Indeed, it is unclear from correspondence and secondary literature who or where Osgoode's helpful and apparently necessary connections in Britain's government were. It can be said, though, that Osgoode spent the following two dozen years in London in gentlemanly retirement alongside neighbors Lord Henry Brougham and Lord

60. See generally JI Little, "Contested Land: Squatters and Agents in the Eastern Townships of Lower Canada" (1999) 80:3 Can Historical Rev 381; Richard Cole Harris, ed, *Historical Atlas of Canada: From the Beginning to 1800*, vol 1 (Toronto: University of Toronto Press, 1987) at plate 51; Gerlad F McGuigan, "The Emergence of the Unincorporated Company in Canada" (1962) 2:1 UBC L Rev 31.

61. See generally Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal: McGill-Queen's University Press, 1994) at 22-55; John EC Brierley, "Quebec Common Laws (*droits communs*): How Many Are There?" in Ernest Capparos et al, eds, *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 109; John EC Brierley, "The Co-existence of Legal Systems in Quebec: Free and Common Socage in Canada's *pays de droit civil*" (1979) 20:1 C de D 277.

62. See Land Minute Books of the Executive Council of Lower Canada, LAC (RG1 E1); Land Minute Books of the Executive Council of Upper Canada, LAC (RG1 L1). See generally Lillian F Gates, *Land Policies of Upper Canada* (Toronto: University of Toronto Press, 1968).

63. See Osgoode to John King (15 June 1795, 16 September 1799, 4 May 1800, 14 April 1801) in COA, *supra* note 58.

George Gordon Byron in Prince Frederick, the Duke of York's former quarters at Albany House in Picadilly. He is said to have enjoyed entertaining with dinners at home and wild game hunting.[64] One consequence of Osgoode's abandonment of law on leaving Canada is that he produced no further professional record in Britain with which his Comyns annotations can be compared. Perhaps he anticipated that early and lengthy detachment from legal work, and therefore thought it unnecessary to transport his law library back to Britain. Alternatively, Osgoode may have regarded law books in England as similar to modern economists' "inferior goods," whose supply outstrips demand for them.[65] Or, he may simply have overlooked this part of his library while packing to leave Quebec City abruptly.

One challenge related to matching Osgoode's marginal book musings and silences with, or measuring library holdings against, his statecraft, is that primary Canadian source material related to Osgoode as a judge is scarce, and curiously absent from places one would expect to find it. There are, for example, no letters to or from Osgoode in the papers of either Chief Justice of Montreal James Monk (1794–1820) or Lower Canadian Attorney General (and later Chief Justice) Jonathan Sewell (1795–1808) in Library and Archives Canada (LAC) collections, or in the Collection Louis-Francois-George Baby at the University of Montreal (which includes the papers of Francois Baby, an influential and long-tenured Upper Canadian Justice of the Peace).[66] Osgoode seems not to have treated judicial leadership as a priority, or even to have engaged much with the small number of judges whose hierarchy he topped. Nor does he appear to have corresponded with members of the judiciary in other British colonies, an apparently regular practice on which colonial legal historian John McLaren has recently shone revealing light.[67] Moreover, the civil secretary's correspondence in LAC contains about four thousand partially indexed pages from the 1792–1802 period during which Osgoode was in Canada. There is no correspondence from Osgoode in

64. On his death in 1824, Osgoode's estate was said to have been worth approximately £70, 000 (about $14 million by early-twenty-first-century standards). See Will of William Osgoode of Albany House (26 May 1824), UK, National Archives (PROB 11/1686/261); See also Hay & Paley, *supra* note 4; "William Osgoode, Esq," *The Gentleman's Magazine and Historical Chronical* (February 1824) 181.

65. See generally William Noblett, "Samuel Paterson and the London Market for Second-Hand Books, 1755-1802" (2014) 108:2 Papers Bibliographical Society America 139.

66. See James Monk and Family Fonds, LAC (R5003-0-2); Jonathan Sewell and Family Fonds, LAC (R6199-0-9); Collection Louis-Francois-George Baby, Montreal, Archives de l'Université de Montréal (P58, A4/98, H2/53).

67. See generally John McLaren, *Dewigged, Bothered, and Bewildered: British Colonial Judges on Trial, 1800-1900* (Toronto: University of Toronto Press, 2011) [McLaren, *Bewigged*].

that cache of letters either, however—perhaps because he could conveniently speak directly to other colonial officials in Quebec City during much of that time.[68] Bibliotheque et Archives nationales du Quebec (BAnQ) records of the Lower Canadian Court of King's Bench (criminal side) for Osgoode's time in that jurisdiction are few and mostly limited to indictments.[69] Judges' archived bench books for that Court date from 1808 with those of Jonathan Sewell of Quebec City and James Reid of Montreal, and therefore include none that belonged to Osgoode. On the civil law side, there are no King's Bench or Court of Appeal judgment books in BAnQ until after 1802, which is also post-Osgoode. There are approximately twenty boxes of case dossiers from those two courts from the 1795–1801 period.[70] Sampling them has shown that there are Osgoode judgments in that bilingual, indexed-by-plaintiff material, but not much more than a handful. Moreover, provincial case reporting, either private or official, would only commence a couple of decades after the Chief Justice left Canada.[71] Osgoode's few and cursory civil law judgments characteristically begin and end with the results of litigation in terms of money or divisions of estates. They typically are not founded on legal texts, perhaps because the parties themselves were more interested in the collection of debts than abstract points of law. The juridical authority most commonly mentioned by Osgoode in those decisions is the so-called *Coutume du Canada*, apparently a localized and blended version of regional French customs.[72] Matching his marginal book musings with judicial work in the field has therefore been a difficult exercise.

The largest archive of Osgoode material may be about two hundred pages of unreciprocated letters (ranging from one to twelve pages in length, and written at one or two week intervals) that he sent to Whitehall between 1794 and 1802, to British Undersecretary of State John King (for whom King Township in

68. Compare LAC (RG4 A1).
69. But see *R v Parks*, *R v Poire*, LAC (MG23 HI 10) (two murder cases that Osgoode decided in September of 1800, which include benchnotes).
70. See Montreal, Bibliotéque et Archives Nationales du Québec [BAnQ] (TL18, S2, ss1, containers 1991-08-006/1 to 1991-080006/14, 1980-09-031/9 to 1980-09-031/13, 1980-09-031/18). See generally Evelyn Kolish, *Guide des Archives judiciaries*, vol 1 (Montreal: Archives Nationales du Québec, 2000) 11-24; Evelyn Kolish, "Some Aspects of Civil Litigation in Lower Canada, 1785-1825: Towards the Use of Court Records for Canadian Social History" (1989) 70:3 Canadian Historical Rev 337.
71. See generally Raymon Crete, Sylvio Normand & Thomas Copeland, "Law Reporting in Nineteenth-Century Quebec" (1995) 16:2 J Leg Hist 147. See also Anne C Matthewman, "Volumes of History: The Development of Law Reporting in Ontario" in Foote, *supra* note 25, 176.
72. See the text accompanying note 91.

