"FOR THE MORE EASY RECOVERY OF DEBTS IN HIS MAJESTY'S PLANTATIONS": CREDIT AND CONFLICT IN UPPER CANADA, 1788-1809

by

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ABSTRACT

This thesis is concerned with the relationship between creditor/debtor law and broader political, economic, and social relations in Upper Canada before 1812. The research reviews the history of credit relations in early Upper Canada through a critical reassessment of both the historiographic debates and available primary legal and archival sources. Recent historical writing, in seeking out the community based nature of creditor/debtor relations has often tended to overlook the extent to which social, political, and economic conflicts were also played out in the arena of credit and debt. In early Upper Canada, matters relating to credit and debt were not infrequently the focus of conflicts about constitutionalism and the rights of colonial subjects.

The thesis argues for a re-framing of the study of creditor/debtor relations to take account of the overall context of economic inequality. Feminist historical and theoretical work is drawn upon to expand conventional understandings of the economic, and to argue that local or communal based relations are not always consensual. The thesis draws a connection between social inequality, political repression, constitutional politics and the private law of property, credit, and debt. It asserts that early Upper Canadian creditor/debtor relations were expressive of the struggle over the kinds of institutions that would represent the new polity, and of a sensibility among at least some portion of the population that the rule of law should apply to a wider range of people than those who made up the elite. It is found that the role of certain financial instruments and the contents of certain court records has been misunderstood. These findings change our understanding of the 1794 court reforms in Upper Canada, which established an English-style Court of King's Bench. It is also found that debtor/creditor law, in particular the seizure of land for debt in Upper Canada (a remedy that was not available in England) impacted upon the constitutional politics of the time.
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My father, Harvey Irwin Pearlston, died in October of 1997, soon after I traveled from Toronto to Vancouver and began the course work for my LL.M. Dad wanted to study history, but there were few academic or teaching jobs for Jews in Canada in the nineteen-fifties. He became a pharmacist instead. This work is for him.
Chapter One

INTRODUCTION

This thesis is about credit and conflict during the earliest years of European settlement in Upper Canada. By focusing on conflict, it deliberately tries to undermine recent work on early modern credit relations that emphasizes credit as consensual, because it was pervasive and facilitative. I argue that because credit relations took place in a context of economic and social inequality, they were of necessity conflict ridden, even though there were also consensual elements to the system. The contrary view can be sustained only if credit relations are artificially hived off from the social, economic, and legal context and the associated power relations in which they operated.

Although often extra-judicial in the sense that credit arrangements were private agreements in which disputes could often be settled without recourse to the courts, credit relations were also “subject to certain conditions, structures of rights and duties within the coercive framework of the law.” Moreover, power relations associated with credit cannot be defined only with reference to the courts. In early Upper Canada, social and economic inequality and perceived lack of legal fairness between debtor and creditor provided a site for struggle over constitutional politics, posing the question of whether British justice would be sacrificed to the interest of elite groups. Upper Canada before 1812 therefore provides a useful microcosm for examining the role of conflict in the history of credit relations. At the same time, the focus on conflict in early Upper Canada challenges conventional ideas about consensus in Canadian history.

Writing Canadian Business Law History

Until relatively recently, much of Canadian history was written from a perspective that intrinsically assumed a Canadian past consisting mainly of a consensus-building

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exercise regarding the values and priorities of the kinds of people by and about whom most of the histories were written.\textsuperscript{2} This tendency has been particularly strong in historical writing about Upper Canada which, along with Lower Canada, constituted the central-Canadian cradle of what was “commonly designated the two founding nations until such Eurocentrism was challenged by aboriginal claims to ‘First Nations’ status in the 1980s.”\textsuperscript{3} Conventional histories of Upper Canada have minimized dissent, focusing instead on the loyalty, love of order, and deference to authority that is a real part – but only part – of the story.\textsuperscript{4} As Paul Romney wrote in regard to historical writing on post-1812 Upper Canada, “the underlying pattern of social inequity and political repression...has vanished from historical consciousness.”\textsuperscript{5} This phenomena is at least as marked for histories of the earliest years of the colony, when the institutions and ideologies that became and sustained the Family Compact were being created. As discussed in chapter five of this thesis, the vocal dissenters of the pre-1812 period have usually been dismissed as opportunists or worse.

Romney’s article, published in 1987, argued that the types riot of 1826 and the rebellion of 1837 were linked by factors that were more than “merely personal.”\textsuperscript{6} Romney argued that both events were linked to twenty years of anti-reform political violence,\textsuperscript{7} and that “the ideology of the Upper Canadian elite incorporated contradictory moods and


\textsuperscript{6}Ibid., 140.

\textsuperscript{7}Ibid.
values, some of them incompatible with the rule of law.” This was a new and controversial interpretation at the time. The controversy redounded into the field of Canadian legal history, partly because Upper Canadian legal and political culture were closely tied together, and partly because of Romney’s insistence that the idea of the rule of law was an important political factor in the early nineteenth-century. Five years later, the idea that the early Upper Canadian elite abrogated the rule of law remained sufficiently controversial for Robert L. Fraser to comment that “the charge of partiality levelled against the administration of justice...is a touchy subject still – there are those who think that raising the subject is somehow subversive.” This thesis will extend Romney’s arguments to look at elite abrogations of the rule of law in the context of private law and in the earliest period of Upper Canadian settlement. By doing so, it makes a connection between social inequality, political repression, constitutional politics and the private law of property, credit, and debt.

Historical studies of business and of business law in early Upper Canada are few, and most are written from a perspective that has much in common with the conventional, consensus-based approach to Upper Canadian history. Business history and business law history has focused on valorizing merchants by highlighting the role of mercantilism and the entrepreneur in the development of the Upper Canadian economy. The few legal

8Ibid., 115.

9The editors of the journal in which Romney’s article appeared appended a note to its first page in which they call it a “new and, we believe, important interpretation of the political culture of Upper Canada” which had even before publication “been the subject of heated debate and controversy.” Ontario History 79 (1987): 113.


histories covering this early period have contributed to this perspective by downplaying conflict in favour of either valourizing perceived development toward capitalism\textsuperscript{12} or casting debtor/creditor relations in a context of a generalized Upper Canadian 'communalism.'\textsuperscript{13} This approach bypasses any coercive aspect of legal relations. It also cuts off any consideration of the relationship between creditor/debtor law and criminal law, belying the lengthy history and ideological importance of imprisonment for debt (which was certainly practised in early Upper Canada).\textsuperscript{14} Yet early Upper Canadian creditor/debtor relations were rife with conflict; expressive of the struggle over the kinds of institutions that would represent the new polity, and of a sensibility among at least some portion of the population that the rule of law should apply to a wider range of people than those who made up the elite.

This thesis, then, is an exercise in historiography. It attempts to illuminate "the underlying pattern of social inequity and political repression" in which creditor/debtor relations were constituted by focusing on two particular aspects of those relations in Upper Canada. The first is Upper Canada's relationship to the international long credit economy as viewed through the law of commercial paper and, in particular, the under-historicized "Bon" or merchant's note, which has been perceived by historians as being a cause of the 1794 court reform. The second is the seizure of land for debt, a remedy that was not available in England. Both of these issues were surrounded by considerable political controversy, much of it focused on the role and practice of merchants and on the association between large merchants and the administrative elite. That controversy has been minimized, distorted, and even ignored by some historians. Recovering knowledge of those controversies has involved an attempt to tease out the ways that merchants have been


\textsuperscript{14}Wylie, 201-16.
depicted in contemporary sources and historical writing, and in particular to differentiate
between large and small merchants.

My goal is to use the field of creditor/debtor relations to recast the business and
business law histories of the period in relation to critical social, economic, and legal
histories. In addition to taking advantage of pre-existing critical histories and paying
attention to material conditions and power relations, a primary strategy has been to integrate
a gender analysis into the thesis. Gender "is a term feminist theorists developed to explain
how being male or female is not simply the result of biology but is socially constructed and
reconstituted."15 This simple model was soon and justifiably critiqued for its binarism,
which, by excluding the existing and ever-changing variety of gender expression, tends to
reinforce the rigidity of the masculinity and femininity that it seeks to overcome.16 In an
influential article, the historian Joan Scott defined gender in terms of "an integral
connection between two propositions: gender is a constitutive element of social
relationships based on perceived differences between the sexes, and gender is a primary
way of signifying relationships of power."17 My own analysis of gender relations is
materialist rather than post-structuralist.18 It therefore tends toward the first of Scott’s two
propositions, seeking to situate gender as constitutive of social relations, structures, and
institutions such as the state, legal relations, work, the market, the family, and the public

and Mark Rosenthal (Mississauga: Copp Clark, 1996), 1.
16For a critique of gender binarism, see Judith P. Butler, Gender Trouble: Feminism and the
17Joan W. Scott, “Gender: A Useful Category of Historical Analysis,” in Gender and the
18I agree with the poststructuralist insight that we understand the world around us only through
systems of signification, but I am not satisfied with analyses that confine themselves to those
systems. As one feminist theorist has remarked, “the fact that reality is mediated through language
does not in any rigorous sense mean that reality is, therefore, made of language.” See Teresa L.
Ebert, Ludic Feminism and After: Postmodernism, Desire, and Labor in Late Capitalism (Ann
space of liberalism’s civil society. It should be noted that this is not a one-way process, that those spheres of activity are themselves also constitutive of gender, and that, in my view, gender is a product of both discourse and material practice.

Analysis of gender as constitutive appears mainly in this first chapter, where I discuss some of the ways in which the above-mentioned institutions are gendered, and how that gendering relates to creditor/debtor relations. The body of the thesis then deals with creditor/debtor relations as they relate to other structures and institutions. There are some direct connections made to gender and to women throughout the thesis, but they are few. This is a consequence of the choice I made to study a period and place where (for reasons that will be briefly explored in subsequent chapters) women’s public participation in the polity was peculiarly muted.

There is another way in which gender analysis runs through this thesis and, because it will not be obvious, it makes sense to explain it here. One aspect of poststructuralist theory with which I have come to agree is with “a tolerance of ambiguity” which Joy Parr explicitly connects with gender history. This has to do with what Parr explains as “an inherent instability in identities – that being simultaneously a worker, a Baptist, and a father, one is never solely or systematically any of these.” But it also has to do with a distrust for the rigid categories and teleological claims of much marxist and feminist social

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22 Ibid.
theory. This distrust has grown directly through my practice of feminist theory and gender history, fed by a persistent conviction that orthodox theories and categories cannot account for the complexity of ways in which women labour, and that the closure imposed by a belief in the historical inevitability of anything militates against understanding its current dynamics. This resistance to closure should not be foreign to the practice of historians, for whom "our craft, no matter how refined, will never allow us entirely to reclaim the past worlds that are the focus of our historical imaginings." My tolerance for ambiguity and resistance of closure is, I hope, balanced by a materialist perspective which holds that the discourses (such as gender) in and through which we understand ourselves and the world are themselves the result of struggles over power and resources, and not only over how we understand those things. Incorporating a gender analysis can make it possible to destabilize the given conclusions of both neoclassical and marxist theory, often just by noticing what has been excluded from the discourse. Understanding discourses as the product of struggle can help to move forward from critique to a more explicit understanding of the practices that produce inequality.

Credit, Informality, and Private Law

Like Canadian history, the history of credit relations is sometimes written in a manner that implies a greater degree of consensus than that which existed. This is partly due to the pervasiveness of credit in different places and times, and to the ways that credit relations can be conducted non-legally and informally.

Credit is everywhere: everywhere in the private law system, everywhere in economic relations (even in the family, where it is hidden), everywhere in society. Credit is more fluid than property, especially the older forms of chattel and landed property; and it is perhaps more fluid than (although often the subject of) contract. The social and legal

\[23^{\text{Ibid.}}, 8.\]

\[24^{\text{See Rosemary Hennessy, Materialist Feminism and the Politics of Discourse (New York: Routledge, 1993).}}\]
relations that constitute and regulate property were developed in relation to **tangibles**: land and its uses, buildings, beds and bedding, clothing, household implements and tools. One could have a future interest in land, but the land itself could be looked at and walked upon, the clothing worn, the bed slept in. An infant or a married woman could not legally own or control those **things**, and intangible property forms, for example the share, came to be recognized only gradually.25

The argument is a bit more difficult to make for contract law, since contracts are not, in themselves, tangible. However, the paper on which they are written sometimes is, and this was once an essential part of the law. Contract in the modern sense of “an agreement giving rise to obligations which are enforced or recognised by law,”26 grew in part out of the medieval action of covenant. Covenant:

required the production of a sealed instrument. The agreement was enforced not because the parties had exchanged mutual promises, but because it had been made in a particular form to which the law attached a peculiar force.27

People regularly exchange mutual promises that are not legally enforceable. It was the legal enforceability of covenants (and the later forms of contract) that made them attractive and important. The role of contract in developing a civil society separate from the (then decentralized) state began very early. As Goebel put it in the 1950s, “covenant furnished the only means of placing a few barriers against the antic exercise of royal pleasure.”28

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Credit may be more informal than property and contract. By more informal, I mean less often subject to legal regulation. This does not mean that credit would not have been regulated by other means. But technical legal regulation brings a certain kind of formality that is derived from recognition by the state in some public sphere. There is evidence for the informality (non-legality) in the character of credit relations in the large number of women money lenders in medieval and early modern Europe. Deborah A. Rosen, author of a study of women, credit, and the law in late eighteenth and early nineteenth-century New York, found that women were increasingly shut out from economic activity (e.g., they could not get credit) as the legal system became more formalized. It was formal law, the law of coverture (established in England by the early thirteenth century), that stopped married women from being economically active. Under coverture, married women could not own property or make contracts, yet medieval and early modern wives were active as borrowers and lenders. Woman moneylenders usually made domestic loans to other women. Domestic loans were small and local, and usually repaid in weeks or months. Woman to woman credit transactions did not attract the scrutiny of formal legal regulation:

This informality undermined all legalistic attempts to prevent adult women, married or otherwise under the juridical 'cover' of a male, from making contractual obligations without their husbands' or other appropriate men's consent.

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32Jordan, 24.
33Ibid.
But, Jordan cautions that even informal credit relations (and even among women) were not “a love feast.” Credit networks were “always unbalanced, skewed in their reciprocity, biased toward one group or another.”

Despite these indications that credit, even when informal, could still be coercive, much of the literature on credit favours a consensual analysis that focuses on the positive aspects of the credit relationship, using either a moral economy or a straightforward pro-development approach. The first argues that credit relations were consensual, and that debtors and creditors had mutual obligations; the second that availability of credit facilitates development. Both of these assertions have some truth – there were some positive aspects in credit systems. But there were also – and remain – many negatives, and these are too often hidden among the assumptions underlying analyses that take neither economic inequality nor formal legal inequality into account when analysing credit systems. Both the development school and the moral economy school obscure some of the components and structures underlying the history of Anglo-Canadian credit relations.

Respectability, Kinship, and Patronage

There is no denying that eighteenth and early nineteenth-century credit networks were community-based, and dependent on personal connection and knowledge. Credit, “in the widest sense,” means “trustworthiness.” Credit was a communal system, with a heavy moral element derived from the importance of personal reputation. Reputation in its turn is affected by factors not directly related to business behaviour. In the late eighteenth and early-nineteenth century:

The behaviour of the entrepreneur, his family and household as well as their material setting, were tangible indications of financial as well as moral probity. The couplet coined for the late eighteenth-century gentleman farmer could have equally applied to any family enterprise:

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34 Ibid., 30.
35 Ibid., 27.
36 Ibid., 25.
Keep up appearances, there lies the test
The World will give thee Credit for the Rest37

This kind of scrutiny placed demands for specific kinds of behaviour – often gender-based – in order to prove credit-worthiness. Those demands helped to re-form familial relations by valorizing new and separate spheres of activity for women and for men. Women were to become the angel in the house, crucibles of virtue and religion. Men were to be active, creative, entrepreneurial, in charge of enterprises and making money. “Such expertise was an essential part of the middle-class challenge to the aristocratic male whose skills lay with gambling, duelling, sporting and sexual prowess.”38 These middle class men and their families, with their new claims to gentility, were an important part of the early Upper Canadian business class.39 Their challenge to, and subsequent cohesion with, the aristocratic values of the colony’s administrators are important to the story told in this thesis.

Kinship and other personal ties were one of the means used by traders to surmount the problem of “trusting” over lengthy periods and long distances in what is known as the “long credit” system.40 With the exception of a few chartered trading companies, the partnership was the key enterprise form in the period. In contrast to companies

37Davidoff and Hall, 208.
38Ibid., 205.
40“Long credit” refers to credit extended for a long period, usually a year or more, and often over a long distance as well. Long credit arrangements were usual between merchants in the home country and their customers in the colonies. The working of the long credit system is explained in detail in Jacob M. Price, Capital and Credit in British Overseas Trade: the View From the Chesapeake, 1700-1776 (Cambridge: Harvard University Press, 1980). See also Chapter 3, below.
(corporations), in which the central element is “not specific people but a capital fund,” the central element of a partnership is its partners. Davidoff and Hall describe how the middle-class business partnership developed from the household in which family members and servants together performed all productive and subsistence labour. “If expansion was required this unit was reproduced by taking a partner.... Much like a family member, every partner could act as an agent for the other but was also liable for all debts.” Quoting Holdsworth, they add that “partnerships were in some sense brothers who represented each other.”

This pattern of kinship or quasi-kinship ties appears to have held for dealings between the old world and the new, as well as between Quebec and Upper Canada. Merchant firms were often represented in frontier areas by their employees or junior partners. Robert Hamilton provides one example. Hamilton, who became one of the two richest men in early Upper Canada, was born in Scotland, the son of a Presbyterian minister. He may have “followed in the family footsteps and at least began a degree at the University of Glasgow.” Hamilton travelled to Upper Canada in 1775 as an employee of the Ellice Brothers, who “had long been major figures in the fur trade and army supply” and had their head office in London, with a branch in Montreal. Richard Cartwright, Hamilton’s business partner and the other richest man in early Upper Canada, was a United Empire Loyalist from Albany, New York, where his father had been “a pillar of the

42 Davidoff and Hall, 201.
43 “Quasi-kinship” is a shorthand way of saying that people would-develop family-like ties with business partners to whom they were not related. For example, Quebec firms probably oversaw the education of their up-country merchants’ children. See the discussion of the Cummings family in chapter 3.
45 Wilson, Enterprises, 18.
46 Ellice Brothers were tied to Phyn, Ellice and Company, a fur trade concern which was founded in the American colonies in the 1760s. See Wilson, ibid., 59; J.K. Johnson, “Richard Duncan,” Dictionary of Canadian Biography V: 281-2.
community” before the Revolutionary War. The younger Cartwright left New York for Quebec (by this time a British colony) in 1777 after his pro-British activities attracted attention from local Patriot organizations. He spent two years in a loyalist regiment before entering into partnership with Hamilton in 1780.

Hamilton and Cartwright both hailed from the well-educated upper echelons of the middle class, a group that from the late eighteenth century was able to draw on its demonstrated merit to press its claims to gentility. Hamilton and Cartwright operated on the Niagara peninsula, where the Indian Department and the supply system for the garrisons were rife with corruption. A major scandal broke about a year after they founded their firm. In its aftermath:

...the military were particularly sensitive to the respectability and patriotism of their suppliers. Hamilton and Cartwright possessed both in ample quantities. Relative to their competitors, they came from genteel backgrounds.... Both shared the language and the assumptions of the educated officer elite of the regular army and the officers felt comfortable in dealing with them.48

Patronage was as important as respectability. Cartwright was particularly well connected. Back in Albany, his father had been the personal supplier to the powerful loyalist Johnson family, who dominated the British Army’s Indian Department before and during the Revolutionary War. The elder Cartwright “was a client of the family patronage system. The Johnsons regarded the younger Cartwright as a protégée” and recommended him to Haldimand, the Governor and commander-in-chief of the British forces in Quebec.49

Hamilton also had connections – with the Montreal fur trade, developed by him since his 1775 arrival in Quebec.

Although the importance of respectability and patronage is superficially similar to the requirements for business success in England, the Upper Canadian context was very

48Wilson, ibid., 20.
49Ibid., 17-8.
different. Prior to the Revolutionary War, with the exception of fur trade posts, there was no white settlement in Upper Canada. The war led to an expanded military presence and an influx of refugees, many of whom were aboriginal people;\textsuperscript{50} important allies for the provisioning of whom the Indian Department was responsible. In contrast, the government was at first unwilling to assist the wives and families of white loyalist men, most of whom were in the military. Refugees arrived from 1778,\textsuperscript{51} but white settlement was discouraged until 1780, when the Governor became “convinced that it would be useful to allow a few families to settle around the posts in the upper country to raise food for the garrisons.”\textsuperscript{52} This market was tiny; a small population of disempowered refugees. The big money came from provisioning the Indian Department and the garrisons, not from trade with the settlers. In the chaos of wartime, the kind of respectability that translates into available credit was not always available to the refugees, the more so because most of them were women and children, often far away from their male relatives.\textsuperscript{53} Government spending continued to dominate the economy even after the war. The patronage of the government and the military was of primary importance to mercantile activities.

**Credit and Conflict in Community**

According to Howard Baker, author of one of the existing studies on creditor/debtor relations in early Upper Canada, “for most historians, community implies, first, the existence of a ‘common space...’”\textsuperscript{54} Community also requires a network of social relations, characterized by mutuality, a common purpose, and shared values.\textsuperscript{55} Craig Muldrew’s 1993


\textsuperscript{51}Ibid.

\textsuperscript{52}Lillian F. Gates, Land Policies of Upper Canada (Toronto: University of Toronto Press, 1968), 11.

\textsuperscript{53}On refugee conditions and gender differences among loyalists, see chapter 2.

\textsuperscript{54}H. Baker, 90.

\textsuperscript{55}Ibid, 91.
study, “Credit and the Courts: Debt Litigation in a Seventeenth-Century Urban Community” provides a portrait of creditor/debtor relations in one such setting. Muldrew’s work on local court records in the English town of King’s Lynn from 1683-1686 initially appears to be a strange choice as a comparator for Baker’s study of Upper Canada between 1785 and 1815. I have two reasons for this choice. First, Muldrew provides a dense portrait of creditor/debtor relations in a communal setting. This is a useful background for the discussion of Upper Canada. Second, both Baker and Muldrew appeal to the explanatory power of the concept of “moral economy” in order to carry out their analyses and justify their conclusions, whereas I will argue that relying too much on the moral economy notion tends to skew interpretations of credit relations too far toward the consensual, erasing the conflict that was also always present.

Muldrew’s data on King’s Lynn is interesting for what it reveals about who was engaging in litigation and how often: almost every household in town -- even the poorest -- was involved, and often repeatedly. Because of the prevalence of litigation, the large number of poor people among the litigants, and the fact that most of it went no farther than the initial registration of a complaint, Muldrew interprets the credit system as more consensual, communal and benign than I think his data can support. In King’s Lynn, poor people often sued richer people, and they made up a large proportion of plaintiffs. However, poor people were the largest group in the town, so, while it is interesting that they litigated at all, once they did so it is not surprising that they made up the largest group of participants.

The prevalence of litigation is interesting in itself, but it is difficult to tell how interesting because the majority of the records studied are of cases that did not move

57Muldrew, “Credit and the Courts”, ibid., 30-1.
58Ibid., 34.
59Ibid., 33.
beyond the complaint stage. This can tell us something about the credit system. Most of the disputed debts were for unpaid sales credit or unpaid wages. Buying, selling, and employing on the basis of ongoing credit was prevalent because cash was in short supply.\(^{60}\) In addition, the community was relatively stable (in comparison to early Upper Canada), with trust extended not only to respectable traders, but daily and in small amounts that were both indicative of and helped to foster the bonds that held people together.\(^{61}\) However, the prevalence of litigation does not necessarily tell us anything about credit as a specifically legal relation in King’s Lynn. There is simply not enough data provided to enable a qualitative assessment of how and why the law was used. For example, registering a complaint against a debtor may have been used as a way to register the debt, as the promissory note was used by Upper Canadian storekeepers to consolidate and provide evidence of the debts of delinquent customers.\(^{62}\) Insisting that a customer sign a promissory note was a way for the creditor to up the ante, but this was a long way from an actual lawsuit. A similar pattern may be indicated by Muldrew’s findings for King’s Lynn.

Muldrew does portray a social and economic situation in which credit—trusting—thrived in a small community where “most people lived in close proximity,” “there would have been a great deal of personal familiarity in market dealing,” and accessible courts helped members of the community to maintain their trust in one another.\(^{63}\) But proximity and familiarity tells us nothing about the unequal power relations in that proximate and familiar setting, and the existence of an accessible court system provides only quantitative

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\(^{60}\)Ibid., 25.


\(^{63}\)Muldrew, “Credit and the Courts,” 36.
evidence that people of diverse economic levels were able to take advantage of the same legal form and procedures.\textsuperscript{64}

In fact, Muldrew’s data can be understood as revealing considerable inequality. He divided the people involved in litigation into eight wealth categories. The largest category, 64 percent, is of course the poorest group. In this case, the poorest group of litigants may have been quite poor. Muldrew used tax records to develop his wealth categories, and the people in the lowest wealth category did not appear on any of the tax lists. This would have included an unknown number of people who did not live in the town, but it would also have included most of the town’s poor (since virtually all households were involved in litigation). The next category had 12 percent of the litigants. This group did appear on the tax lists, and they would have had housing worth £5 or less a year or £25 or less worth of goods.\textsuperscript{65} The wealthiest category comprised only 1 percent of the litigants. People in that category had housing worth more than £40 and more than £500 worth of goods.\textsuperscript{66}

For Muldrew, “what is noticeable about these figures is how similar the distribution of defendants by wealth category is to the wealth distribution for the population as a whole.”\textsuperscript{67} That is, people got sued in proportion to their representation in the population of litigants. However, distribution of plaintiffs is skewed. Although the plaintiffs from the larger and poorer wealth categories initiated the largest total number of law suits, individual plaintiffs in the smallest, wealthiest categories were far more likely to initiate litigation than were individuals in the poorer categories. According to one of Muldrew’s tables, in the three years he studied, there were 571 plaintiffs from the poorest category, and they initiated a total of 922 law suits, for an average of 1.6 per person. In the same period, there


\textsuperscript{65}Muldrew, “Credit and the Courts,” 31.

\textsuperscript{66}Ibid., 32-3.

\textsuperscript{67}Ibid., 34, my emphasis.
were 14 plaintiffs from the wealthiest category, and they initiated a total of 206 law suits, for an average of 14.8 per person.\textsuperscript{68}

Muldrew acknowledges that rich people initiated litigation more frequently than poor people,\textsuperscript{69} yet he emphasizes the \textit{even} distribution of defendants far more than the \textit{uneven} distribution of plaintiffs, concluding that his calculations “demonstrate that the wealthy did not prey upon poor defendants.”\textsuperscript{70} “Prey upon” is a loaded term, but I disagree with Muldrew's emphasis. It is difficult to understand why he presented different calculations for plaintiffs and defendants. I think part of the explanation might be a failure to problematize the communal kind of credit system that he depicts, or to criticize the easy assumption that because a system is small and local, there is little conflict. Muldrew argues that:

\begin{quote}
in social and economic terms, credit was a levelling force within the community. Rich and poor alike were bound by reciprocal bonds of indebtedness, and needed to trust one another. True, the poor were more indebted to the wealthy, and credit did not ultimately alter the power of wealth, but the wealthy were still indebted to the poor to a considerable degree.\textsuperscript{71}
\end{quote}

This is probably accurate, at least in part. In fact, it provides useful insight into the formation of legal and market equality, so long as we keep in mind that this equality was available only to those who had equal access to those formal spheres. But does this mean, as Muldrew asserts, that “in many ways members of the community had equal potential as both economic and moral agents”\textsuperscript{72}

I think, on the contrary, that economic and moral agency should be distinguished. Certainly the trust involved in this kind of communal credit system may have levelled the playing field of moral agency in the sense that persons of very different economic positions

\textsuperscript{68}Ibid., 34.
\textsuperscript{69}Ibid., 33.
\textsuperscript{70}Ibid., 34.
\textsuperscript{71}Ibid., 34-6.
\textsuperscript{72}Ibid., 36.
appear to have considered each other worthy of trust. This probably accounts for some of what Muldrew considers to be the socially levelling effect of credit. He is less convincing regarding its economic effect. In particular, he does not bring a critical analysis to the fact that large numbers of relatively affluent people were indebted to members of the poorest group, that is, they were not paying what they owed for the goods and services provided by the poorest people in town; presumably those who could least afford to have their assets tied up in the hands of others. The reciprocal bonds of indebtedness highlighted by Muldrew operated in a context of economic inequality. The fact of economic inequality should not be easily rationalized away. Equality of opportunity – in this case, presumed equal ability to get credit and to access the courts – does not mean economic equality. Missing from Muldrew’s assertions regarding how the rich did or did not use their economic power is the understanding that bonding, communalism, or shared moral values do not preclude unequal power relations. On the contrary, those factors often co-exist with coercive social and economic relations; the patriarchal family being a prime example of the phenomenon.

In contrast to Muldrew’s assertion about the necessity of neutral and accessible courts to the maintenance of the community trust that enabled a balanced credit system, Howard Baker argues in his thesis, “Small Claims, Communal Justice and the Rule of Law in Kingston, Upper Canada, c.1785-1819”73 that ‘rule of law ideology’...grew in influence as the hold of communalism in Upper Canada began to weaken around the turn of the nineteenth century in the face of demographic change and the increasing importance of market forces in the Provincial economy.”74 In other words, for Muldrew, neutral and accessible courts – a central component of ‘rule of law ideology’ – are an important condition for the maintenance of a communal credit system. For Baker, however, the existence of that kind of legal ideology is an indication that a communal credit system is no

74Ibid., 10-11.
longer in place. Baker in fact pays considerable attention to establishing that “the law” was not an important factor in early Upper Canadian creditor/debtor relations; that “insofar as it affected small claims” the law “did not occupy a crucial niche within the social and economic order,” and, as “one instrument among many for the processing of disputes,” was, finally, irrelevant. Baker and Muldrew both take approaches that minimize unequal power relations by attempting to demonstrate that the formal representation of creditor/debtor relations in litigation indicates a tendency toward balanced power relations. Both scholars argue that because a large proportion of adult men were involved in litigation and not all of them were from economically privileged sectors (from which it follows that, although plaintiffs usually won, the rich did not always win because not all of the plaintiffs were rich), the courts were not dominated by any particular class or group. We have already seen this in Muldrew’s assertions regarding the even distribution of defendants throughout the population. Baker echoes Muldrew when he notes that “plaintiffs...were more likely than their rivals to walk away with a judgment in hand.” He asks the question, “did this somehow reflect an imbalance in power relations in local society,” then answers it by counting the number of known merchants among the litigants, along with people from other groups. He concludes that “small claims litigation in Kingston was an activity initiated by people from many walks of life, not a process dominated by the privileged.”