Ontario's York County was named by Governor Simcoe). That correspondence was routinely begun by Osgoode with "secret and most confidential" and signed "W.O." [73] It includes a two page letter to King (with appendices) about the high-profile *McLane* case, which was written by Osgoode the day after he convicted the accused traitor and condemned him to death by drawing and quartering.[74] Overall, those letters are gossipy and partisan, and show Osgoode as alternatively haughty and inflexible, or sycophantic and preoccupied with elements of comfort like his living arrangements, wages, and pension.[75] He also apparently had a penchant for exaggeration (Osgoode's father, similarly named William, was a Leeds County hosier and Methodist, a modest background that may have led the younger Osgoode to take on compensatory pretensions and secretive tendencies toward his past). Insofar as his letters to King deal with affairs of state, their focus is executive, legislative, and administrative rather than judicial. The sole law book mentioned by Osgoode in them is the *Quebec Gazette* (referred to twice, with short excerpts from it attached to both of those citations). His references to judicial events are limited to *McLane* and Judicial District of Montreal debt litigation in *Grant and Lymburner v Lloyd* (in which Osgoode had no involvement).[76] The only local law he discussed in any detail in his correspondence with King was that of seigneurial privileges like *cens et rentes, lods et ventes,* and *banalités*.[77] (Osgoode himself is reported to have owned some twelve thousand acres of land in the Canadas as a speculator, and was the longstanding chair of the Lower Canadian Executive Council's Committee on Land Grants.)[78] His letters are thus very different from rank-and-file lawyers' correspondence of the day, which leading English legal historian John Baker

73. COA, *supra* note 58. But see Mealing, *supra* note 1.
74. See *Trial of David McLane*, *supra* note 55. See also Osgoode to John King (22 July 1797) in COA, *supra* note 58.
75. On judicial remuneration in British North America, see generally Jim Phillips & Bradley Miller, "Too Many Courts and Too Much Law: The Politics of Judicial Reform in Nova Scotia, 1830-1841" (2012) 30:1 L & Hist Rev 89 at 94-114.
76. See Osgoode to John King (14 May 1799, 11 November 1799) in COA, *supra* note 58.
77. See *e.g.* Osgoode to JB Burland (27 October 1795), Osgoode to John King (4 January 1797) in COA, *supra* note 58.
78. See generally Mealing, *supra* note 1; David Gagan, "Property and Investment: Some Preliminary Evidence of Land Speculation by the Family Compact in Upper Canada" (1978) 70:1 Ontario History 63. For indications of Osgoode's land speculation in Britain, before and after his Canadian sojourn, see Insured: William Osgood, Lincoln's Inn, as Mortgagee (11 August 1792), London, London Metropolitan Archives [LMA] (MS 11936/388/604015); Insured: William Osgoode of the Albany (16 July 1817) LMA (MS 11936/476/931953); Insured: William Osgoode, Twelve Paper Buildings (3 April 1804) LMA (MS 11936/431/706711).

says often "provide a mine of inside information about the workings of the legal system in the eighteenth and nineteenth centuries… [and] is of a kind not to be found in books or court records."[79]

Primary sources available for reconstruction of Osgoode's Canadian activities are, in a word, meager. Those gaps may therefore cast a pall of questionability over this article on reception of laws and law book history. It has also been difficult, on the basis of that record, to address historians' standard questions about patterns of change in Osgoode's colonial embrace of imperial law and institutions during the decade he spent in Canada. His Comyns annotations, sparse, sometimes high-handed, and bereft of context as they are, may be the best available source of information about his views on metropolitan law and other vehicles for governing the colonies.

III. SIFTING IMPERIAL LAW IN THE EARLY CANADAS

It bears repetition that Osgoode's Canadian book annotations show that he highlighted, modified lightly, and downplayed imperial law, parsimoniously and pedantically. He tended to be impatient with those books' authors and with the legal doctrine displayed in them, revealed by marginal commentary like "that was not the point," "totally contradicted later on," "my well-meaning accusations are good," "pretender" (with reference to an English judge, and elsewhere to a legal text-writer), and "overruled" (by which Osgoode apparently meant that he was doing the overruling in the books' margins), rather than "overruled by *Bridges v. Morrison*" or "overruled by Lord Mansfield," which he also scribbled as notes.[80] It may be, however, that institutional works were generally annotated more aggressively than statutes or legal manuals in part because they were framed in open-ended terms that invited engagement.[81]

Douglas Hay has penned what is perhaps the most candid commentary available on Osgoode's legal persona. He concluded (largely on the basis of the locally unprecedented *McLane* prosecution) that the Chief Justice "made his reputation as an effective instrument of state power, at the expense of his judicial

79. John Baker, "Legal Process as Reported in Correspondence" in Matthew Dyson & David Ibbetson, eds, *Law and Legal Process: Substantive Law and Legal Procedure in English Legal History* (Cambridge, UK: Cambridge University Press, 2013) 246 at 246. See also Karen S Beck, "A Working Lawyer's Life: The Letter Book of John Henry Sender" (2007) 99:3 Law Libr J 472.

80. Comyns, supp vol, *supra* note 3 at 358, 13, 207, 375; Comyns, vol 4, *supra* note 3 at 297; Comyns, supp vol, *supra* note 3 at 207, 13.

81. Compare the text accompanying notes 29-35; Baker et al, *supra* note 9.

impartiality … [Osgoode] was committed to upholding aristocratic, monarchical, anti-democratic government … [and] stood out as one of the fiercest defenders of British oligarchical government at the expense of the Rule of Law."[82] By contrast, Ontario Supreme Court Justice and pioneering Canadian legal historian William Renwick Riddell reported in 1916 that "a perusal of the shorthand notes to [the *McLane*] trial will prove to the lawyer that the proceedings were conducted [by Osgoode and counsel] with the utmost fairness and decorum, and that no other verdict [than guilty] was possible."[83] Somewhere between those two sets of conclusions lies contemporary Canadian legal historian Murray Greenwood's comment about *McLane*, that Chief Justice Osgoode "pushed [the imperial criminal law of] constructive treason to new limits," operating as he was within the "garrison mentality" that characterized Lower Canada's English-speaking community during the French revolutionary period.[84] A tendency on Osgoode's part towards exaggeration or sycophantism may again be seen in his reaction to David McLane and his desire to please Whitehall.

Commentators have also observed that early modern Anglo-American judges were often regarded by their regal masters, each other, and themselves as "lions under the throne," with an obligation to provide support and counsel to the executive branch of their government.[85] That perceived duty tempered the idea of a modern rule of law, which was further qualified by the bureaucratic fact of colonial chief justices like Osgoode presiding simultaneously over the courts as well as the executive and legislative branches of government. Osgoode's *Judicature Act* empowered him as Chief Justice to hear appeals from himself. Notice also that the exercise of judicial functions by late-eighteenth and early-nineteenth-century

82. Douglas Hay, "Tradition, Judges, and Civil Liberties in Canada" (2003) 41:2 Osgoode Hall LJ 319 at 319-21[Hay, "Tradition, Judges, and Civil Liberties"].

83. William Renwick Riddell, "Canadian State Trials: *The King* v. *David McLane*" (1916) 10:3 Royal Society Canada 321

84. F Murray Greenwood, *Legacies of Fear: Law and Politics in Québec in the Era of the French Revolution* (Toronto: University of Toronto Press, 1993) 169-70 [Greenwood, *Legacies*]. See also F Murray Greenwood, "Judges and Treason Law in Lower Canada, England, and the United States During the French Revolution" in Greenwood & Wright, *supra* note 5 at 297; Greenwood, "Treason Trial", *supra* note 55 at 5. Compare R Kent Newmyer, *The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation* (New York: Cambridge University Press, 2012) 143-79.