75Ibid., 105.
76Ibid., 106.
77Ibid., 107.
78Baker’s statistics show that in 1791 and 1792, 8.4 per cent and 5.8 per cent, respectively, of adult males in the district appeared in the records of the weekly Court of Common Pleas. H. Baker, 58-9. That court had jurisdiction for up to £8. There was only one Court of Common Pleas for each of the four districts that comprised Upper Canada prior to 1794. In that year, the courts were re-organized and the weekly Court of Common Pleas was replaced by Courts of Request, several in each district, and with a jurisdiction of up to £2. In 1817, 1818, and 1819, approximately 24 per cent, 24.8 per cent, and 30.5 per cent, respectively, of the adult male population appeared in the records of the Court of Request serving the town of Kingston and its environs. Ibid, 59.
79Ibid., 62.
80Ibid., 65.
As with Muldrew, Baker depends on a theoretically formalist analysis. Both of them separate creditor/debtor from other economic relations, removing them from the overall context of economic inequality. Counting how many rich people or how many merchants appeared among plaintiffs and defendants relative to members of other groups or how successful they were when they appeared tells us only that economically and socially dominant groups were not – at that time and place – using the legal system as a weapon with which to out-and-out rob the poor, and that the legal system had legitimacy for at least some of the non-rich. It misses the point that the credit system is a system, and it is part of an unequal economic system that chugs along without being much affected by the action or inaction, the advantage or disadvantage, or particular individuals. Creditor/debtor relations can be thought of as egalitarian only if viewed formally – that is, in their form of negotiation, agreement, and equal access to the courts, and outside of their context in economic inequality. An exclusive focus on law suits puts too narrow a parameter around the conflicts inherent in creditor/debtor relations in an unequal economic system.

When the content of that form is included in an evaluation of the system, the case for its egalitarianism becomes more difficult to make out. Baker and Muldrew have established that small claims litigation was both widespread and initiated by a heterogeneous population. Having done so, the question should not be, as Baker puts it, whether small claims litigation was “the monopoly of a mercantile elite determined to bludgeon a suffering debtor class into submission” or “an activity which attracted plaintiffs from varied walks of life.” Either conclusion would be simplistic. There is, instead, a myriad of other questions to be asked. For example, why were plaintiffs from a variety of

81 This may have changed in Upper Canada a few decades later. See Paul Romney on the Bridgewater Works and Chaudière Falls scandals in Romney, Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899 (Toronto: The Osgoode Society, 1986), passim.

82 The economic system in early Upper Canada was clearly unequal in that some people were developing great concentrations of wealth, while others were losing. Whether this system was specifically capitalist is a vexed question. The difficulties of defining the economic relations of the past in terms of capitalism are addressed in chapter six.

83 H. Baker, 10.
classes and groups (in King’s Lynn, even the very poorest) “attracted” to small claims litigation? If poorer people routinely sued richer people, why were the richer people not paying their debts? What was the impact on poorer people of being forced to litigate? What did it cost them in terms of time and inconvenience? How did the credit system, in its formal and its informal aspects, contribute to other social and political processes, for example, gender differentiation or state formation? The kind of historical data discovered and presented by Muldrew and Baker should be only the beginning of the inquiry.

**Credit And ‘Moral Economy’**

To my mind, there has been too easy an elision between a situation of communal/moral regulation and an assumption of lack of conflict, as well as between legal regulation and an assumption of conflict. Conflict can be a central element of communal or moral regulation; whether a simple conflict between two parties or groups, or conflict between one group among whom there is a customary consensus and one or a few individuals or another group.

Similarly, the existence of communal, morally regulated creditor/debtor relations does not mean that there was no inequality or conflict in the system. The notion of “moral economy” was developed by E.P. Thompson as an aid to understanding specific behaviours of eighteenth-century English crowds who were engaged in food riots. Thompson’s usage of moral economy is different from Muldrew’s, and especially Baker’s. Thompson rejected the notion that food riots were simple, spasmodic responses to “elementary economic stimuli” in favour of an approach that attempted to identify the objectives of the crowd. During food riots, the crowd was acting “upon a consistent traditional view of social norms and obligations, of the proper economic functions of several parties within the community, which, taken together, can be said to constitute the moral economy of the poor.”

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85 Ibid., 188.
basis of this consensus, the crowd, in times of dearth, was sometimes able to enforce a kind of direct action bargaining in which crowds of poor people seized local grain. This was not outright thievery. Instead, the crowd set a fair price for the grain and then individuals in the crowd would buy it. This was moral economy as a complex dynamic of rights and obligations within a specific set of material conditions. Thompson wanted to get away from the “abbreviated view of economic man,”86 which presents a rational economic actor, removed from any context, and acting in simple and direct response to economic stimulus.

Thompson did not present a conflict-free situation. Instead, he depicted a crowd that shared a moral consensus about an economic issue. That crowd was in conflict on that issue with other individuals or groups, and it acted to resolve the conflict in its favour. Nor did Thompson present the moral economy as disconnected from or superseding the material economy; that is the means of production and distribution. As Thompson said elsewhere, he warned “against precisely this confusion”87 in his essay on the moral economy of the crowd, arguing that although people do respond to economic stimuli, the question should be about how they respond, “how is their behaviour modified by custom, culture, and reason?”88

Baker, however, associates conflict with legal regulation, and lack of conflict with moral regulation. This can be seen in his argument that legal regulation grew as communal ties weakened, but also when he poses the question of why, when debts were difficult to collect, credit was granted very freely.89 The answer according to Baker, lies in recognizing:

that the colony’s economy was, in essence, a “moral economy” in which custom and ritual, notions of trust, loyalty and reciprocal obligation, and considerations of private and public reputation tempered self-interest and

86Ibid., 187.
88Thompson, “English Crowd,” 187.
89H. Baker, 85.
moderated the exercise of bargaining power on both sides of the debtor-creditor equation.\textsuperscript{90}

Yet Baker's conception of a moral economy – which nowhere references Thompson's – is disconnected from any material economy. For Baker, instability and tension were injected into the system because the terms of the "moral criteria" were negotiated between the participants, so that "misunderstandings and disagreements might easily arise to disturb the finely-balanced equilibrium between debtors and creditors."\textsuperscript{91} Baker provides little evidence for these assertions, relying only on a listing of debt-collection methods other than law suits, for example, collection agents, dunning letters, the consolidation of book debt into promissory notes, or the threat of a lawsuit.\textsuperscript{92} Moreover, in his concluding remarks, he notes that major merchants – including Richard Cartwright – rarely sued in small claims venues, but they prospered nevertheless. This he attributes entirely to "the workings of the Province's moral economy,"\textsuperscript{93} rejecting another scholar's "materialist understanding of economic relations" because his evidence "demonstrates that monetary obligations were not...devoid of moral content in the eyes of Upper Canadians."\textsuperscript{94} In other words, the mere fact that money and credit are never completely disassociated from morality for Baker renders economic relations entirely non-material.

Although I cannot agree with him regarding some of the specific dynamics of creditor/debtor relations, Muldrew is persuasive when he brings a moral economy analysis to bear on the history of market relations more generally. In an article that draws on but does not centre on his King's Lynn research, Muldrew argues that economic historians have teleologically imposed Smithian ideas of utilitarianism and self-interest back onto earlier market behaviours, and then suggests some of the processes by which occurred what

\textsuperscript{90}Ibid., 86.
\textsuperscript{91}Ibid., 87.
\textsuperscript{92}Ibid., 88.
\textsuperscript{93}Ibid., 103.
\textsuperscript{94}Ibid.
he characterizes as “changes in the way economic agency was structured within society.”

His main argument is similar to that already reviewed, that credit relations acted as a kind of levelling force within the community. Here, however, he expands his analysis to include market relations as a whole, disagreeing with what he believes to be a historiographic consensus, depending on neo-classical economic theory, that the development of market relations in itself led to the decline of community bonds. Muldrew argues that, on the contrary, buying and selling in the early modern period, “far from breaking up communities, actually created numerous bonds which held them together.”

Whether Muldrew is right, and early modern marketing behaviours did enhance community, is not important to this thesis. However, his description of those marketing relationships, and the way he traces the effect of the developing long credit system on the communally bonded market societies that he claims prevailed in the early modern period, can be helpful to understanding what credit relationships may have looked like in early Upper Canada.

As we have already seen, credit was extended through personal networks that involved a good deal of trust. The criteria for that trust helped to change other important social structures, such as the family. Less personal systems of credit developed gradually, most likely in larger concerns trading over longer distances. This long distance (and long term) credit continued to be extended informally, and on trust. This point is relevant to Upper Canadian creditor/debtor relations in two ways. First, Muldrew's argument implies that the communal nature of early modern local markets, because of their emphasis on trust, provided the cultural conditions for the development of long distance credit since, as a beginning, someone had to trust someone else from far away:

Even though trust could most easily be generated within local communities... because knowledge of trustworthiness could be passed on from person to person, people were still willing to extend it to others over considerable...
distances, and in the late seventeenth century it certainly was not absent from national, or even international markets.\textsuperscript{97}

Second, and more important, is the process whereby long credit relations gradually changed local relations:

Eventually, contracts made on a national scale become more important for large-scale merchants. Given the much more fragile state of trust which existed in obligations contracted over long distances, it is probable that the more distant obligations of some larger middlemen might have become as important, or more important, for the maintenance of their credit and wealth, as obligations to others within their own communities, especially those towards the poorer members. If this was so, then it is possible that a division in the nature of the social structure of obligations might have eventually helped in the erosion of older customary charitable obligations....\textsuperscript{98}

Muldrew's more nuanced approach to moral economy may provide a clue to help us understand the relationship between moral and material economy in early Upper Canada, and especially to help us answer Baker's question as to why major merchants did not bother to press for small debts and how, even so, they managed to prosper. Part of the answer is that they did, sometimes, press their small debtors. Another part is that the really large merchants, like Richard Cartwright and Robert Hamilton, operated diverse enterprises that were not dependent on the timely repayment of small consumer debt. Both of these factors will be explored in the following chapters. But Muldrew's insights into the cultural changes that may have accompanied the long credit system are also helpful, for they provide a way to conceptualize interactions between the moral and the material economy.

Economic Man, And The Family

Not all of the scant literature relating to creditor/debtor relations in early Upper Canada relies on notions of communalism and moral economy. Another important strand in the literature is neo-classical economic theory. How this approach plays out in the work of Douglas McCalla, currently the leading economic historian of pre-1850 Ontario, is

\textsuperscript{97}Ibid., 180.
\textsuperscript{98}Ibid., 181.
discussed at length below, especially in chapter three. I will here confine my discussion to more general remarks on the theme. In Canadian economic and business history, reliance on neo-classical economics has led to the valorization of development in general, and of merchant capital in particular, and in particularly rigid way. I argue in chapter three that, at least in McCalla’s work, this rigidity is the effect of a reaction against the political economy school, a leftist scholarly trend that is critical of merchant capital because, they argue, it made Canada vulnerable to foreign investment. But the connections do not have to be explicit in order to betray a reliance on the models and assumptions of neo-classical economics. That reliance can also be seen in the work of W.N.T. Wylie. Wylie’s 1980 Ph.D. thesis is the most substantial existing work on creditor/debtor relations in early Upper Canada. As discussed in chapter five, it has influenced the perceptions of later scholars. But Wylie’s analysis is problematic because his approach to the development of creditor/debtor relations in the province’s early years focuses only on prominent people, and allows each of those people to play only one of two roles. For Wylie, those people favoured either commercial development or an aristocratic order, with no room for negotiation or accommodation between the two positions. He does perceive conflict, but only between those two poles, minimizing the protests and the discontent among Upper Canadians who were not powerful, but were most affected by the developing creditor/debtor regime. Wylie sees the non-powerful as under the sway of opportunists, who manipulated them into condemning the courts rather than reforming them.99 This, in his view, hindered economic development, in contrast to the United States, where “an ongoing process of legal change was underway to facilitate the development of commercial capitalism.”100 Further, Wylie sees the merchant and the administrative classes in Upper Canada as in conflict throughout the pre-1812 period. As I argue in chapter four, however, while the two groups were initially in competition, there was a rapprochement between them by about 1795. After that, the main conflict was

99Wylie, 273-82.
100Ibid., 370.
between those who were at the centre of power, and those who were not. Wylie’s focus on commercial capitalist development keeps him from seeing the importance of government in economic development, and the ways in which the administrative class and the merchants worked together, expressed common interests, and, to a certain extent, merged through intermarriage and social activities.

The influence of neo-classical economics in Wylie’s thinking is betrayed first in his assumption that commercial capitalism is the best direction for development, and more subtly in the way he organizes his analysis in terms of the binary opposition between those in favour of capitalist development verses those who oppose it because they wish to maintain their aristocratic privileges. What slips out of the picture when this model is used, once again, is the context of economic inequality and, to be more specific, the people who created the wealth that is at issue in creditor/debtor conflicts. To use language developed by the theorists Stephen A. Resnick and Richard D. Wolff, Wylie’s approach to the social and political context of creditor/debtor law is situated in the nonclass rather than the class tradition of economic analysis.¹⁰¹ That is, it ignores “the complex social process of exploitation: the production, appropriation, and distribution of surplus labor in different forms,”¹⁰² implicitly relying instead on neo-classical paradigms of individual choice and the invisible hand of the market.

This describes Wylie’s focus on the cultural characteristics of the administrative and the mercantile groups in early Upper Canada, as well as McCalla’s focus on the contributions of merchants to economic development. Less obvious is the way that Craig Muldrew’s work also fits into this neo-classical paradigm. Notwithstanding Muldrew’s insight into the tendencies of historians to read Smithian individualism back into their interpretations of pre-modern markets, his conclusions regarding the levelling effect of

¹⁰²Ibid., 41.
creditor/debtor relations play right into just such an individualistic world view. Let us take another look at Muldrew’s assertions regarding the socially and economically levelling effect of credit.

As already stated, I agree with Muldrew on this point so long as it is acknowledged that the levelling effects of credit are confined to the sphere of those who possessed formal legal and market equality. By formal legal equality I mean those persons who possessed legal personhood; that is, an increasingly wide range of adult white males, as symbolized in England by abolition of the property qualification for members of parliament in 1858, and universal manhood suffrage in 1867; unavailable to women in England until 1918. By formal market equality, I mean the right to sell one’s labour power; unavailable to married women until the married women’s property acts of the late nineteenth century, prior to which wives could not own their wages. The levelling effect of credit, then, would not have included women, or at least not in the same way as it may have included men.

Many women would have been involved in the buying, selling, lending and borrowing which make up a large sphere of the market activities in which Muldrew locates the levelling process, but they would not have controlled their work or its proceeds. Nor would they have been part of the practice of litigation, where Muldrew locates some important parts of the levelling process. Muldrew claims that his data reveals:

The courts as institutions which played an important role in economic life. They were perhaps the most important formal secular institutions outside the family, for there were still few banks, manufactories, or incorporated companies.\(^{103}\)

It was not just the existence of courts, but the actual practice of litigation that had a levelling effect:

On many court days the poor would have been present in the hall with their betters, and would also have spent much time talking to lawyers, or entering complaints with the court clerk.\(^{104}\)

\(^{103}\)Muldrew, “Credit and the Courts,” 24.

\(^{104}\)Ibid., 33.
Married women would not have owned the property which was the subject of the litigation, nor would they have had standing to bring a complaint. Muldrew acknowledges the problem of standing, but not that of ownership, nor does he analyse the implications of women's legal disabilities on the equality which he claims was being constituted by credit relations.

Muldrew's insights regarding the levelling effect of credit fall back into the economic man paradigm because he is talking only about those who possess formal equality, and he neglects the exclusion of women and the family (as well as members of other groups who did not attain full citizenship in liberal society) from the very institutions which he says increased equality. This kind of naturalization of the family/household which was a founding component of liberal society has persisted despite the gradual elimination of almost all of women's formal legal disabilities, and it has had a detrimental effect on historical writing about credit, about law, and about Canada's past.

The family has been doubly privatized in liberalism, for it is the private domain within the private sphere of civil society; “the domain into which the King's writ does not seek to run.” Civil society, however, is conceived of as private primarily because it is not the state. This dichotomy is a false one, since important institutions of civil society such as the market, law, and the family could not exist in their ostensibly private forms without the co-operation of the state in the policing of the boundaries of the private.

Moreover, “the family and the market do not constitute autonomous spheres with discrete

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105Ibid., 28-9.
forms of regulation, but rather production and reproduction are interrelated." In contrast to the family, however, legal venues and the market are 'public' – too public until recently for women to appear in them safely and with gentility. By neglecting these factors, Muldrew has replicated the naturalization of women and the family. That naturalization is central to how the family has been viewed by both classical liberalism and neoclassical economics.

Naturalization of the family is also implicit in analyses that equate proximity and familiarity with equality or consensus. In many ways, the family "is the most essentially private institution, the heart and centre of everything we associate with what is not the state." It is also the quintessentially communal unit, the "black box" of assumed inner altruism, out of which economic man appears to take his place in the rough and tumble of the market. The violence that exists in many families, and the inequality that exists in almost all, has only begun to become known and acknowledged by scholars in recent years.

A consensual, communal model of credit relations works too smoothly with conventional, consensus views of Canadian history. Ideas about consensus and community are appealing, but they are perhaps no more accurate than the notion that families are conflict-free and internally altruistic. The growing understanding of family history and of the internal dynamics of families should caution us to avoid any assumption that communal, local, morally regulated relationships are conflict-free.

The remainder of the thesis is organized into five chapters. Chapter two introduces the Upper Canadian context, arguing that early Upper Canada was a more diverse society.

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than has been assumed. Upper Canada was stratified from the beginning. Various elite
groups jockeyed for power, while other groups were shunted aside. Those groups were
defined by ethnic and cultural background and by religion as well as by class and gender.
The chapter also provides a brief sketch of early Upper Canada’s legal and administrative
structures as background for the detailed arguments regarding credit relations and power in
the rest of the thesis. Chapter three takes up the debate between neo-classical and political
economy views of Canadian economic history. The chapter extends the critique of neo-
classical economics that has been presented above, while at the same time arguing that both
sides in the debate have held too simplistic a view of merchants, credit, and debt in early
Upper Canada. The arguments are supported by evidence about different kinds of
merchants in early Upper Canada and their relationship to the long credit system.

Chapters four and five move from the theoretical to the presentation of substantive
findings. Chapter four reviews the kinds of commercial paper used during the period and
tries to place the privately-issued merchant’s note or “Bon” within that framework. That
chapter also reviews the relationship between the Bon and other aspects of the merchant
system, grievances directed against that system, and the court reforms of 1794 which set up
a judicial system that was English in form. It provides an account of the power struggle
between government and large merchants in the earliest years of the colony, and of how the
two groups quickly reached a rapprochement and cooperated to rule Upper Canada.
Finally, the chapter finds that the use of the Bon may have been exaggerated as a reason for
anti-merchant sentiment in much of the historiography and, in that context, reviews some
other possible reasons for hostility toward merchants. Chapter five looks at the important
issue of the seizure of land for debt in Upper Canada, a remedy that was not available in
England. Because of high expectations for British justice in Upper Canada, the issue of
land seizure remained alive for many years and was, I argue, connected to the constitutional
crisis of 1805-7. Finally, chapter six attempts to draw some tentative conclusions regarding
how to develop an adequate framework for looking at credit.
Chapter Two

UPPER CANADA LAW AND SOCIETY 1788-1809

This chapter provides a general background for the specific arguments of the thesis: that credit relations in Upper Canada were from the beginning imbued with unequal power relations and that this inequality impacted upon early constitutional politics in the province. It sets out to show that early Upper Canada was a more diverse society than has generally been assumed. Even the United Empire Loyalists were a diverse group, united perhaps more than anything else by their fear of the Americans and the disorder and threat of assimilation of the revolution, and by their looking to Britain for protection. This point is important in reference to arguments about the ideological importance of notions of British justice in the period.

The chapter also provides a brief sketch of legal and administrative structures as background for detailed accounts of credit relations in the body of the thesis. The legal regime set up for the Loyalists is compared to the previous French Canadian regime in Quebec. The comparison is placed in the context of contemporary feelings among British merchants at Montreal regarding the ostensible superiority of British over French law.

Early Settlement

The French regime in Quebec had permitted European settlement only in the St. Lawrence and Richelieu river valleys. With the exception of some trading posts on the Great Lakes, aboriginal peoples retained control of the land north of lakes Ontario and Erie.¹ This changed with the British conquest of Quebec in 1760.² In the years that followed, boundary definitions and military excursions led to some British encroachment on the Indian Territory. Civilian settlement, however, did not begin until after the outbreak

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²Ibid., 93.
of the American Revolution. Many thousands of white Loyalists left the United States during and after the Revolutionary War. Most of them went to England, the West Indies, Nova Scotia, or Quebec. Only about five thousand settled in the territory that would become Upper Canada. That first five thousand were the basis for a new colony. It grew rapidly, so that “by 1812 the Native peoples found themselves pushed away from large sections of their waterfront lands on the upper St. Lawrence River, Lake Ontario, the Niagara River, Lake Erie, and the Detroit River.”

Until 1791, when it was divided into Upper and Lower Canada, the entire territory was known as Quebec. During the American Revolutionary War, Quebec was under military rule. The earliest Loyalist refugees to Quebec were men. They joined regiments and became involved in the fighting. The women and children who were left behind were sooner or later forced to flee as well, undertaking harrowing journeys to Quebec. Most were destitute. The basic needs of male Loyalists were taken care of by their regiments, but the military government viewed the women and children as unwanted burdens. Initially, the government attempted to require their families to support them, but the wartime conditions made this unrealistic, and the government assumed responsibility for their support by 1778.

Many Loyalist women and their children in Quebec lived in camps, some for as long as eight years. Provision of food and housing was organized on principles similar to those in the English poor law; people requiring relief were categorized as deserving or undeserving, only a subsistence level of support was provided, and the needy were forced to work for their subsistence. Officially, each woman was to receive one-half the rations of a man, but the officials in charge of provisioning were often corrupt. In addition, provisions were distributed according to class. People from the privileged classes were favoured

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3 Ibid., 96-7.
4 Ibid., 98.
5 Ibid., 92.
because they were unused to dealing with adversity and were therefore considered less able to do so. Rations were used to force people to follow orders and, as the war continued, provisions grew short and rations were cut. Slaves and servants were not provisioned at all. Save those who could establish their upper-class origins, women and girls over twelve were forced to work for their rations, and some were cut off when they were unable to find employment.  

In May of 1784, white Loyalists living in camps were ordered to muster for transport to new settlements near Cataraqui (later Kingston). Others had already settled around Detroit and Niagara, and on Carleton Island near Cataraqui. Settlement in those areas began in 1780, and there were 126 farms at Niagara by 1784. Although assisted with tools and provisions, the settlers were subject to many restrictions, including the requirement to sell their surplus to the garrisons at a fixed price.

Loyalists in the new settlements continued to be assisted by the British government and subjected to its hierarchical and paternalistic order. Food, tools, equipment and clothing were not distributed equally. Land was distributed according to military hierarchy, with grants ranging from 100 acres (plus an additional 50 for every family member) for discharged private soldiers to 5,000 acres for field officers. Some of the officers insisted on being assigned the front lots instead of drawing for them with their men. This was an early source of grievance.

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7Ibid., 117-19.
8Ibid., 128.
11Potter-MacKinnon, 128.
12Gerald M. Craig, Upper Canada: The Formative Years, 1784-1841 (Toronto: McClelland and Stewart, 1963), 12.
13Gates, 17.
Who Were The Loyalists?

The conventional image of the United Empire Loyalist is a person of English descent whose loyalty to the English crown and government made it impossible to remain in the disloyal turmoil created by the Patriot movement in the thirteen colonies. These hardy souls, we are told, made tremendous sacrifices for the unity of the Empire and the privilege of living under English law. The reality was somewhat different. Although the Loyalists did make sacrifices, not all of them were of British or even European descent, and the reasons for their Loyalism are as varied as their background. There is room here only to briefly sketch some of the kinds of people who were Loyalists, and some of the meanings of their Loyalism.

There were many Loyalists among the Iroquois Confederacy. Prior to the American Revolution, the Six Nations of the Confederacy lived south of the Great Lakes in New York State and part of Pennsylvania. The American Revolution split the Confederacy, with some fighting on the British side, some on the American, and others remaining neutral. The Mohawk were most closely allied with the British. Part of the reason for the close alliance between the Mohawk and the British was the connection between a Mohawk family, the Brants, and a British family, the Johnsons. Sir William Johnson, the British Superintendent of Indian Affairs, was one of the most prominent white citizens in the Mohawk Valley of upstate New York. Joseph Brant (Thayendanegea) was a protege of Johnson’s. Johnson educated Brant, and the two worked closely together until Johnson’s death in 1774. Molly Brant was William Johnson’s second wife. They began living together in the late 1750s. They had eight children, including five daughters, all of whom married into the Upper Canadian elite.

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15 Surtees, 97; Beaver, 228.
Molly and Joseph Brant were influential among both Iroquois and British. They believed that the interests of the Iroquois would be best served by fighting on the side of the British. The American colonists had made many encroachments on Six Nations lands. On a trip to England, Joseph Brant told the Secretary of State for the American colonies that:

> It is very hard when we have let the Kings subjects have so much of our lands for so little value, they would want to cheat us...of the small spots we have left for our women and children to live on.

The Secretary agreed, but added that redress would not be possible until the rebels had been dealt with. If the Six Nations remained loyal, he said, they would receive every possible support from the British.

That promise was not kept. During peace negotiations Britain gave the United States sovereignty over huge territories that aboriginal people believed they had never relinquished to the British. With the coming of peace, the British became less interested in appeasing their First Nations allies, settling them on limited parcels of land with uncertain title. Joseph Brant devoted much of his effort to organising an Indian confederacy to stop American expansion. He was unsuccessful, partly because of lack of backing from the British. As British policy changed, Brant's efforts became an annoyance to a government that now preferred to keep the First Nations "divided, dependent, and subservient." Brant spent many years attempting to resolve the nature of the Six Nations title to the Grand River grant, and he intervened on at least one occasion to aid the Mississauga Ojibwa in their attempt to negotiate fair treatment from the Upper Canadian government.

Also contrary to the image of English inheritance, Loyalists of European origin were culturally heterogeneous. Some of the prominent Loyalist spokesmen, such as the powerful

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17Ibid., 241.
19Ibid.
20Ibid., 808.
merchant Richard Cartwright, were American born and of British descent, but others were members of ethnic or religious minority groups; immigrants or the children of immigrants to the thirteen colonies who lived in close-knit communities and retained their own language culture.\textsuperscript{22} Many had left Europe because of religious persecution.\textsuperscript{23} Prominent among these were the German Palatinates, Protestants who fled religious persecution in other European countries and settled in the Palatinate in the early eighteenth-century. They soon had to leave. One group of several families who were neighbours or relatives in Germany migrated as a group, first to England, then Ireland, then to America after the Seven years War, where they settled together in New York, migrating to Quebec as a group during the Revolutionary War.\textsuperscript{24} There were also many Dutch speakers among the Loyalists, especially those who were committed to the traditions of the Dutch Reformed Church.\textsuperscript{25} The largest group of recent immigrants among the Loyalists were Scottish. Scots were Loyalists in disproportionate numbers, and both highland Catholic and lowland Protestant Scots travelled and settled in groups.\textsuperscript{26}

For members of these groups, Loyalism was a group decision, one that was associated with the group having maintained its own language and culture. For example, although Dutch people were found on both sides during the Revolutionary War, Dutch who had maintained their language and culture supported the English, while most Dutch who supported the Patriot side had already become anglicized.\textsuperscript{27} Minority groups who had maintained their cultural cohesion “feared the assimilative threat posed by American

\textsuperscript{22}Potter-MacKinnon, 12, 14.  
\textsuperscript{23}Ibid., 13.  
\textsuperscript{24}Ibid., 14.  
\textsuperscript{25}Ibid., 15-6.  
\textsuperscript{26}Immigrants from Great Britain to North America between 1760-1775 were 44 per cent Irish, 32 per cent Scottish, and 24 per cent English. But Eastern Ontario Loyalists from Great Britain were 23 per cent Irish, 65 per cent Scottish, and 12 percent English. Ibid., 16-7.  
\textsuperscript{27}Ibid., 15.
society."  

Many of them, especially the groups who had been persecuted for their Protestantism, already looked on England as their protector.

In some cases, tenants followed the leadership of their Loyalist landlords. The Johnson family provide a case in point. Sir William Johnson had a 200,000 acre estate in the Mohawk Valley of northern New York, peopled with tenant farmers who had been attracted by Johnson’s generous terms. “His patronage was immense,” and when a county government was created in 1772, Johnson named most of its officials. About 20 percent of the county’s population were tenants of the Johnsons, and Sir William was paternalistically kind to them, cancelling debts and advising on personal matters. This created bonds of deferential loyalty. When Sir William Johnson died in 1774, his son John took over. In May of 1776, Sir John and a group of 170 made up of his tenants and other Loyalist men fled together to British territory.

There were also many Black people among the Loyalists. Most of them were enslaved. The British offered emancipation to all slaves who served with the Loyalist forces during the war, but few of those Blacks who crossed over into Loyalist territory were allowed to serve in the military. Some were taken prisoner and either kept as slaves by their captors or sold, and some were returned to their Loyalist masters. “The line between slaves who surrendered to British officers, and slaves who were captured and thus taken to be the legitimate spoils of war, was one too thin to draw at times,” and many were sold by British and Loyalists officers. Some Black people who were kept as slaves by Loyalists,
including one with Richard Cartwright, complained that they were being held illegally.\textsuperscript{35} Slaves and servants in Loyalist refugee camps did not receive provisions since “those who can afford to keep Servants cannot be considered...proper Objects of that bounty.”\textsuperscript{36} When the Loyalists were settled, Black people “although in theory entitled to land grants for their military service, were treated like property and were provisioned only because they were need to help the Loyalists clear their land.”\textsuperscript{37} There were slaves at almost all of the Loyalist settlements, with some families (including Cartwright's) having ten or more, and others with one or two. One estimate put the slave population at Niagara at almost 300 in 1791.\textsuperscript{38} Slavery was curtailed in 1793 when the legislature passed an act banning the importation of slaves.\textsuperscript{39}

**Loyalist Ideology**

Settlements were supported and land was distributed to white Loyalists because the British government felt itself obliged to assist the Loyalists in return for their service and their sacrifices, including the abandonment of their property in the thirteen colonies. Loyalists were financially compensated for their losses during the war according to their rank and their former property holdings.\textsuperscript{40} They had to petition for compensation, and “in the petitions the meaning of their experiences had to be articulated.”\textsuperscript{41} The petitions in which the Loyalists made their claims:

[t]ell us...the extent to which Loyalists had by the 1780s defined in clear and consistent terms the meaning of their refugee experience. They were not like

\textsuperscript{35}Ibid., 29-30.

\textsuperscript{36}Potter-MacKinnon, 119. There was at least one exception: “Molly Brant’s slaves were being provisioned at Carleton Island, which may merely show Molly Brant’s influential connections.” Ibid.