85. See *e.g.* Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (Cambridge, UK: Cambridge University Press, 2015) 70-107; Peter Oliver, "Power, Politics, and the Law: The Place of the Judiciary in the Historiography of Upper Canada" in G Blaine Baker & Jim Phillips, eds, *Essays in the History of Canadian Law: In Honour of R.C.B. Risk* (Toronto: University of Toronto Press, 1999) 443; JGA Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, UK: Cambridge University Press, 1957) 30-69.

Canadian legislatures, which deserves a detailed study of its own, is another example of merged components of governmental action.[86] As historians have said, the transition to an independent British North American judiciary was a collateral consequence of the introduction of responsible government, and Osgoode's juridical orientation probably should not be assessed on the basis of that later, large constitutional transition.[87] One senses that Osgoode might have responded to modern critics of his "judicial activism" with a statement like, "yes, but what, exactly, is irregular in what I have done?"

The range of conclusions that have been drawn about Osgoode's comportment and holding in the *McLane* case is, thus, broad. It bears emphasis, however, that while the resources available for reconstructing the Chief Justice's sense of the mission and accountability of early Canadian judges may be slim, they are not limited to *McLane,* a leading treason decision. The paucity of Comyns annotations by Osgoode notwithstanding, he did comment on *Digest* passages that dealt with the eighteenth-century equivalents of treason, traitors, and aliens, and he did write about the *McLane* case to Undersecretary King. Those marginalia, together with the King letter's unexceptional tone and its preoccupation with facts, suggest that Osgoode bargained confidently with himself about the transplantation of imperial law when tangible opportunities to do so presented themselves.[88] "Bargaining," in this context, is meant to denote negotiation or debating with oneself about the scope of one's discretion to act, the enumeration of externalities or transaction costs associated with alternatives, and the provision of justifications for a preferred course of action. Osgoode imposed on McLane the grisly, increasingly rare, and soon to be abolished penalty of drawing and quartering, which suggests further self-assuredness or even over-confidence in what he was doing.[89]

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86. Compare Steven Watt, "State Trial by Legislature: The Special Council of Lower Canada" in Greenwood & Wright, vol 2, *supra* note 5 at 248; Christine A Desan, "The Constitutional Commitment to Legislative Adjudication in the Early-American Tradition" (1998) 111:6 Harv L Rev 1381. See generally Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body* (Chapel Hill: University of North Carolina Press, 1978).
87. See generally Jim Phillips, "Judicial Independence in British North America, 1825-1867: Constitutional Principles, Colonial Finances, and the Perils of Democracy" (2016) 34:3 L & Hist Rev 689.
88. See Comyns, vol 4, *supra* note 3 at 41; Comyns, supp vol, *supra* note 3 at 375. See also Osgoode to John King, *supra* note 58.
89. *Wikipedia* reports four examples of the imposition of that penalty in eighteenth-century Britain, and one instance of its use in eighteenth-century North America. "Hanged, drawn and quartered" (24 May 2017) *Wikipedia*, online: <https://en.wikipedia.org/wiki/Hanged,_drawn_and_quartered>. See also, Geoffrey Abbott, *Execution: A Guide to the Ultimate Penalty* (Chichester, UK: Summersdale, 2004).

As an aside, the Comyns treason annotations and the letter about *McLane* to King also suggest a need for subtlety in the search for relevant marginal commentary in, or the making of arguments from silence about, Osgoode's books. Recent criticism of his *McLane* judgment falls into the broad, modern legal categories of criminal procedure (Osgoode's appointment of junior, rather than leading, counsel to represent the accused); evidence (Osgoode's overlooking of delivery by the prosecutor of public largess to Crown witnesses); international relations (Osgoode's failure to address the capacity of enemy aliens, without allegiance to the Crown, to commit treason); and sentencing (imposing the penalty of drawing and quartering when that form of punishment had more or less fallen out of favor and deemed barbaric elsewhere in the Anglo-American world). None of those keywords provides ready access to annotated passages of the *Digest*.[90] The terminology and organizing concepts, as well as the architectonic structure, of eighteenth-century institutional works requires acuity in legal translation.[91] And notice that neither Osgoode's periodic recording of marginalia in Latin, nor Comyns' deployment of Law-French titles and subtitles, has yet been factored into the mix. It nonetheless seemed appropriate to provide a brief historiographic commentary on Osgoode's judgment in *McLane*, not only to air modern historians' assessments of the Chief Justice's judicial legacy, but also to use that decision's lack of fit with his Comyns annotations to introduce issues of legal translation across the space separating North America from Europe, the cultures distinguishing colonial from imperial legal professions, and the time separating the eighteenth from the twenty-first century.

Turning to more ambitious legal transplantation work by Osgoode, his halting importation of eighteenth-century, Westminster-based common law through Upper Canada's 1792 *Reception Act* formally displaced local operation

90. For discussion of the mid-and-late-nineteenth-century origins of legal language and categories at play in this treatment of late-eighteenth-century events, see generally Paul D Halliday, *Habeus Corpus: From England to Empire* (Cambridge, Mass: Belknap Press, 2010); Phil Handler, "Legal Development in Victorian Criminal Trials" in Dyson & Ibbetson, *supra* note 79 at 263; Christopher JW Allen, *The Law of Evidence in Victorian England* (Oxford: Clarendon Press, 1997).

91. Compare Timothy G Kearley "From Rome to the Restatement" (2016) 108:1 Law Libr J 55; Tony Honoré, *Justinian's Digest: Character and Compilation* (Oxford: Oxford University Press, 2010) 8-78; Wilfred Prest, "Blackstone as Architect: Constructing the *Commentaries*" (2003) 15:1 Yale JL & Human 103.

of the customs of Normandy, Paris, and Vexin.[92] The *Reception Act* also excluded England's poor laws, bankruptcy laws, and its laws related to ecclesiastical rights.[93] Further, the *Act* made no reference to English criminal law, presumably because Osgoode regarded relevant provisions of the *Royal Proclamation* of 1763 and the *Quebec Act* of 1774 as sufficient to have received English penal justice in the Canadas.[94] Much like the earlier *Quebec Act*, Osgoode's Upper Canadian reception law was about "property and civil rights," which effectively meant land and the law of persons.[95] The quasi-constitutional symbolism or international advertisement associated with settling land in freehold rather than seigneurial land-tenure, but not much more about imperial common law, seemed important to him. Osgoode's Upper Canadian *Marriage Act* modified English practices in respect of the formalities of spousal unions by legitimating retroactively, and authorizing prospectively, marriages celebrated by justices of the peace rather than Church of England clergy, thereby facilitating civil unions.[96] His *Juries Act*