\textsuperscript{37}Ibid., 139.

\textsuperscript{38}Winks, 33-4.

\textsuperscript{39}An Act to Prevent the Further Introduction of Slaves, and to Limit the Term of Contracts of Servitude Within this Province. 33 Geo. III, c. 7 (U.C.).

\textsuperscript{40}Potter-MacKinnon, 138.

\textsuperscript{41}Ibid., 125.
other settlers. They were Loyalists, motivated by principle, who had been attached to the British crown, empire, and constitution. They had proven their loyalty through military service, which had led to property losses and suffering. It was the duty of the British government to reward these people for their noble contributions to the British empire.\textsuperscript{42}

Petitioners often exaggerated their former affluence. This is one source of the myth that most Loyalists were of upper class origin. In fact, about 50 per cent had held less than 200 hundred acres of land, and 35 per cent less than one hundred. Although even 100 acres was a substantial holding, 40 per cent of the petitioners stated that they had cleared only 10 acres or less.\textsuperscript{43} In addition, a good many Loyalists had been tenant farmers.\textsuperscript{44} For every lord of the manor turned Loyalist refugee like Sir John Johnson, there were hundreds of small holders and tenants.

Loyalists did not exaggerate their claims only for pecuniary motives. They also needed to convince themselves that they had done the right thing, that their struggles and sacrifices were worthwhile. This extended to lauding the achievements of the new settlements.\textsuperscript{45} Key to this was the differentiation of Upper Canada from the United States. As S.F. Wise explained:

\begin{quote}
Loyalty did not simply mean adherence to the Crown and the Empire, although it started there. It means as well adherence to those beliefs and institutions the conservative considered essential in the preservation of a form of life different from, and superior to, the manners, political and social arrangements of the United States.\textsuperscript{46}
\end{quote}

As an ideology, Loyalism would have developed in contrast to the negative "other," in this case the United States, but the United States as a discursive construction, as ideas about the States, and not necessarily what conditions there really were. As with all ideologies, Loyalist ideology held grains of truth, but it was mainly an admixture of notions and beliefs

\begin{itemize}
\item \textsuperscript{42}Ibid., 148-9.
\item \textsuperscript{43}Ibid., 22.
\item \textsuperscript{44}Ibid., 24-5.
\item \textsuperscript{45}Ibid., 155-6.
\end{itemize}
constructed around the necessity to, in the earliest days, explain and justify the sufferings of the Loyalists during and after the American Revolutionary War. The British constitution and its correlate, a British system of justice, were important components of what Loyalists were supposed to believe that they had fought and suffered for.47

**Upper Canada and the Quebec Act**

At the time of the first Loyalist settlements in the upper province, the entire territory was still considered to be in Quebec. It was governed according to the provisions of the Quebec Act of 1774,48 which retained English criminal law, set up a non-representative government by Governor and appointed Legislative Council, and reserved for the Crown the power to constitute courts. The Act also stipulated, with some exceptions, that “in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of [French] Canada, as the Rule of the Decision of the same” unless altered or varied by ordinances passed by the Governor and Council.49

From the first, that provision of the Quebec Act was opposed by the small group of English merchants who had established themselves among the French majority since 1763. They complained that the laws of Canada were not adequate to a commercial colony. Although the law of Canada was not identical to the law of France, it included “all edicts and ordinances applying to the whole kingdom of France and issued before 1759.”50 The laws of Canada would therefore have included the modernized French commercial code, known as the code marchand, which embodied ordinances passed in 1673 and 1702. After the English takeover of Quebec, however, there was confusion about whether the code marchand applied, as it may have never been formally registered in the

47 On loyalty as an ideological concept in Upper Canada, see Mills, especially 2-33.
48 An Act for Making More Effectual Provision for the Government of the Province of Quebec, in North America, 14 Geo. III, c. 83 (Imp.)
49 Ibid., s. 8.
50 Hilda M. Neatby, The Administration of Justice Under the Quebec Act (Minneapolis, University of Minnesota Press, 1937), 5.
Merchants, lawyers and judges generally believed that the nonregistration of the code marchand made its enforcement illegal under the Quebec Act.51

It is easy to assume that English merchants questioned the validity of the code marchand because of a chauvinistic preference for English law. Neatby challenges such assumptions on the basis that the “unwillingness of the judges, two of them French Canadians, and all opposed to the merchant party, to commit themselves on the subject, indicates that they were not at all sure of their ground.”52 In addition, a French critic, writing in 1758, complained that the code marchand was inadequate because it did not provide enough protection for creditors or for the European partners of firms in the colonies. For Neatby, this was “startling confirmation of the bitter complaints of English merchants and their lawyers during the years following the Quebec Act.”53

This is not the place to examine whether the French commercial law of the 1700s was in fact inadequate, to explore the interests and alliances of Neatby’s contemporary critic, or to try and tease out where prejudice may have affected either her interpretation or those on which she relied. More important here is the fact that the English merchants either genuinely believed the law of Canada to be inadequate for their purposes, or were willing to use and manipulate that belief for their own ends. Either way, the belief meshed well with the developing Loyalist ideology that Loyalists, having fought and suffered for it, were especially deserving of the ostensible benefits of English law and liberty. With the Loyalist influx, the English merchants of Quebec “now smelled success, as they viewed the growing strength of the Loyalists in the light of added weight to be used in waging the old struggle.”54

Change was incremental until 1792. After the Quebec Act, the colony had been divided into two districts, Quebec and Montreal. The district of Montreal encompassed the colony.

51Ibid., 15-16.
52Ibid., 16.
53Ibid., 17.
54Craig, 9.
entire territory that was to become Upper Canada, and the courts were located at the city of Montreal. An April 30, 1785 ordinance provided for the appointment of justices of the peace in the new settlements. The new justices were authorized to determine actions of debt of less than £5 and greater than two shillings and sixpence. Another 1785 ordinance stipulated that actions of over £10 would be tried at Montreal or Quebec. It also introduced two features of the English legal system into Quebec by establishing the option of trial by jury in commercial cases (trader against trader) at the request of either party, and adopting English rules of evidence in commercial cases. A 1787 ordinance empowered the Governor to form new districts and to commission district officers. Finally, in July of 1788, the Governor, Lord Dorchester, proclaimed the creation of four new districts in the upper country.

With the creation of the new districts, the justices of the peace who had been appointed in 1785 were replaced by a new set of local officials. A Court of Common Pleas was created for each district. In addition, each district was to have a sheriff, at least one coroner, a number of new justices of the peace, and a Court of Common Pleas. A few months after the first group of officials was appointed, the government added another body, a Land Board for each district.

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56 An Ordinance. For Granting A Limited Civil Power and Jurisdiction to His Majesty's Justices of the Peace in the Remote Parts of this Province, 25 Geo. III, c. 5 (Que.).
59 Craig, 12.
60 Neatby, 288.
The new justices of the peace were commissioned as the Court of General Quarter Sessions of the Peace. Magistrates meeting at Quarter Sessions were empowered as inferior courts of criminal jurisdiction. More serious matters were tried at King's Bench in Montreal. The magistrates also had charge of many facets of local administration. Courts of Common Pleas began sitting in 1789. Common Pleas was mandated to sit weekly for actions of less than £10, and in quarterly terms for the hearing of larger claims. They heard cases of tort and contract, but the majority of cases were for debt of various kinds. The Courts of Common Pleas were uneven in practice and substance, and they were abolished in 1794. The Land Boards had the authority to grant land, select town sites, and lay out or improve roads, making the Boards “the single most significant administrative institution in the eyes of the pioneer community it regulated.” The Land Boards were also abolished in 1794. As an institution, Quarter Sessions were of longer duration than the Land Boards or the Court of Common Pleas. Until 1842, “local government in Upper Canada was almost entirely in the hands of appointed justices of the peace.” But all three bodies were active during Upper Canada’s first years.

Upper Canada’s Early Constitution

Early 1791, in a statute known as the “Constitution Act, 1791” or the “Canada Act,” the English Parliament divided British North America into the two provinces of Upper and Lower Canada and constituted the forms of government. The Governor was to reside in Lower Canada and each province would have a lieutenant-governor, an elected House of Assembly, an appointed Legislative Council, and an appointed Executive Council. The Legislative Counsel was equivalent to the House of Lords. Appointment was for life, with

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61 Chapter four details what were thought to be some of the problems with Common Pleas.
62 Wilson, Enterprises, 53.
64 The statute was formally styled An Act to Repeal Certain Parts of An Act, Passed in the Fourteenth Year of His Majesty’s Reign Intituled, “An Act for Making More Effectual Provision for the Government of the Province of Quebec, in North America,” and to Make Further Provision for the Government of the Said Province, 31 Geo. III, c. 31 (Imp.).
some restrictions. Members were appointed to the Executive Council at the pleasure of the
government, but in practice this usually meant for life. As with the English Cabinet, the
Executive Council was not responsible to the House of Assembly. There was provision to
create hereditary titles and annex them to membership in the Legislative Council, but this
was not done. Among other things, the Act also stipulated that lands in Upper Canada
would be granted in free and common socage. It also reserved one-seventh of the land in
each township for the support of the protestant clergy, and another one-seventh for the
Crown.

The governance structures constituted by the statute were quite deliberate:

It was believed that the American Revolution had occurred, in large measure,
because the democratic arms of the colonial legislatures had grown too
powerful. There would be no repetition of that error in Upper Canada.

The statute’s framers hoped that the structures it mandated would facilitate the “so-called
mixed or balanced constitution composed of the three classical forms of polity: monarchy,
aristocracy, and democracy.” In Upper Canada, the equivalent bodies would be the
lieutenant-governor, the appointed legislative council, and the elected assembly:

These elements brought together within a system of checks and balances
would, it was believed, prevent the natural tendency of political regimes to
degenerate into their unconstitutional forms: tyranny, oligarchy, and
anarchy. A proper aristocratic emphasis would allow the newly erected
colonies to hold the democratic element in check as had not been the case in
colonies such as New York prior to [the American revolution].

The first session of the Legislative Assembly was held in 1792. The first statute
passed by the assembly repealed the part of the Quebec Act that stipulated recourse to the

65Frederick H. Armstrong, *Handbook of Upper Canadian Chronology*, rev’d ed. (Toronto:

66George Sheppard, *Plunder, Profit, and Paroles: A Social History of the War of 1812 in Upper

67Robert L. Fraser, “‘All the Privileges Which Englishmen Possess’: Order, Rights, and
Constitutionalism in Upper Canada,” in *Provincial Justice: Upper Canadian Legal Portraits from
the Dictionary of Canadian Biography*, ed. Robert L. Fraser (Toronto: University of Toronto Press,
1992), xxviii.

68Ibid., xxix.
laws of Canada in respect of property and civil rights, replacing it with English law, excepting the bankruptcy law and the poor law. The first session also introduced trial by jury, and it reformed the Court of Common Pleas by abolishing its summary proceedings in actions under £10 and directing jury trials in all causes of more than forty shillings, or £2. The legal regime governing debt was completed, for the time being, by a statute that empowered the justices of the Quarter Sessions to set up divisions in their districts, each division to have a Court of Request sitting twice a month to hear actions of debt for forty shillings or less.

John Graves Simcoe was commissioned as the first lieutenant-governor of Upper Canada. Simcoe already had North American experience, having served with the British forces during the Revolutionary War. When Simcoe prorogued the first session of the legislature in October of 1792, he congratulated the members and urged them to explain to their constituents that “this province is singularly blessed, not with a mutilated Constitution, but with a Constitution which had stood the long test of experience, and is the very image and transcript of that of Great Britain, by which she had long established and secured to her subjects as much freedom and happiness as it is possible to be enjoyed under the subordination necessary to civilized Society.” For many in Upper Canada, the province's political and legal forms and practices were to fall far short of this promise.

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District Officers: Power, Privilege, And Patronage

The new district office holders held positions of considerable power. In many cases, the same people were appointed to two or even three of these bodies. There were sixteen people commissioned as Common Pleas judges in the Eastern, Midland and Home districts between 1788 and 1794. Of the twelve about whom I was able to find biographical information, nine were justices of the peace, and ten sat on their district Land Board. These people were under the patronage of or held in esteem by some powerful person in the government. However, this does not mean that all of the appointees were equally powerful. Some attended at their duties sporadically or not at all, and one, who was an active farmer, petitioned lieutenant-governor Simcoe to be “relieved from the weight of his public occupations.”

This may have been a frequent experience for farmers.

In contrast, service on the Land Board or the Courts was of direct benefit to merchants. For example, Robert Hamilton never missed a sitting of the Court of Common Pleas:

Hamilton...as an important merchant, found regular attendance compensated him in an immediate fashion. The jurisdiction of the court...was wide. Through it, Hamilton was able to establish community policy on such vital economic matters as the sale of liquor, the exchange of land, and the verification of wills.

Using the Dictionary of Canadian Biography, I have been able to identify probable occupations for eleven of the Common Pleas judges. Of these, six were merchants of some kind. Three of them, Richard Cartwright in Midland district, John Munro in Eastern, and Robert Hamilton in Home, attended all or almost all of the sessions of the Court.

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73 Wilson, Enterprises, 53.
74 Ibid., 54. Some of these matters were most likely settled at Quarter Sessions rather than at Common Pleas. The records for the Court of Common Pleas in the Home district, where Hamilton was on both courts, are often intermixed with those of the Quarter Sessions, indicating that the magistrates held both courts on the same day. Metropolitan Toronto Public Library, Upper Canada Court of Common Pleas, Nassau District Minutes, 14 Oct. 1788 - 10 April 1794.
The situation in the Western district was quite different. There, an Indian agent and two merchants were commissioned as judges. The Detroit business community objected. In a memorial to him from thirty-three English merchants, including one of the appointees, the Governor was reminded that Detroit’s business community had already suffered for many years from the necessity of litigating its commercial disputes far away in Montreal. Moreover, the two merchants were too busy with their own interests to become conversant with the law. In addition:

Their business interests made them wholly unsuitable for judicial office in a confined and almost exclusively commercial community where they were likely to be personally interested in many of the cases that came before them. Indeed “it would not be at all impossible that under the idea of conciliating the good will of the judges the trade of the district should gradually and at last wholly centre in the Bench.”

The petitioners asked that a professional lawyer be appointed as judge. This was granted, and William Drummer Powell, one of the two practising lawyers in the Canadas, was appointed as sole judge.

The courts, and especially Common Pleas, developed a reputation of bias in favour of merchants. Recent commentators have affirmed this perception. It is not my intention to disagree, but I do want to complicate the assertion in two ways. First, as a general statement, courts in common law countries in the period were in general increasingly favourable to commerce and commercial interests even though in some ways and places (including Upper Canada, as will be discussed in Chapter five) they were not. Therefore, the issue is not whether Upper Canadian courts were biased towards merchants but how this bias manifested in the particular place and time. Second – and this argument will be made in detail in the next chapter – not all merchants were alike. In regard to the perception that the Upper Canadian courts were particularly biased in favour of merchants, this perception significantly derives, at least in the earliest years, from the power and prominence of two

75 Neatby, 295.
men, Richard Cartwright and Robert Hamilton, the two wealthiest people in Upper Canada prior to 1812.

Economic dependence on the British military and government characterized Upper Canada's society and economy during the early years. The government heavily subsidized the new province through the payment of salaries, the half-pay pensions of retired military officers, and grants for civil expenses. The garrisons provided the first market for the settlers' produce, which was sold by the farmers to the merchants and by them to the army. Wheat was the first and most important product, but peas were also significant and, after 1793 and especially 1800, pork.77 Although imports were always important, the export market to and through Lower Canada began to open somewhat later; after 1800 in Niagara,78 and a little earlier for the eastern parts of the province. The local market was also significant. Settlers sold produce and services to each other. Not all settlers were farmers, some were professionals, artisans, or labourers, as well as merchants; and few farm families produced all they needed of every kind of local produce. In addition, earlier settlers were in a position to sell to those who came later.79 Much of the local exchange was in the form of barter, but it was accounted for in cash terms.80 At least some of the time, even for transactions that did not directly concern the storekeeper, the accounting and reconciling of accounts was done in the books of the local store.81 In such a situation, it is easy to see how merchants and storekeepers could become very powerful in local society. Merchants like Hamilton and Cartwright, however, had more than local power. This power was affirmed in 1792 when they were both appointed to the first Legislative Council of Upper Canada.