92. See *Reception Act*, *supra* note 50, s 1. Compare Ada-Marie Kuskowski, "Inventing Legal Space: From Regional Custom to Common Law in the *Coutumiers* of Medieval France" in Meredith Cohen & Fanny Madeleine, eds, *Space in the Medieval West: Places, Territories, and Imagined Geographies* (Farnham, UK: Ashgate, 2014) 156. See generally Judith Ann Everard, *Le Grand Coutumier de Normandie: The Laws and Customs by which the Duchy of Normandy is Ruled* (St. Helier, Channel Islands: Jersey and Guernsey Law Review, 2009); NB Doucet, *Fundamental Principles of the Laws of Canada*, vol 2 (Montreal: John Lovell, 1841).
93. See *Reception Act*, *supra* note 50, s 6. See generally Russell Smandych, "Colonial Welfare Law and Practice: Coping without an English Poor Law in Upper Canada, 1792-1837" (1996) 23:2 Man LJ 214; Evelyn Kolish, "L'introduction de la faillite au Canada: Conflit social ou national?" (1986) 40:2 Rev d'histoire l'Amérique française 215; AH Oosterhoff, "Religious Institutions and the Law in Ontario: An Historical Study of the Laws Enabling Religious Organizations to Hold Land" (1981) 13:3 Ottawa L Rev 441.
94. Compare *Royal Proclamation* (London: Mark Basket, 1763); *Quebec Act* 1774 (UK) 14 Geo III c 83. Osgoode's successor in the Upper Canadian chief justiceship, English barrister John Elmsley, apparently thought otherwise about the reception of imperial criminal law (or at least sought to move the date of reception forward in time to 1792). See *Criminal Law Reception Act* 1800 (UC) 40 Geo III c 1. See also JLIJ Edwards, "The Advent of English Criminal Law and Procedure in Canada: A Close Call in 1774" (1984) 26:4 Crim LQ 464.
95. See generally Lionel Smith, "Intestate Succession in Québec" in Kenneth JC Reid, et al, eds, *Comparative Successions Law: Intestate Succession*, vol 2 (Oxford: Oxford University Press, 2015) 55; Jean-Philippe Garneau, "Une culture de l'amalgame au prétoire: les avocats de Quebec et l'élaboration d'un langage juridique commun au tournant des XVIII et XIXe siècles" (2007) 88:1 Can Historical Rev 147; Robert Yalden, "*Unité et différence*: The Structure of Legal Thought in Late-Nineteenth-Century Quebec" (1988) 46:2 U T Fac L Rev 365.
96. See *Marriage Act*, *supra* note 50. See generally William Rennick Riddell, "The Law of Marriage in Upper Canada" (1921) 2:3 Can Historical Rev 226; Bettina Bradbury et al, "Property and Marriage: The Law and the Practice in Early-Nineteenth-Century Montreal" (1993) 26:51 Historical Sociale/Social History 9.

streamlined legislatively mandated English practice, and expanded the franchise for jury duty.[97] Most significantly, in respect of legislative drafting, and despite his decade and a half of English practice in equity, neither Osgoode's *Reception Act* nor his *Judicature Act* provided for an Upper Canadian chancery court.[98] By way of contrast, a majority of the colonies of Britain's first and second empires had courts of equity from their first years.[99] Indeed, few of the seaboard and second generation inland American reception statutes were as selective or partial as Osgoode's reception law.[100] Other early provincial officials like Lieutenant Governor Simcoe, Attorney General White, Attorney General Allcock, and Chief Justice Elmsley would seemingly have gone further towards a technically complete Upper Canadian reception of English common law and judicial institutions, and sometimes they later did so.[101] Conversely, Osgoode's keystone policies on Lower Canadian land tenure were adopted by the English Parliament and by Lower Canada's Special Council, albeit several decades after he espoused them, with the introduction of voluntary regimes for the commutation of seigneurialism in Lower Canada and Canada East.[102]

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97. See *Juries Act*, *supra* note 50. See generally R Blake Brown, *A Trying Question: The Jury in Nineteenth-Century Canada* (Toronto: University of Toronto Press, 2009) 57-61.
98. See *Reception Act*, *supra* note 50; *Judicature Act*, *supra* note 50. See generally JK Johnson, "Claims of Equity and Justice: Petitions and Petitioners in Upper Canada, 1815-1840" (1995) 28:55 Historical Sociale/Social History 220; John C Weaver, "While Equity Slumbered: Creditor Advantage, A Capitalist Land Market, and Upper Canada's Missing Court" (1990) 28:4 Osgoode Hall LJ 871.
99. See generally Greg Taylor, "South Australia's *Judicature Act* Reforms of 1853: The First Attempt to Fuse Law and Equity in the British Empire" (2001) 22:1 J Leg Hist 55; Jim Cruikshank, "The Chancery Court of Nova Scotia: Jurisdiction and Procedure, 1751-1855" (1992) 1:1 Dal J Leg Stud 27; Solon Dyke Wilson, "Courts of Chancery in the American Colonies" in American Association of Law Schools, ed, *Select Essays in Anglo-American Legal History*, vol 2 (Boston: Little Brown, 1908) 779.
100. See generally Jerry Dupont, *The Common Law Abroad: The Constitutional and Legal Legacy of the British Empire* (Littleton, Colo: Fred B. Rothman, 2001); William Stoebuck, "Reception of English Common Law in the American Colonies" (1968) 10:2 Wm & Mary L Rev 393; Elizabeth Gaspar Brown, *British Statutes in American Law, 1776-1836* (Ann Arbor, MI: University of Michigan Press, 1964).
101. See generally Mary Beacock Fryer & Christopher Dracott, *John Graves Simcoe, 1752-1806: A Biography* (Toronto: Dundurn Press, 1998) 129-254; Edith G Firth, "John White" in *DCB*, *supra* note 1, vol 4 at 766; Armstrong, *supra* note 52; Firth, *supra* note 52.
102. See *Canada Trade Act* 1822 (UK) 3 Geo IV c 119; *Canada Land Tenures Act* 1825 (UK) 4 Geo IV c 59; *Lower Canada Free and Common Socage Act* 1828 9-10 Geo IV c 127; *Saint Sulpice Ordinance* 1840 (LC) 3 Vict c 30. See generally Gregory Thomas Johnson, *Perceptions of Property: The Social and Historical Imagination of Quebec's Legal Elite, 1836-1856* (SJD Thesis, University of Wisconsin, 1989) ch 2 [unpublished]; RG Riddell, "A Study of the Land Policy of the Colonial Office, 1792-1820" (1937) 18:4 Can Historical Rev 385.

Osgoode did not, in available correspondence or law book marginalia, mention his prototypes for statutory enactments, and a sampling of the legislative law of sibling jurisdictions has revealed few apparent models. Nor is there commentary in Osgoode's scribblings or letters on leading English case law that dealt with limitations on the reception of law in respect of ceded colonies or newly occupied Native lands.[103] Handwritten precedent books were valuable professional resources in private, late-eighteenth and nineteenth-century Canadian law practice, and presumably were relied on in early legislative processes as well.[104] Published versions of them were widely available within a generation of Osgoode's departure from the Canadas.[105] But neither unpublished nor published legislative precedent books have been located in public repositories of Colonial Office or Canadian material for the late eighteenth century.

Osgoode the legislator and draftsman of procedural regulations appears, in sum, to have been keen about infrastructure (civil procedure, court structure, justices of the peace, juries, and marriages) and symbolism (selective reception of imperial laws and optional freehold tenure), but less concerned about mainstream, technical legal issues (the status of English criminal law or equity in Upper Canada).[106] It is also noteworthy from the standpoint of legislatures' prominence that, unlike Chief Justice Monk's late-eighteenth-century introduction of rules of court for the Judicial District of Montreal, Osgoode sought to have his District of Quebec rules enacted by the Assembly rather than adopted administratively

103. Compare *Campbell v Hall* (1774), 98 ER 1045 (KB); *Blankard v Galdy* (1693), 90 ERB 1089 (JCPC); *Calvin's Case* (1608), 77 E R 377 (KB); Robert J Miller et al, *Discovering Indigenous Land: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010).

104. See *e.g.* "Rough Agenda Book," *supra* note 38; "John Robinson's Book of Precedents" (1959) 59:2 Cumberland & Westmorland Antiquarian & Archaeological Society 139; "Torrance and Morris Precedent Book, 1848-68," Montreal, McGill University Rare Book Room (MS 220-1).

105. See *e.g. Precedents of Private Acts of Parliament* (London: Maxwell, 1829); John Halcomb, *A Practical Treatise of Passing Private Bills through Both Houses of Parliament* (London: Sweet & Stevens, 1836); Henry Thring, *Practical Legislation, or, the Composition of Acts of Parliament* (London: Her Majesty's Stationary Office, 1878).

106. Bringing Osgoode's experience with statute draftsmanship and the enactment of judicial law in the Canadas forward in time, he was, later in life, a minor participant in the English commission that oversaw the piecemeal abolition of civil forms of action through legislation. See *Uniformity of Process Act* 1832 (UK) 2 Will IV c 39. See generally Mealing, *supra* note 1.

by King's Bench.[107] Again, parliamentary law making apparently made a difference to him.

It bears repetition that Osgoode was most attentive to institutional structures and processes and, in lesser measure, criminal and property law. Those interests mesh roughly with his local career. Since much of Osgoode's Canadian work was done in executive and legislative councils, he spent an undeterminable but seemingly limited amount of time applying *ancien regime* English criminal law at the trial and appellate levels in Lower Canada; he drafted a foundational local statute on judicial law, and he wrote two monographic commentaries on the law of successions (one of which was prepared in Quebec City).[108] But thirty-some annotations (a few of which are minor) is not a lot of commentary for four thousand pages of Comyns' text. So, Osgoode's marginal silences seem as important as his marginal musings. It may be that these omissions were provoked by swaths of Comyns' text that neither bothered nor pleased him or, alternatively, were triggered by passages which he regarded as irrelevant.[109] Moreover, some of Osgoode's annotations had to do with things other than Westminster-based common law, such as Cicero's theories of citizenship, and local English legal customs like those of Kent, Northumberland, or Wales and the Marshes.[110] Insofar as they related to court-made law, those marginal notes tended to be perfunctory and occasionally condescending.

Putting the point bluntly, Osgoode, the first Chief Justice of Upper Canada, second Chief Justice of Lower Canada, and the draftsman of the upper province's statute mandating measured local reception of imperial law, was largely uninterested in and seemingly unfussed about that law. The economically, politically, or culturally symbolic uses of state law apparently mattered to Osgoode, but its substance does not appear to have played a large role in his engagement with provincial or imperial affairs. And, although Osgoode referred periodically in his correspondence to non-judicial dispute settlement processes,

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107. See Osgoode to Dorchester, *supra* note 51; *Journal of the House of Assembly of Lower Canada, November 20, 1795-May 7, 1796* (Quebec: John Neilson, 1796) at 29-31 [*Journal*]. Compare LAC (RG4 A1 vol. 62, 19721-19790); District of Montreal *Rules,* LAC (RG4 A1 vol.63, 20144-20267).
108. See generally Greenwood, *Legacies*, *supra* note 84 at 116-192; Banks, *supra* note 45; *Journal*, *supra* note 106; William Osgoode, *Remarks on the Inconsistencies of the Table of Descents, Projected by Mr. Professor Christian* (London: Strahan, 1797); William Osgoode, *Remarks on the Law of Descent* (London: Butterworth, 1779).
109. Compare Lange, *supra* note 17. For a volume-by-volume commentary on marginalia, see Baker et al, *supra* note 9 (from which one can extrapolate to the annotations' makers in reconstructed collections of law books).
110. See *supra* note 15.

there is little indication that he participated in those venues. Nor, unlike some legally trained colonial officials, did he carry on a private law practice or treat his role in the state as an extension of that kind of work. Osgoode's Canadian world appears to have revolved around legislative and other administrative offices. The same preferential attitude toward non-judicial governance by the state seems to have animated other Upper and Lower Canadians of the day, as well.[111]

Osgoode's *Reception Act* was enacted shortly after Upper Canada's *Constitutional Act* of 1791 came into force.[112] It can thus be viewed as part of the second British Empire's rarified contribution to a wave of constitution writing in the North Atlantic world that gave new prominence to the organization of governmental powers and to parliamentary procedure.[113] The function of those kinds of organic and quasi-constitutional reception texts (sometimes called "super statutes" by American scholars), as with legislation at large, was increasingly thought to be hortatory, rhetorical, or symbolic.[114] Osgoode's correspondence reveals much interest on his part in the offices and personalities of executive and legislative government, and occasional flair for forward looking policy analysis. His statutes are coherently and sometimes perceptively drafted. By contrast, the few available examples of his judicial work show a workmanlike pre-occupation with facts, and a muted sense of *stare decisis*.[115] Several of his Comyns annotations

111. See generally Brian Young, "Pluralisme, 'common law', et la culture légale de Jean-Thomas Taschereau (1778-1832)", in Alex Tremblay Lamarche, ed, *Brussels Symposium* [Forthcoming in 2017]; Michel Morin, "The Discovery and Assimilation of British Constitutional Principles in Quebec, 1764-1774" (2013) 36:2 Dal LJ 581; Albert Schrauwers, *Union is Strength: W.L. Mackenzie, the Children of Peace, and the Emergence of Joint-Stock Democracy in Upper Canada* (Toronto: University of Toronto Press, 2009) at 66-150.
112. *Clergy Endowments (Canada) Act*, 1791 (UK) 31 Geo III c 31. See generally Pierre Tousignant, "Background for a New Approach to the 1791 *Constitution Act*" in Guy Laforest et al, eds, *The Constitutions that Shaped Us: A Historical Anthology of Pre-1867 Constitutions* (Montreal: McGill-Queen's University Press, 2015) 255.
113. See generally Linda Colley, "Empires of Writing: Britain, America, and Constitutions, 1776-1848" (2014) 32:2 L & Hist Rev 237; Mary Sarah Bilder, "Colonial Constitutionalism and Constitutional Law" in Daniel W Hamilton & Albert L Brophy, eds, *Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz* (Cambridge, Mass: Harvard University Press, 2009) 28; Daniel J Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005) 75-206.
114. See generally John W Cairns, "Attitudes to Codification and the Scottish Science of Legislation, 1600-1830" (2007) 22 Tul Eur & Civ LF 1; Michael Lobban, "Old Wine in New Bottles: The Concept and Practice of Law Reform, 1780-1830" in Arthur Burns & Joanna Innes, eds, *Rethinking the Age of Reform: Britain, 1780-1850* (Cambridge, UK: Cambridge University Press, 2003) 114; Erwin C Surrency, "Revision of Colonial Laws" (1965) 9:3 Am J Leg Hist 189.
115. See *e.g.* BAnQ, *supra* note 69; *Trial of David McLane*, *supra* note 55.