77 Douglas McCalla, Planting the Province: The Economic History of Upper Canada 1784-1870 (Toronto: University of Toronto Press, 199), 17-19, 26; Wilson, Enterprises, 77-85 and passim.
78 Wilson, ibid., 84, 90.
79 McCalla, Planting, 6, 24-7.
80 Graham D. Taylor and Peter A. Baskerville, A Concise History of Business in Canada (Toronto: Oxford University Press, 1994), 141.
Loyalists, Late Loyalists, and Land Policy

The ideological peace of Upper Canada was soon disrupted and the privileges of the United Empire Loyalists threatened by the rapid influx of the “late Loyalists,” settlers from the United States who arrived after 1784. How to treat these newcomers was controversial: should they be granted land at all? If so, should they also be provisioned and get the other privileges that the Loyalists felt should be reserved for themselves? Larger settlements were desirable, so by 1788 “the policy adopted seems to have been to grant land to all whom the term loyalist could be stretched to cover.” Land was offered free of charge except for fees paid to the officials who surveyed it and handled the administrative paperwork. But the distinction between “Loyalists” and “late Loyalists,” and the difficulty of distinguishing between the latter and “Americans” would continue to be invoked over the ensuing decades. The official status of United Empire Loyalist entitled its holder to more than just the privilege of writing the honorific “U.E.L.” after his or her name. For example, although all settlers received free land, only Loyalists were exempt from paying administrative and surveyors’ fees, and the sons and daughters of Loyalists also received land, sons when they came of age and daughters when they married. This led to rampant confusion for several decades, partly because of a belief that all the descendants of U.E. Loyalists should receive free land, and partly because names on the official U.E.L. list were more than once cut or added. The widespread exemption from fees also reduced government revenues.

From the initial small group of Loyalists, the population of European origin increased to about 77,000 by 1811. Most immigration was from the United States. Simcoe believed “that the American Revolution had been a conspiracy instigated by a minority, and that many people in the new republic remained actively loyal to Great Britain,

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82 Gates, 19.
83 Craig, 24.
84 Gates, 20-1, 63-5; Craig, 49.
while a great many more could easily be won back to their old allegiance.” Simcoe solicited American settlers. He was willing to use his ability to grant land for free (except for administrative fees) in order to attract this population. In the United States, public lands were sold for cash and only in large parcels. In contrast, in Upper Canada, “newcomers merely had to take the oath of allegiance and assert that they had not served in the rebel forces to acquire a free grant of land.”

Grants that were free except for fees also contributed the problem of delays in patenting land. Land grants were initially given on the basis of location tickets (also known as certificates of occupation), with the process of patenting the land (receiving clear and permanent title) happening somewhere down the road. Most land titles were not regularized until near the end of the period covered by this thesis. There were many delays before patents were issued and, because the fees were charged during the patenting process, many settlers avoided paying fees by delaying their patent applications, relying instead on their location tickets. Land transactions nevertheless took place, based only on the location tickets. Sometimes the original nominee had died and the land passed on to their heirs, in other cases, the land had been sold or mortgaged, sometimes several times, and sometimes to speculators.

In 1797, the legislature created a Heir and Devisee Commission that was empowered to hear claims and validate titles. Many of the Commissioners were the same prominent people who held other offices. For example, six of the Common Pleas judges, including Hamilton and Cartwright, were on the Heir and Devisee Commissions for their districts, and their sometime business partner John Askin was a member in the Western district. These merchants (and others like them) had already either bought or received in

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86 Craig, 21.
87 Craig, 32.
88 Ibid.
89 Sheppard 19.
90 Gates, 53; Craig, 33.
91 An Act for Securing the Titles to Lands in this Province, 37 Geo. III, c. 3.
payment for debt many land certificates. It was therefore in their interest to be lax in their findings regarding what constituted a legitimate transfer. In addition, justices of the peace had for a few years had the power to issue land certificates for up to 200 acres. Some of the justices, notably including John Askin, had bought many certificates issued under these circumstances. Not all of the magistrate's certificates were passed, but in 1802, when a new Heir and Devisee Act was passed, the Commissioners were empowered to hear claims based on a wider range of documentation, and to rely on evidence that would not have been admissible in a court of law.92

The transfer of certificates was only part of the picture of widespread land speculation. The land speculations of large merchants in relation to the law of debt will be discussed in subsequent chapters. Another aspect of speculative holdings was the unequal size of initial grants; in part a consequence of the attempt to develop a landed aristocracy in Upper Canada. In the Simcoe years, members of the Executive and Legislative Councils received grants of 3,000 to 5,000 acres, and each of their children 1,200.93 This alone led to the holding of many thousands of acres by a single family, and when the myriad of matrimonial and business cross connections typical of the Upper Canadian elite were taken into account, a massive amount of land could be controlled by a single grouping.94

Most of these large land holdings remained undeveloped, waiting to gain enough value to be realized as capital, and land policy was also a means to keep part of the population poor.95 The Upper Canadian elite was unashamed. The literature on land policy and practices in Upper Canada demonstrates the extent to which land was grabbed in large amounts and held, presumably for speculative purposes, without being settled. There was

92 Gates, 59.
93 Craig, 33-4.
on one side at least a perception of widespread corruption which manifested in popular discontent, a discontent that those at the centre of power claimed to find incomprehensible. For example, in an 1809 pamphlet written to expose Upper Canada's corruption to an English audience, John Mills Jackson alleged that Loyalist and military claimants requesting particular parcels of land would be refused "under the pretence that there was no land vacant in those townships" only to find that "the same lots that had been particularly applied for have been given to some more favoured applicant." The practice was not denied in a public reply, anonymously authored by Richard Cartwright. Instead, Cartwright defended the practice:

Where there was a competition, a connection with the Government was surely an allowable motive of preference; nor would an unprejudiced man find any thing very censurable in with-holding from a casual Settler, admitted on grounds of favour, an advantageous location, which might afterwards be granted to a person of superior pretensions.

For his services in writing the reply to Jackson, Cartwright was awarded 3,000 acres of land without fees.

Elite Fears and the Repression of Dissent

Contrary to the traditional history of Upper Canada, in which a Loyalist, Tory consensus is only sporadically disrupted by malcontents, more recent work depicts pre-1812 Upper Canadian society as made up of a diverse and fragmented population which

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96 John Mills Jackson, A View of the Political Situation of the Province of Upper Canada in North America (London: 1809), 54.
98 Gates, 78.
99 See, for example, Craig.
was almost always in some degree of turmoil.\textsuperscript{100} The majority of immigrants in the early period were American, not English. As already alluded to, the position of “late Loyalists” and of American settlers in general, was contentious. The Upper Canadian elite was frightened of Americans for many reasons, and even Loyalist members of the elite could have aspersions cast upon them for being American-born. William Drummer Powell, the Loyalist judge, was repeatedly accused of having American sympathies. Hannah Jarvis, another member of the Loyalist elite, complained that “British officials ‘think that an American knows not how to speak’ and that, ‘The language held is that Americans are not trustworthy, they are only fit for hewers of timber and drawers of water.’”\textsuperscript{101} American-born Loyalists also distrusted most American immigrants. Richard Cartwright believed that they should be excluded from Upper Canada, in part because of “the opinion fondly cherished by


the loyalists that the donation of lands to them in this country was intended as a mark of peculiar favour for their attachment to their sovereign."

Despite the feelings of Cartwright and others like him, the Loyalist population was being overwhelmed by immigrants from the United States. Americans were feared and distrusted not only because they were thought to be overly democratic in their thinking, but also because of their association with dissident religious groups, especially Methodism.

The Church of England had a special place in the British government's vision for Upper Canada, including reserving one-seventh of the land in each township for the support of the clergy. The Church of England, however, had very few adherents in Upper Canada. Many of the Loyalists belonged to other established Protestant denominations. In 1797, those churches were given some official status when the house of assembly passed a Marriage Act which extended the right to perform marriages to the ordained clergy of congregations professing to be Church of Scotland, Lutherans or Calvinists. The privilege was pointedly not extended to Methodists. As Chief Justice Elmsley explained it, the framers of the statute were careful to confine the relief given by it to:

Such of the Protestant Dissenters as, though non-conformists here, are members of an establishment elsewhere and would for that reason bring with them their sober and regulated modes of thinking both in political and religious subjects which are the usual consequences of habitual conformity to an established ritual which form perhaps the best barrier against the encroachment of either infidelity or fanaticism and, the inseparable companion of each, sedition.

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102 Quoted in Wilson, Enterprises, 102.
103 Christie, 16.
Methodism had a controversial history in England, partly because of its focus on personal conversion and a relationship with God that was not mediated through the Church, partly because of its leaders, who were not conventionally educated and who travelled on circuits, holding classes and preaching extemporaneously and/or in unorthodox locations, and partly because some of its leaders were women. It was only after the 1791 death of John Wesley, its founder, that Methodism in England began to change from sect to church, to take on a more conventional form, and gradually to rid itself of women leaders. This caused Methodists who wished to keep to the less conventional roots of the sect to split off.

One reason for the development of an increasingly mainstream Methodism was pressure from the British Parliament, some members of which “feared that the tide of republicanism and democracy that threatened to swamp the English nation had some relationship to the enthusiastic ‘fanatical’ Methodists.... The fact that Methodists championed the poor and desired to dissociate themselves from the established church was for many people enough proof of the Society’s treasonable intent.”

Methodism was viewed in much the same way by Upper Canada’s ruling elite. Methodism represented not only the affirmation of a different and threatening kind of religious ethos, but also a rejection of the established church; a rejection of rationality in favour of the anarchy of republicanism, democracy, and unseemly behaviour. Although Evangelical movements, including Methodism, “eschewed” involvement in political debate, “evangelicals rejected the contemporary relations between church and state in which the ecclesiastical body buttressed the power of the hierarchical political edifice.” Moreover, in a society marked by uncertainty, “the evangelical ethos provided a high degree of

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106 Muir, 10-30.
107 Ibid., 30.
108 Ibid., 33.
109 Ibid., 32.
110 Christie, 36.
ideological coherence."111 The travelling preachers could break down geographical isolation and draw the poorer settlements together “in a new sense of identity which could effectively offset the ideological control of colonial office-holder.”112

John Strachan, an Anglican clergyman and leading ideologue for the Upper Canadian elite, believed that the “rational traditions of the Anglican church” were more important than the constitution for the development and survival of an orderly society.113 For Strachan, enthusiasm in religion was “pride and presumption,” and reason, “must always be the guiding and ruling faculty – the affections must not lead but follow.”114 In contrast, Methodists preached and exhorted, used and appealed to the emotions. Nor did they adhere to specified rituals and liturgy. Itinerants travelled; their services could take place in fields, barns, or homes. Their “varied use of space contradicted notions of religion occupying a separate area in people's lives, hived off from the daily transactions of society.”115 Moreover, Methodist itinerants did not have the formal education of the Anglican clergy. Consequently, according to Strachan, “those who should be leaders were just as susceptible to impulse and irrationality as their flock.”116 Methodism threatened families, where it sometimes happened that one member converted and others did not.117 And Methodism threatened women, both by turning them into wantons who would presume to teach and to preach, and because they were the most vulnerable to the emotional excesses of enthusiastic religion.118 Methodism was also very popular, becoming the largest Protestant denomination in Upper Canada by 1812.119 A four-day camp meeting in 1803

111Ibid., 38.
112Ibid., 38-9.
113Ibid., 17.
114Quoted in Morgan, 101-2.
115Morgan, 113.
116Ibid., 102.
117Ibid., 114.
118Ibid., 106-8.
119Ibid., 111.
drew 3,000 people.\textsuperscript{120} Worse, most of the early Methodist itinerant ministers were Americans, as were many of their adherents.\textsuperscript{121} The combination of Methodism’s unruliness and the perceived threat of democratic politics was a potent one for the Upper Canadian elite.

Americans were not the only group viewed with suspicion by the elite. The British were in the midst of a long war with the French, and the French had supported the American side in the Revolutionary War. The Irish — or at least some of them — were also viewed as a threat. There had been an whig party in the Irish parliament for some time. The whigs wanted Ireland to continue its association with England, but with legislative autonomy for Ireland. In 1791, an extra-parliamentary opposition formed in Ireland. Calling itself the United Irishmen, the group sought to unite Catholics and Protestants against British rule. The group armed itself, and it supported the French Revolution. Rebellion erupted in 1791. The rebellion was put down, but fears of Irish, French and American plots were constant among the elite in both Upper and Lower Canada, and the elite was much motivated by “official anxiety about apprehended insurrection.”\textsuperscript{122}

Official response to dissent was repressive. An American, accused of plotting with the French, was executed for treason in Lower Canada in 1797.\textsuperscript{123} In 1804, the Upper Canadian legislature enacted seditious aliens legislation.\textsuperscript{124} The Act, however, was not limited to aliens. It “focused directly on the particular conditions in the province and ranged

\textsuperscript{120}Christie, 12.
\textsuperscript{121}Morgan, 111.
\textsuperscript{124}An Act for the Better Securing this Province Against All Seditious Attempts Or Designs to Disturb the Tranquility thereof, 44 Geo. III, c. 1.
widely to cover the local concerns of the governing elite. The most important of these local concerns was the emergence of articulate dissent and concern about Irish radicals and American ‘aliens’.\textsuperscript{125}

As will be seen in the following chapters, however, there were many reasons for dissent in early Upper Canada. The ideal British justice that had been promised to the Loyalists was not delivered, and many dreams of a modest competency on the land were dashed by the manoeuvring of the powerful, who were motivated by the peculiar mixture of paternalism and greed that characterised the early Upper Canadian elite. Issues relating to credit, debt, and land were also issues of constitutional law and politics. As discussed in chapter one, highlighting dissent in early Upper Canada remains controversial among historians. In the following chapters, I argue that there was considerable dissent but, despite the repression with which it was met, the majority of dissenters nevertheless took their stand from a position of loyalty, not one of revolution. At issue were differing interpretations of loyalty, and of the meaning of the rule of law and of British justice. The role of large merchants, their relationship to government, and the propensity and ability of both merchants and government to use land policy and the credit system for their own benefit was central to disputes over the meaning of justice and the form of government in early Upper Canada.

\textsuperscript{125}Wright, 239.
Chapter Three

ALL BAD OR ALL GOOD?: DISAGGREGATING THE STEREOTYPE OF THE EARLY UPPER CANADIAN MERCHANT

This chapter situates Upper Canada’s early mercantile system in relation to the long credit system that centred on England and Scotland. This approach complicates a received historiography that has, with a few exceptions, tended to see the role of merchants in Upper Canada as either very very good or very very bad. The project is pursued with reference to two distinct but related historiographic debates: first the Innis staples thesis which was arguably one of the defining moments of Canadian economic and business history; and second, the specific historiography of the Upper Canadian merchant. The debate regarding the staples thesis provides a context for the rest, so I will begin there.