reflect a similar obliviousness, and sometimes resistance, to legal precedents. Histories of the Anglo-American doctrine of *stare decisis* suggest that this attitude was the norm in the 1790s, and help to explain why Osgoode thought (as Greenwood concluded in respect of *McLane*) that it was acceptable to "push the constructive law of treason to new limits."[116] To the extent that Osgoode spent time musing about Westminster-based common law, he seems to have concluded that some of it could and perhaps should be pushed to new limits. In that connection, it bears recollection that an identifiable and unified English common law would not crystalize in Britain until several generations after Osgoode's tour of colonial duty, which explains some of the discretion he thought he had as a jurist. In England, the seventeenth and eighteenth-century persistence of regional legal customs is one indicator of delayed nationalization of the common law.[117] The same can be said of the North American reception of clusters of regional metropolitan law during the same period.[118] Nineteenth-century projects of legal consolidation, such as the standardization of law teaching in Britain's universities, the zenith of treatise writing, and the geographic diversification of central courts, are three additional indicators of a belated crystallization of imperial common law in its home jurisdiction.[119] It bears further recollection that Osgoode was,

116. Compare Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge, UK: Cambridge University Press, 2008) 31-57; Rupert Cross & JW Harris, *Precedent in English Law* (Oxford: Clarendon Press, 1991) 24-35; Frederick G Kempin, "Precedent and *Stare Decisis*: The Critical Years, 1800-1850" (1959) 3:1 Am J Leg Hist 28.

117. See generally Brodie Waddell, "Governing England through the Manor Courts, 1550-1850" (2012) 55:2 Historical J 279; Andrea C Loux, "The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century" (1993) 79:1 Cornell L Rev 183; Carolyn A Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (New York: Oxford University Press, 1991) 28-56, 215-17.

118. See generally Richard J Ross & Philip J Stern, "Reconstructing Early-Modern Notions of Legal Pluralism" in Lauren Benton & Richard J Ross, eds, *Legal Pluralism and Empires, 1500 to 1850* (New York: New York University Press, 2013) 109; David Grayson Allen, *In English Ways: The Movement of Societies and the Transferal of English Local Law and Custom to Massachusetts Bay in the Seventeenth Century* (Chapel Hill: University of North Carolina Press, 1981); Julius Goebel, "King's Law and Local Custom in Seventeenth-Century New England" (1931) 31:3 Colum L Rev 416.

119. See generally Christopher W Brooks & Michael Lobban, "Apprenticeship or Academy: The Idea of a Law University, 1830-60" in Johnathan A Bush & Alain Wijffels, eds, *Learning the Law: Teaching and the Transmission of Law in England, 1150-1900* (London: Hambledon Press, 1999) 353; David Sugarman, "A Hatred of Disorder: Legal Science, Liberalism, and Imperialism" in Peter Fitzpatrick, ed, *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991) 34; W Wesley Pue, "Guild Training vs. Professional Education: The Committee on Legal Education and Law Department of Queen's College, Birmingham in the 1850s" (1989) 33:3 Am J Leg Hist 241.

by professional background, a draftsman of functional instruments in equity during a period when chancery courts often welcomed progressive creativity.[120] That may be the attitude he brought to the authorship of colonial legislation, ordinances, and (notwithstanding few opportunities and little apparent interest), judicial decision making.

In respect of Osgoode's penchant for symbolism or fiction, it is noteworthy that he added the "e" to his surname in an ostensive attempt to distinguish himself from "lower-order" Leeds hosiers to whom he was related by descent.[121] He also touted his close relationship with Lower Canadian Church of England Bishop Jacob Mountain, which acted as a substitute for his family's similarly friendly relations with British Methodist leader John Wesley.[122] But occupancy of the Duke of York's former apartments following his 1802 return to Britain may have been Osgoode's symbolic *ne plus ultra*. That living arrangement seems to have given rise to a persistent but fictitious rumor that he was an illegitimate son of King George II.[123]

IV. REPRESENTATIVENESS OF MARGINALIA

A lack of correspondence with sibling judges like James Monk, Jonathan Sewell, and Francois Baby suggests that Osgoode did not regard leadership of the Canadian judicial bench as a priority. And sixty-some personal letters written by him to Whitehall during his decade-long chief justiceships, containing merely three references to legal literature or case law, show that court-made law was not one of his consuming vocations. Osgoode's corrections of punctuation and spelling in four volumes of Comyns' *Digest* indicate that he read those books, but his provision of more sweeping marginal commentary in what were sometimes condescending and cavalierly sarcastic tones implies that he had

120. For general descriptions of the "legal" context in which Osgoode worked in equity, see Adam S Hofi-Winograslow, "Parents, Children, and Property in Late-18th Century Chancery" (2012) 32:4 Oxford J Leg Stud 741; Dennis R Klinck, *Conscience, Equity, and the Court of Chancery in Early-Modern England* (Farnham, UK: Ashgate, 2010); Henry Horwitz & Patrick Polden, "Continuity or Change in the Court of Chancery in the Seventeenth and Eighteenth Centuries" (1996) 35:1 J British Studies 24.

121. See Mealing, *supra* note 1.

122. See *e.g.* Osgoode to John King (February 4, 1799) in COA, *supra* note 58. See generally Todd Webb, *Transatlantic Methodists: British Wesleyans and the Formation of an Evangelical Culture in Nineteenth-Century Ontario and Quebec* (Montreal: McGill-Queen's University Press, 2013) at 17-69; DC Masters, "G.J. Mountain: Frontier Bishop" (1963) 42:1 Can Historical Association 89.

123. See Mealing, *supra* note 1.

limited professional reverence for legal doctrine or publicists (including other judges). A near-comprehensive lack of primary sources depicting Osgoode at work as a judge may be partly due to the vicissitudes of storage and destruction of court records over time, but it must also have to do with the fact that he did not undertake much Canadian judging. Despite this article's best-laid plans, Osgoode's *Digest* marginalia could not readily be compared to his judicial work as part of a contextualized examination of the reception of imperial law. Instead, the Chief Justice was found to have been a visible executive and legislative councilor, and a productive statutory draftsman. He was selective in his parliamentary, administrative, and judicial adoption of imperial law for the Canadas, and self-assured when bargaining about that process with himself and others.

How typical or historically significant is this story about the transmission of metropolitan law in the second British Empire, motivated initially by Osgoode's sometimes sharp musings and lengthy silences in the margins of a set of eighteenth-century English law books? And how much change over time is revealed by this account, as the Canadian colonies became more politically and economically stable in the wake of the *Treaties of Paris*? One response to those questions is that too little is known about Osgoode's service in the Canadas to appraise his importance as a statesman in anything other than a tentative fashion. His veneration through the later naming of local institutions and landmarks after him was arguably serendipitous. Toronto's Osgoode Hall, for example, was constructed by the Law Society of Upper Canada in the late 1820s as a dormitory for out-of-town law students who were in the provincial capital to "keep [judicial] term" or take the Society's bar admission examinations. It was remote from Toronto's center, outside its municipal limits, and cramped.[124] Several decades would pass before the Hall was rebuilt and expanded as an urban, Victorian palace of justice. By that time, its label had presumably stuck. Osgoode's other named legacies seem to have followed in sequence and perhaps inexorably from that one, although no one appears to have provided a plausible, published explanation for the naming of Ottawa's Osgoode Township.[125]

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124. See generally Christopher Moore, *The Court of Appeal for Ontario, 1792-2013* (Toronto: University of Toronto Press, 2014) 3-38 [Moore]; JD Honsberger, *Osgoode Hall: An Illustrated History* (Toronto: Dundurn Press, 2004) at 115-40; G Blaine Baker, "Legal Education in Upper Canada: The Law Society as Educator, 1785-1889" in Flaherty, *supra* note 46 at 49.

125. The *Ottawa Citizen* has suggested that the Township was named to commemorate an 1803 Quebec City judicial decision by Osgoode that struck down slavery in that jurisdiction. But Osgoode left Lower Canada in 1801, and no such judgment seems to exist. See "Courageous Settlers First Located in Carleton Back in 1818", *The Ottawa Citizen* (28 April 1953), A20.

The representativeness of this short and slightly unconventional account of the colonial reception of imperial law and government practices is similarly hard to assess. Detailed accounts of post-reception cases in which issues of transplantation of law were litigated in British North America have begun to appear.[126] Those internal studies tend, perhaps naturally, to be methodologically and conceptually narrower than less common, socially oriented, and sometimes extra-legal ones that have been undertaken.[127] This article adds to both of those kinds of accounts by inserting into histories of reception of law the ambivalence toward English common law on the part of a leading architect and manager of a reception infrastructure. It is tempting to conclude that formalistic views of the transmission of imperial law to Canada are time-bound products of late-nineteenth-century legal positivism and anglophilia, rather than reliably delivered inheritances from eighteenth-century normative pluralism.[128] In interpersonal relations or politics, Osgoode himself was not a franco-phobe or any other obvious kind of nativist (although he did not care for 'Yankees'). He did, however, think that social planning and statal order would be best advanced through British-inspired executive and legislative processes.

There have been several companion studies of 'political' action in public and judicial spheres by British North American judges, and the censorship of that

126. See *e.g.* Bernard J Hibbitts, "Her Majesty's Yankees: American Authority in the Supreme Court of Victorian Nova Scotia, 1837-1901" in Philip Girard, Jim Phillips & Barry Cahill, eds, *The Supreme Court of Nova Scotia, 1754-2004: From Imperial Bastion to Provincial Oracle* (Toronto: University of Toronto Press, 2004) 321; H Robert Baker, "Creating Order in the Wilderness: Transplanting the English Law to Rupert's Land, 1835-51" (1999) 17:2 L & Hist Rev 209; Barry Cahill, "How Far English Laws are in Force Here: Nova Scotia's First Century of Reception Jurisprudence" (1993) 42 UNBLJ 113.

127. See *e.g.* Dale Gibson, *Law, Life, and Government at Red River*, vol 1 (Montreal: McGill-Queen's University Press, 2015); Philip Girard, "British Justice, English Law, and Canadian Legal Culture" in Phillip Buckner, ed, *Canada and the British Empire* (Oxford: Oxford University Press, 2008) 261; Jerry Bannister, *The Rule of the Admirals: Law, Custom, and Naval Government in Newfoundland, 1699-1832* (Toronto: University of Toronto Press, 2003) at 141-86.

128. See generally Sylvio Normand, "Une thème dominant de la pensée juridique traditionnelle au Québec: la sauvegarde de l'intégrité du droit civil" (1987) 32 McGill LJ 557 [Normand, "Une thème dominant"]; G Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3:2 Law & Hist Rev 219; RCB Risk, "Sir William Ralph Meredith, CJO: The Search for Authority" (1983) 7:3 Dal LJ 713.

behavior.[129] But the activity of these judges was not quite the kind of conventional political activity in which Osgoode was engaged. Perhaps more to the point, scattered observations have recently been made about the contributions of colonial chief justices as statutory draftsmen or legislative managers. There is not, however, enough of that commentary to appraise Osgoode's representativeness as a parliamentarian or as a gubernatorial confidant.[130] Among those commentators, Susan Buggey has concluded that,

> as the sole fully-trained jurist in office for many years, [mid-eighteenth-century Chief Justice Jonathan Belcher] is credited with having drafted the laws passed by Nova Scotia's first and subsequent legislatures. The very small number of laws rejected on technical grounds by the English law officers testifies to his skill and attentiveness. Belcher's substantial legal library as well as his notebooks and long experience are also evident in his revision and annotation of the first volume of Nova Scotian laws, published in 1767 by Robert Fletcher, and in his supervision the following year of an index of English legislation acknowledged to extend to the colonies.[131]

This resonant commentary invites inter-colonial collation. Ideally, expansion of those comparisons to seaboard colonies of Britain's first empire like Massachusetts, New York, and Pennsylvania should also be undertaken. The relevant questions for those inquiries would be about the frequency with which draft legislation was introduced to parliament through the legislative council, and who brought that legislation forward.[132] One would also like to

129. See *e.g.* Jim Phillips, "The Impeachment of the Judges of the Nova Scotia Supreme Court, 1787-1793: Colonial Judges, Loyalist Lawyers, and the Colonial Assembly" (2011) 34:2 Dal LJ 265; John McLaren, "The King, the People, the Law, and the Constitution: Justice Robert Thorpe and the Roots of Irish Whig Ideology in Upper Canada" in Constance Backhouse & Jonathan Swainger, eds, *People and Place: Historical Influences on Legal Culture* (Vancouver: University of British Columbia Press, 2003) 11; Evelyn Kolish & James Lambert, "The Attempted Impeachment of the Lower Canadian Chief Justices, 1814-1815" in Greenwood & Wright, *supra* note 5 at 450.

130. See *e.g.* McLaren, *Bewigged, supra* note 67 at 34-87; Oliver, *supra* note 85; Romney, *supra* note 46.

131. S Buggey, "Jonathan Belcher" in *DCB*, *supra* note 1, vol 4.

132. For literature that begins that work, see *e.g.* Frederic H Guild, "Legislative Councils" (1943) 36:5 Law Libr J 169; William Seal Carpenter, "Separation of Powers in the Eighteenth Century" (1928) 22:1 American Political Science Rev 32; Franklin Lafayette Riley, *Colonial Origins of New England Senates* (Baltimore, Md: Johns Hopkins University Press, 1896); Charles Paul Hoffman, *The Abolition of the Legislative Council of Nova Scotia, 1925-1928* (LLM Thesis, McGill University Faculty of Law, 2011) [unpublished]. Compare Patrick O'Brien, "Judges and Politics: The Parliamentary Contributions of the Law Lords, 1876-2009" (2016) 79:5 Mod L Rev 786; Kenneth F Ledford, "Judicial Independence and Political Representation: Prussian Judges as Parliamentary Deputies, 1849-1913" (2000) 25:4 L & Social Inquiry 1049.

be able to say more about late-eighteenth-century statutory draftsmanship at large, but existing studies of precedent books for legislation and manuals for the enactment of statutes have tended to focus on the mid-Victorian era, rather than the late Georgian period that is the focus of this article.[133]