The Staples Thesis, and its Critics

According to Graham Taylor, from the 1930s to the 1980s, Canadian economic and business history was “dominated, if not virtually monopolized, by adherents of what was commonly called the ‘staple thesis’ or ‘staple approach’ associated with Harold Innis, an economist at the University of Toronto.” Taylor explains the staple thesis as follows:

The central argument of the staple thesis is that the growth of the Canadian economy was determined mainly by concentration on the production and export of a series of raw material commodities or staples: fish and furs in the seventeenth and eighteenth centuries, timber in the nineteenth century, and wheat and minerals in the twentieth century. According to Innis, this dependence on staple exports affected nearly every aspect of Canada’s political and economic development: Population was involved directly in the production of the staple and indirectly in the production of facilities promoting (staple) production. Agriculture, industry, transportation, trade, finance, and governmental activities tend to become subordinate to the production of the staple.... The development of the merchant community and financial institutions, the construction of canals and railroads, and the fashioning of government land settlement and trade policies were all

harnessed to the service of the staple sector rather than reflecting the establishment of a diversified economy.  

According to Innis, the centrality of staple exports kept Canada economically dependent long after it became politically independent, so that the Canadian economy was severely disrupted when foreign demand for Canadian staples shifted or failed due to factors external to Canada. The staple exporting economy also created conditions which encouraged the growth of monopolies.

The staple thesis has proven to be an incomplete explanation. Subsequent research has shown that growth was not always export-led, and in Upper Canada "the timing of provincial development and of fluctuations in economic activity do not appear to be immediately explicable in terms of wheat prices, harvests, and export volumes." Douglas McCalla, currently the leading economic historian of pre-1850 Ontario, argues that the booms and busts in the Upper Canadian economy "were essentially those of the emerging general pattern of economic fluctuations in the western economy" and "production for household consumption and for local markets was at least as vital to the economy's survival and expansion as these external dimensions of the economy." Rather than relying on the idea of staple-based growth, McCalla argues that the Upper Canadian economy should be understood as "an example of a broader and more complex process, led by investment." Yet relating the Upper Canadian economy to the pattern of North Atlantic economies overall and asserting that it was led by investment does not in itself negate the staple theory.

Investment in early Upper Canada did come from foreign sources, most often from English or Scottish merchant firms or direct subsidies from the British government. Why then would a scholar like McCalla so discount the idea of staple based growth?

\[^{2}\]Ibid., 123-4.  
\[^{5}\]McCalla, "Internal Economy," 399.
McCalla objects not just to Harold Innis's staples thesis, but also to the politicized use made of it by Innis's followers in the sixties and seventies. In the 1960s, Innis's ideas were taken up by a new generation of marxist and non-marxist Canadian nationalists who used diverse interdisciplinary approaches to take the basic idea of the staples thesis in a variety of new directions. These scholars:

called themselves "political economists" to distinguish their approach from mainstream economists who, in their judgment, were obsessed with quantification, addressed economic issues far too narrowly, and were increasingly under the influence of American scholars committed to theories that supported the capitalist status quo and the absorption of Canada into a continental system dominated by the United States.6

This approach was controversial, partly because it was avowedly left-wing and anti-capitalist, partly because of its Canadian nationalism, and perhaps partly because the interdisciplinary approach of the new Canadian political economy led to a wide variety of applications, some of them far removed from the conventional concerns of economic historians:

The object of political economy research is typically macro-level description and/or explanation of material practices.... At its best, political economy makes the connection between the economic, political, and cultural/ideological moments of social life in a holistic way.7

These concerns have included those generated by a gamut of inequalities, including regional disparity, labour organization by both capital and the working class, gender and the family,8

6Taylor, 125.
8Political economists, like the rest of the white left, were just beginning to take race seriously when the turn toward postmodern theory took place. See Frances Abele and Daiva Stasiulis, "Canada as a 'White Settler Colony': What about Natives and Immigrants?" in The New Canadian Political Economy, ed. Wallace Clement and Glen Williams (Kingston: McGill-Queen's University Press, 1989), 268-70. On this point, it should be borne in mind that much of the impetus for the fracturing of identity that is a hallmark of postmodernism came from people of colour—most often women. The point is discussed in Mariana Valverde, "Poststructuralist Gender Historians: Are We Those Names?" Labour/Le Travail 25 (1990): 229; and in Inderpal Grewal and Caren Kaplan, "Transnational Feminist Practices and Questions of Postmodernity," in Scattered Hegemonies: Postmodernity and Transnational Feminist Practices, ed. Inderpal Grewal and Caren
along with the more conventional concerns of development economics like the relationship between the staple exporter and its trading partner(s).

Conventional political economists, whether liberal or marxist, argued that investment led growth was part of an over-reliance on foreign capital that weakened Canadian industrial development and fostered dependency. In contrast, McCalla argues that economic growth in Upper Canada was led by investment. Because of what he views as an exclusive reliance on the staple theory, McCalla argues that the writing of Canadian economic history was held back by political economy and the staple thesis, which:

with its quasi-theological quality evidenced in its repetitious incantations of sayings of Harold Innis, and with its ideological, empirical, and methodological blind spots...has tended to become self-contained and simply uninterested in a wide range of relevant and sophisticated scholarship on the history of the Canadian economy.

For McCalla, the 'new' economic historians who began to dominate the field in the United States in the 1960s revealed "large gains in analytical clarity from explicitly applying neo-classical economics to history; and there was a general invigoration." But neo-classical economics also has its "blind spots." McCalla shares the pro-development bias of traditional business historians, who present a picture largely devoid of social causes and effects. Business historians who are influenced by neo-classical economic theory tend to produce work in which:

historical agency is attributed to individuals through innate or culturally-constructed characteristics such as the gift of entrepreneurship, the Protestant ethic, and ethno-religious stereotypes.... Why bother with the inherent modalities and social implications of the capitalist system when it is based on the most rational decisions and, thus, offers the best promise of fulfilling human desires? And why focus on the most sordid aspects of business

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11Ibid., 1.
operations when individuals dedicated to progress perform such an essential
duty in the metamorphosis of useless raw materials into valuable
commodities?\textsuperscript{12}

In common with other neo-classical thinkers, McCalla tends to produce histories
that present a truncated picture of the social relations that surround and relate to what we
think of as the economy. In particular, the context of inequality in which economic
relations are situated is neglected or denied. McCalla has made many contributions that
have recast interpretations of Ontario's past in important ways. In particular, his emphasis
on the local economy is welcome, especially because of its focus on the activities of farm
families and the importance of farm production and other local productive activity. But, as
with his entrepreneurial interpretation of business history, McCalla does not pay attention to
inequality within the family, and he minimizes inequality between the family (head) and the
merchant. His neo-classical outlook leads him to interpret much of merchant/farmer
interaction as the result of individual choices made in a bargaining relationship. This
allows him to avoid recognizing the structural constraints that the long credit system
imposed on farmers. At the same time, he emphasizes the constraints that the system
placed on merchants, and uses the existence of those real constraints to valorize the
merchant's role in the local economy. McCalla's view is that mercantile investment helped
Upper Canada to develop, and that the credit extended to farmers was an important part of
this process, because it permitted them to acquire land, stock, and buildings.\textsuperscript{13}

Local Merchants in Upper Canada: Two Views

There are some problems with the rigid way that merchant power has been portrayed
in some of the works McCalla criticizes. If mainstream historians have tended to valorize
rather than to criticize merchant power, leftist and progressive historians have tended to

\textsuperscript{12}Jacques Ferland, "Business History and the Buried Treasures of the Theory of Value,"

\textsuperscript{13}Douglas McCalla, "Rural Credit and Rural Development in Upper Canada, 1790-1850," in
Merchant Credit and Labour Strategies in Historical Perspective, ed. Rosemary E. Ommer
(Fredericton: Acadiensis, 1990), 256.
neglect the distinctions between different kinds of merchant behaviour and different levels of power and influence, distinctions that could help us to understand how merchants interacted with farmers, artisans and labourers. This somewhat superficial level of analysis of merchants is understandable given the enormous evidence of an Upper Canadian land policy under which huge grants were given to officials, to their relatives, and to other prominent people such as wealthy merchants, the latter of whom also acquired land from defaulting debtors. In combination with the powers merchants had as local officials, magistrates, and lay judges, it is easy to see how Lillian F. Gates could argue that the necessity for settlers to acquire capital to develop land “caused them to become hopelessly indebted to the frequently denounced ‘Shopkeeper Aristocracy’ and eventually to lose their land,” or how Gary Teeple could assert that:

The magistrate merchants were always at hand, ready to take advantage of a pioneer’s need for manufactured goods and, in the absence of much money in circulation, willing to extend credit. The result was often disastrous for the settler.

McCalla discounts the extensively documented problems with land distribution, speculation and forfeiture in early Upper Canada, at least in so far as merchants were

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15Gates, 43, quoted in McCalla, “Rural Credit,” 257.

concerned, because, according to economic analysis, accumulation of large land holdings would have been inefficient. McCalla criticizes critics of the credit system for failing to provide an economic analysis or to explain:

Why the merchant should regard the legal rate of interest, six percent in Upper Canada, as sufficient return on the capital tied up in farmers’ accounts, or why he should deliberately lend so much that he could eventually take over his customer’s farm. He could not farm it himself, and nowhere did tenancy become the main form of land tenure.... It must be presumed, therefore, that sooner or later the merchant intended to resell the land to another unsuspecting tenant farmer so as to start the cycle over again. Here, it was necessary for the merchant to realize a high enough price on the resale to compensate for his costs in carrying the previous farmer’s debts.¹⁷

McCalla’s important contribution is to explain some of the reasons why merchants carried so much debt. To put it simply, his positive view of merchants allows him to avoid viewing them as necessarily and deliberately out to bilk their customers into a situation of dependency. Instead, McCalla is able to recognize that the credit system in which the merchants functioned forced them to do business in a situation of real constraint. In particular, as will be discussed later in the chapter, it was impossible for a merchant in Upper Canada to make sales without extending credit, and without himself becoming indebted to his suppliers.

On the other hand, however, McCalla too easily dismisses the importance of land and land holding practices and their relation to creditor/debtor relations. Although land prices never got very high in the pre-1812 period, land was valued for many reasons, both economic and symbolic.

Extensive land speculation ensured long-term prosperity for some families. Robert Hamilton, for example, was the province’s largest land owner during his lifetime, accumulating more than 130,000 acres.¹⁸ He was optimistic that he could hold onto the

¹⁷McCalla, ibid, 258.
land for long enough to profit from it.\textsuperscript{19} “Such was Hamilton’s confidence that he passed beyond the acceptance of land from settlers for their commercial debts to direct purchase.”\textsuperscript{20} Hamilton’s portaging, retailing and government supply business fell apart after he died in 1809, but his speculative land holdings “survived to provide a cushion for his family’s declining economic fortunes,” and his children were able to stay in the upper echelons of provincial society.\textsuperscript{21}

To give another example of how land was valued in the period, when the Detroit merchant John Askin’s fortunes went into decline in the 1790s, he was saved by his economic and kinship network, which included his son-in-law, Robert Hamilton, along with Richard Cartwright, and many other important commercial figures. The network came together to use their influence on the land claims process in order to ensure that Askin obtained clear title to 8,000 acres. These lands “were especially important to Askin because his creditors had agreed to take those lots at a valuation of £4,000 in payment of a proportion of his debts.”\textsuperscript{22}

Not everyone was as fortunate as Hamilton, or as fortunate in their friends as Askin. The point is that Hamilton, Askin, Askin’s creditors and, presumably, many others, all thought that large land holdings were worth having in pre-1812 Upper Canada. Whether the practice was economically efficient in hindsight has little relevance to merchant behaviour at the time.

Finally, land holding also had important symbolic value for those who aspired to gentility:

With the landed gentry outlook of the late eighteenth century, possession of land symbolized a gentleman. The fact that the property, however good,

\textsuperscript{19}Ibid., 96.
\textsuperscript{20}Ibid., 96, 97.
\textsuperscript{21}Ibid., 164.
\textsuperscript{22}Ibid., 136-7.
might be inaccessible, was irrelevant; the potentiality and the status were there, the development could come later.\textsuperscript{23}

McCalla argues that local merchants contributed to capital development by granting long-term credit to farmers, artisans and labourers who purchased goods at their stores. Although consumer goods were purchased, these loans supported investment by permitting: farmers, and other producers, to use whatever means they possessed initially for other purposes, such as the acquisition of land or stock, or the construction of buildings, in the knowledge that they could postpone their payments for imported goods and, ideally, make them from sales of produce twelve or more months later. Because the ordinary result of a farmer's work included not merely the production and sale of crops but also the expansion and improvement of his farm, such credit helped to create capital in the province.\textsuperscript{24}

Because “Upper Canada developed successfully under it,” McCalla is explicitly critical of authors who have unfavourable views of this business system, especially those who are “inspired by populist or Marxist interpretations of the place of lenders in a capitalist rural economy.”\textsuperscript{25}

As McCalla points out, unfavourable ideas about merchants in Upper Canada go all the way back to the first lieutenant-governor, John Graves Simcoe.\textsuperscript{26} In many cases, subsequent authors have simply accepted Simcoe’s views. But Simcoe’s oft-quoted remarks regarding merchant monopoly\textsuperscript{27} were made in a particular political context, for particular purposes. By the time he left the colony in 1796, Simcoe was working cooperatively with his former opponents among the leading merchants. Further, as will be explored in the next chapter, there are many reasons to believe that Simcoe’s often


\textsuperscript{24}McCalla, “Rural Credit,” 256.

\textsuperscript{25}Ibid.

\textsuperscript{26}Ibid., 257.

\textsuperscript{27}Quoted by McCalla in “Rural Credit,” 257.
vituperative attacks on the merchants – especially Hamilton and Cartwright -- were at times
disingenuous or inaccurate.

Simcoe was not the only critic of merchant power in early Upper Canada. For
example, it was the Upper Canada King’s Bench judge and early agitator, Robert Thorpe
who coined the phrase “Shopkeeper Aristocracy.” Although Thorpe was in many ways a
problematic figure,\(^{28}\) he was not the only person in opposition. The legal historian Barry
Wright had suggested “that the opposition figures and the literate people who followed
them were indeed spokespersons for popular grievances.”\(^{29}\) However much they may have
blinded twentieth-century historians to a more complex view of the country merchant, these
eyear criticisms nonetheless bear some relation to how merchants were viewed by many
early Upper Canadians.

**Upper Canada Merchants: Large and Small**

Upper Canadian merchants had to deal with the constraints imposed by intense
competition and a business structure in which they were themselves heavily indebted to
their suppliers. The market was small and quickly reached saturation. For example, there
were four general merchant shops on the Niagara peninsula in 1789 and twenty-seven by
1803. Thereafter, “despite a rapid turnover, the total number of licensed merchant shops in
the peninsula varied by no more than two from 1803 to 1809.”\(^{30}\) The situation was similar
in other parts of colonial North America, for example Virginia and Lower Canada.\(^ {31}\) In
order to get and to retain customers, merchant storekeepers were forced to extend credit.\(^ {32}\)

\(^{28}\)See chapter 5, below.

University, 1988, 5.

\(^{30}\)Wilson, *Enterprises*, 89.

\(^{31}\)Nicholls, Michael L., “Competition, Credit and Crisis: Merchant-Planter Relations in
Southside Virginia,” in *Merchant Credit and Labour Strategies in Historical Perspective*, ed.
Rosemary E. Ommer, 273-289 (Fredericton: Acadiensis, 1990); Alan Greer, *Peasant, Lord, and
Merchant: Rural Society in Three Quebec Parishes 1740-1840* (Toronto: University of Toronto
Press, 1985), 140-176.