Shifting interpretive ground slightly, it appears that non-judicial dispute settlement mechanisms like charivaries, tarring and feathering, whitecapping, religious shunning, and duels were important parts of turn-of-the-nineteenth-century British North American normativity.[134] 'Low' state law administered by justices of the peace also seems to have played a significant part in those communities' affairs, a role that Osgoode expanded with his *Marriage Act* and *Judicature Act*.[135] Moreover, privately based arbitral decision making has recently been shown to have had more prominence in the Canadas than was traditionally thought.[136] But not much is yet known about early executive, legislative or administrative processes, and that is a gap to which this study of law book marginalia has drawn unanticipated attention. The seemingly ahistorical emphasis in modern writing about legal history continues to be on 'high' state

133. See *e.g.* Gavin Drewry, "Lawyers and Statutory Reform in Victorian Government" in Roy MacLeod, ed, *Government and Expertise: Specialists, Administrators and Professionals, 1860-1919* (Cambridge: Cambridge University Press, 1988) 27; Fred Bowers, "Victorian Reforms in Legislative Drafting" (1980) 48:4 Leg Hist Rev 329; AH Manchester, "Simplifying the Sources of the Law: Lord Cranworth's Attempt to Consolidate the Statute Law of England and Wales" (1973) 2:3 Anglo-Am L Rev 395.

134. See *e.g.* Eric H Reiter, "From Shaved Horses to Aggressive Churchwardens: Social and Legal Aspects of Moral Injury in Lower Canada" in Baker & Fyson, *supra* note 25 at 460; Peter Karsten, *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand, 1600-1900* (Cambridge, UK: Cambridge University Press, 2002); Lynne Marks, "Railing, Tattling, and General Rumour: Gossip, Gender, and Church Regulation in Upper Canada" (2000) 81:3 Can Historical Rev 380; Cecilia Morgan, "'In Search of the Phantom Misnamed Honour': Dueling in Upper Canada" (1995) 76:4 Can Historical Rev 529.

135. See *e.g.* Paul Craven, *Petty Justice: Low Law and the Sessions System in Charlotte County, New Brunswick, 1785-1867* (Toronto: University of Toronto Press, 2014); Donald Fyson, *Magistrates, Police, and People: Everyday Criminal Justice in Quebec and Lower Canada, 1764-1837* (Toronto: University of Toronto Press, 2006); Susan D Lewthwaite, *Law and Authority in Upper Canada: The Justices of the Peace in the Newcastle District, 1803-1840* (PhD Thesis, University of Toronto, 2000) [unpublished].

136. See *e.g.* Paul Craven, "Imagining a Low-Law History of Labour Arbitration in Ontario" (Osgoode Society Legal History Workshop delivered at the University of Toronto, 1 October 2014); Michel Morin, David Gilles & Arnaud Decroix, *Les tribunaux et l'arbitrage en Nouvelle-France et Québec de 1740 á 1784* (Montreal: Édition Thémis, 2012); David Gilles, "L'arbitrage notarié, instrument idoine de conciliation des traditions juridique après la conquête britannique" (2011) 57:1 McGill LJ 135.

law in adjudicative settings.[137] That is so despite early cautions against that focus by several prominent Anglo-American historians.[138]

V. CONCLUSION

Osgoode believed in the governmental primacy of enlightened and duly appointed men, rather than the strict rule of court-made law, which may account for the sometimes arresting character of marginal musings in his library books. In that respect, Hay's assessment of Osgoode's judgment in *McLane* rings more or less true across a range of Osgoode's writings and actions (despite its slightly modern, rule-of-law hue).[139] That resonance is rooted in the Chief Justice's apparently limited respect for and embrace of Westminster-based common law. Perhaps most revealingly, Osgoode thought that mere symbolism in law, politics, and life could often be pragmatic and powerful.

This article is not intended to be a biography of William Osgoode, or an institutional study of early Canadian superior courts. Those topics are incidental to inquiries into the role of imperial legal literature and book annotations in the transplantation of metropolitan law. Nor is this article intended to be iconoclastic. An incompletely formed late-eighteenth-century English common law, the selective and symbolic character of a colonial reception statute, the inchoate nature of the Anglo-American doctrine of *stare decisis*, and a deliberately incomplete separation of governmental powers that enabled ranking judges to allocate greater attention to managerial and legislative functions of the state than to judicial ones are, instead, this article's ultimate or default subjects. In that respect, this article (and not just commentary on empty Comyns margins) is largely about dogs that did not bark in the night.[140] Osgoode appears to have been more like an executive partner in the administration of two British colonies than a judicial medium for the importation or application of legal doctrine. His marginal annotations in Comyns' *Digest* may not be indispensible to inquiries into colonial transplants of imperial law, but they do support a shift in the focus

137. See *e.g.* Muir, *supra* note 47; Moore, *supra* note 124; Girard, Phillips & Cahill, *supra* note 125 at 53-139, 259-448.
138. See *e.g.* Harry W Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985); James Willard Hurst, *The Growth of American Law: The Law-Makers* (Boston: Little Brown, 1950); Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Cambridge, Mass: Harvard University Press, 1948).
139. See Hay, "Tradition, Judges, and Civil Liberties," *supra* note 82.
140. See Doyle, *supra* note 16.

of those studies from lawyerly readings of reception statutes to the material vehicles and human relations of transmission. They also suggest an approach to reception-of-law scholarship that allows for different retroactive takes on that process from one-time period to another. Osgoode's understanding of what he received of Westminster-based common law in Upper Canada was substantially different from what his mid-nineteenth-century successor John Beverley Robinson thought had been received (regional and Westminster-based English law, as part of a universalist mix of sources). Robinson's mid-century appreciation was different again from what his late-nineteenth-century successor Augustus Henry Fraser Lefroy thought had been received (monopolistic, formally-applied, English common law).[141] Similar shifts of understanding appear to have prevailed in the lower province in respect of reception provisions in the *Québec Act* and the *Civil Code of Lower Canada*.[142] Perhaps most important, Osgoode's judicial activity and inactivity and his marginal musings and silences help to highlight the historically contingent character of chief justiceships, imperial law, and legal authority. They also help to show the temporal contingency of distinctions between court based and political processes, private and public spheres of action, and corrective and distributive justice. Finally, Osgoode's deportment helps to emphasize the time-and-place specificity of the ways those concepts have been, and are, theorized.[143]

141. Compare RCB Risk, "The Law and the Economy in Mid-Nineteenth-Century Ontario: A Perspective" (1977) 27:4 UTLJ 403; Risk, *supra* note 128; RCB Risk, "A.H.F. Lefroy: Common Law Thought in Late-Nineteenth-Century Canada" (1991) 41:3 UTLJ 307.
142. Compare Jean-Guy Belley, "Une croisade intégriste chez les avocats du Quebec: *Le Revue de droit*" (1993) 34:1 C de D 183; Normand, "Une thème dominant," *supra* note 128; David Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" (1987) 32 McGill LJ 523.
143. Compare Charles Fried, *Contract as Promise: A Theory of Contractual Obligations* (Cambridge, Mass: Harvard University Press, 2015); Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012); James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford: Oxford University Press, 2006).