\(^{32}\)McCalla, “Rural Credit,” 258; Nicholls, 278.
Because of this, to say that farmers were at the mercy of their local storekeepers is too simplistic. Merchants who were beleaguered by the demands of servicing their indebted local customers while simultaneously finding a way to pay off their suppliers were not necessarily in a position to easily exploit anyone.

Merchant storekeepers, even those reckoned as successful, may have had a difficult time of it. For example, the former Loyalist non-commissioned officer Thomas Cummings had a store in the town of Chippewa on the Niagara Peninsula from about 1801 through 1812. He also ran a potash works. Cummings was frequently berated for his business practices by his Montreal suppliers, Auldjo, Maitland and Co. Montreal firms were indebted to their suppliers in England or Scotland. They extended credit to their Upper Canadian clients, and needed to be paid in a form that they could use for to pay off their own debts. Montreal firms usually accepted local merchandise (especially wheat), bills of exchange, as well as specie (coins). Montreal firms were in position to be aware of changing market conditions, and their clients in the upper country depended on them for this information. Auldjo, Maitland would therefore have had an active interest in the day-to-day operation of Cummings’ business, “advis[ing] Cummings forcefully on what and when to buy and sell.”

In July, 1791, Auldjo, Maitland expressed their disapproval of Cummings’s entrance into the potash business:

We cannot help blaming both you and Mr. Muirhead for undertaking ye potash business which has been attended with considerable expence and after that is gone into – not finding out you cannot or have not time to attend to it – before undertaking there should be reflection – its far better to do little and well than having too many Irons in ye fire to allow some to cool.34

By 1802, Cummings was heavily indebted to Auldjo, Maitland, who continued to supply him.35 In 1806, the firm asked Cummings to list the bills of exchange he enclosed with his

35Ibid., 152, 155.
letters “as it would enable us to ascertain ye correctness” and, regarding potash, they urged him to continue production, “ye expense of kettles and ye erecting ye works being now incurred, it would be wrong to drop it.” The Montreal firm also complained that Cummings did not order goods promptly, bought local wheat at too high a price, and did not ship his produce at the right time or to the right place. In 1807, they advised Cummings “against extensive credits your goods are better on your Shelves than sold to doubtful people ye giving of inconsiderate credit has been ye ruin of many in your province as well as in this.” Yet relations continued cordial; following on this reprimand, the firm informed Cummings of the price of wheat, and concluded, “your daughter is well.”

Despite the foregoing, Cummings can be reckoned a success. He acquired 658 acres and many houses and other buildings, and he managed to keep his store in business until the War of 1812, which devastated the Niagara peninsula and all of the Cummings holdings. He was a man of some prominence, holding several local offices including that of justice of the peace. Although he carried a high debt load, his creditors cared for the education of his children, intertwining his family life with theirs.

Cummings’s store enjoyed an advantageous situation on the Niagara River. Despite this, he could easily have failed without the ongoing patronage and support of Auldjo, Maitland and Co. In addition to cajoling Cummings and extending credit to him, Auldjo, Maitland saw to the Montreal education of at least two of Cummings’ children. This appears to have included providing a Montreal home for Cummings’ daughter, Jane, and perhaps providing entrée into society for her as well. On April 28, 1807, Auldjo, Maitland informed Cummings that a Miss Gamble was being sent back to Upper Canada earlier than expected because her “new pursuits may be incompatible with ye attention that

36Ibid., 163.
37Ibid., 165.
38Ibid.
39Ibid., 145.
40Ibid., 158.
should be paid to Miss Cummings.” In 1808, Jane Cummings married the Niagara merchant James Crooks. Crooks was the son of a Scottish shoemaker, and, on the gentility scale, “his position in the community was strengthened when he married a daughter of a loyalist and former member of Butler’s Rangers.” Economically, however, the marriage would have been a step up for Jane. Her new husband was already prominent on the Niagara peninsula, with connections to the powerful group of merchants that centred on Robert Hamilton. Unlike many Niagara merchants, Crooks prospered even after the War of 1812, eventually moving in the upper echelons of provincial business and government.

There were many merchants who were less successful than Cummings, and many others who failed. Even the relative success of a merchant like Cummings pales in comparison to the dominant figures of Robert Hamilton and Richard Cartwright, who were unrivalled in the province before the War of 1812. As explained in chapter two, their fur trade contacts and Cartwright's military connections helped them to prosper, and they became the two richest men in Upper Canada.

When they entered into partnership in 1780, Hamilton and Cartwright were “supplied and, in part, financed probably by the Montreal firm of Todd and McGill, one of the oldest and most prosperous houses in the southwest fur trade.” Todd and McGill soon arranged for Hamilton and Cartwright to enter into a co-partnership with John Askin, at that time a very successful fur trade merchant at Detroit. By 1785, Cartwright was at Cataraqui, Hamilton at Niagara, and Askin at Detroit, the sites of the three major British garrisons in Upper Canada. Along with his connections at Niagara, Hamilton held the contract for portaging military supplies past Niagara Falls, and the Cartwright-Hamilton-Askin group

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41Ibid., 167.
43Ibid., 185-9.

Hamilton's commercial transactions encompassed the length and breadth of the Niagara peninsula and touched points beyond, an incredible extent for such an operation in a developing pioneer society.\footnote{Wilson, \textit{Enterprises}, 1}

Cartwright and Hamilton's political and administrative prominence was also greater than that enjoyed by other merchant office-holders in pre-War of 1812 Upper Canada. This prominence derived only in part from their formal positions as members of the Legislative Council. At least as important, if not more so, they had direct connections with England through their close association with Todd and McGill as well as with the powerful Ellice Brothers, the partnership that first brought Hamilton to Upper Canada.

**Merchant Debt and Long Credit**

Despite the many important differences between them, large and small merchants all operated within the structure of the long credit system. Even Hamilton and Cartwright dealt through Montreal or Quebec import/export firms,\footnote{Wilson, \textit{Enterprises}, 20.} and those firms in turn dealt with import/export firms in England and Scotland (primarily London and Glasgow). The difference for Hamilton and Cartwright was on the level of respectability. They were as constrained as anyone else by the long credit structure, but the Montreal merchant community and some merchant houses in England respected them as businessmen on the same level as the prominent Montreal merchants. This added prestige allowed them more room to manoeuvre but, like everyone else, they did business on what are called ‘long credit’ terms.

The ‘long’ in long credit primarily refers to the terms for payment: long credit was typically extended for a year or more, either in accordance with the agricultural calendar, or
with the length of time necessary for goods sent out from the metropole to be paid for. According to Price, for example, credit advanced by Glasgow merchants to tobacco growers in the thirteen colonies took on average four years to return. On the other hand, Upper Canadian storekeepers extended long credit because their customers could not pay until harvest-time.

The term 'long credit' is also often used to refer to a lengthy chain of credit, in which most people are debtors as well as creditors. For Upper Canada, the chain was anchored on one end by the farmers and other local people who would receive credit from the stores. Because the stores could not stay in business without extending credit to their customers, debts due comprised an always increasing proportion of assets. For example, when Robert Hamilton died in 1809, twelve hundred debtors owed him a total of £69,000, for an average of £57.10 each. To give another example, the total debt owed to the less successful Lower Canadian merchant Samuel Jacobs is equally astounding. When Jacobs died 1786, 519 debtors owed him an average of 496 livres each, for a total of 257,424 livres, or approximately £17,161 averaging to £33.07 each.

Merchant storekeepers were indebted in turn to a Montreal firm or, sometimes, to a larger Upper Canada merchant like Hamilton or Cartwright. In any case, even the large merchants were indebted to the Montreal firms, who were in turn indebted to one or more import/export firms in the home country. The chain did not end there; the growth of the export trade effected credit terms in the home country as well:

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49 McCalla, "Rural Credit", 260-1.

50 Wilson, *Enterprises*, 1.

51 Greer, *Peasant, Lord*, 174. The conversion is approximate since the two men died 33 years apart and, in any case, currency equivalents in the period can only be rough. Wilson presented all of Hamilton's figures in New York (also known as York) currency, *Peasant, Lord*, 3, see also A.B. McCullough, *Money and Exchange in Canada to 1900* (Toronto: Ministry of Supply and Services Canada, 1985), 72. According to McCullough, one pound York currency was equal to 15 livres, ibid., 292.
Export merchants were better able to give long credits to their overseas customers and correspondents because they got equivalent credits from their suppliers. Because the big wholesalers and other vendors gave long credit to exporters, they found it difficult or even impossible to resist giving credit almost as long to the inland trade. Thus, the export firms were also indebted, usually to wholesalers who kept large warehouses. On the other side of the warehouses were factors (merchants working on commission) who bought the products from manufacturers and advanced the price of raw materials to them. In effect, the warehousers:

supplied both the internal and the export trades on long credit. Thus there appears to have been a distribution of financial function, the factor (through early payment) financing manufacture and the warehouseman (through credit sales) financing distribution.

The most important points in this brief description of the home country portion of the credit chain are, first, that the Upper Canadian commercial system existed in an international context. This does not mean that it was always controlled or dominated by that market (as the staples thesis would have it). As the business historian David S. MacMillan pointed out, Scottish mercantile and shipping operations focused on the North American colonies as much because of their need for an export market as for any want of Canadian staple imports. Second, Upper Canadian merchants were not unique in holding many of their assets as accounts receivable or debt; Montreal, London, and Glasgow merchant firms were all in a similar position.

**Development Or Dependency?**

Cartwright and Hamilton’s direct connection with British firms placed them in a privileged position partly because decisions about Upper Canada were made in England.

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Isaac Todd of Todd and McGill was frequently in England, lobbying for policies that would be friendly to trade in general, and to the interests of Todd and McGill and their associates in particular. By 1793, Todd "began to envision the supply of grain to the government as an eventual replacement for the fur trade,"\(^\text{55}\) which was threatened by the opening of larger areas for settlement and by the loss of territory to the United States. "That year, Todd and William Robertson lobbied successfully in London to secure for Todd and McGill’s Upper Canadian associate Cartwright and others an exclusive sub-contract to victual the military posts on the Great Lakes."\(^\text{56}\)

The ramifications of that sub-contract will be explored in the next chapter. The important point made here is a general one regarding Cartwright and Hamilton’s privileged position in the long credit system. It does not necessarily follow that the various monopolies or near-monopolies controlled by Cartwright, Hamilton, and their close associates “translated itself,” as the authors of the article on Cartwright in the Dictionary of Canadian Biography assert, “into that dependent relationship between debtor and creditor which has characterized so many frontier societies.”\(^\text{57}\) But clearly, although most merchants did not have that much power, some of the largest did, and Cartwright and Hamilton had much larger holdings than anyone else in Upper Canada at the time.

The workings of the rural credit system in different parts of colonial North America did not always lead to coercive dependency in the sense of debt-bondage. Nor was the credit system always as exploitative as the despised truck system in which the coal miner owed his "soul to the company store."\(^\text{58}\) It does, however, seem likely that there was a dependent debtor relationship very close to truck (in degree, if not kind) in some parts of Upper Canada in the very earliest years when the garrisons provided the major market for


\(^{56}\)Ibid.

\(^{57}\)Rawlyk and Potter, 168.

surplus goods. But this situation was transient. Upper Canadian credit practices may in other ways have had something in common with those of early eighteenth-century Massachusetts, where merchants paid workers in shop notes rather than specie (coins). This practice forced workers to shop at certain stores, and it allowed merchants to hoard specie and bills of exchange with which to pay off their own debts.\footnote{See Joseph A. Ernst, “‘The Labourers Have Been the Greatest Sufferers’: the Truck System in Early Eighteenth Century Massachusetts,” in Merchant Credit and Labour Strategies in Historical Perspective, ed. Rosemary Ommer. 16-35 (Fredericton: Acadiensis, 1990).} The use of merchants' notes in Upper Canadian will be discussed in the next chapter.

The degree of coercion in any early North American credit system varied according to factors that were close to but not part of the credit system itself. These included the potential for market or subsistence diversity, distance to transportation, government regulation, and a myriad of ecological and cultural factors.

In an article where he gave high praise to McCalla's work on rural credit, Stephen Innes lists several factors to be taken into account when "distinguishing between creative and destructive debts." According to Innes:

The conditions that appear to have favored non-exploitative debt include the following: a non-monopolistic public policy; competition among merchants; competition among employers; availability of by-employments; relative freedom of contract; relative freedom of population movement; a non-periphery location; effective transportation networks; an economy at least partially agriculturally based; and, finally, comparative prosperity and economic growth. Where these conditions prevailed, as they apparently did for a majority of the free white families in early America, debt relationships at the general store tended to lead to capital formation, not personal dependency.\footnote{Stephen Innes, “Commentary,” in Merchant Credit and Labour Strategies in Historical Perspective, ed. Rosemary Ommer (Fredericton: Acadiensis, 1990), 305.}

Were all of Innes's conditions for non-exploitative debt present in Upper Canada? Probably not, or at least not in unmixed form; especially in the earliest period when the garrisons were a very important market and British government subsidies were key to
settlement.\(^{61}\) There was more competition after the export market to and through Lower Canada began to open. This did not happen until after 1800 in Niagara,\(^{62}\) but it was somewhat earlier for the eastern parts of the province. Thus, the presence of Innes's conditions varied both regionally and temporally, and it is conceivable that, according to the kinds of criteria used by Innes and McCalla, there was more exploitation and dependency in the early period that is the subject of this thesis than there was in later years.

I do not have the data to answer questions in reference to employment. However, some of Innes's conditions can be at least tentatively discussed. For example, in the early Upper Canadian period, government policy, especially when it came to provisioning or portaging contracts, was often monopolistic. This would have mitigated the benefits derived from competition between merchants. I am not aware of any legal restrictions as such on population movement (for "free white" people), but if we recall that many Loyalist refugees were settled in specific areas and with few resources, it is not clear how much effective mobility there would have been. The lack of effective transportation networks was a frequent grievance. This was exacerbated by the land granting system which, by designating two-sevenths of each township as clergy and crown reserves, left large tracts uninhabited. Absentee ownership also contributed largely to this problem. Finally, it should be recalled that merchants dominated transportation and communication networks.\(^{63}\) Therefore, although some of Innes's conditions cannot be evaluated here, conditions in early Upper Canada do not support the hypothesis that the credit system was entirely non-exploitative.

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\(^{62}\) Wilson, *Enterprises*, 84, 90.

\(^{63}\) Ibid., 39-40.
Chapter Four

LAW AND FINANCE IN EARLY UPPER CANADA

This chapter continues and expands on the last chapter’s discussion of the mercantile system and the role of merchants. The purpose is to flesh out the argument made in the last chapter by testing claims about the positive and negative roles played by merchants against the historical record. In particular, a context will be sought in which to evaluate the anti-merchant statements made in the early 1790s by John Graves Simcoe, the first lieutenant-governor of Upper Canada. Simcoe’s statements are important because the assumptions of many historians regarding the operation of the early Upper Canadian business system have their provenance there. Many of those statements relate to the court reforms in 1794 that replaced the civil courts mandated by the Quebec Act with a new superior Court of King’s Bench on the English model. In particular, Simcoe claimed that the courts needed to be reformed because the old merchant-dominated Court of Common Pleas enforced the Bon, or merchant’s note, a kind of negotiable paper that Simcoe thought was key to merchant domination in the province. In fact, the Common Pleas records exhibit no trace of the Bon. This casts doubt on Simcoe’s specific claims. The Court of Common Pleas did favour merchants, but not, as Simcoe claimed, by enforcing the Bon system. There were, however, complaints from farmers and members of the legislative assembly about the growing power of merchants. These complaints were heightened in 1793, when the British government granted Cartwright, Hamilton, and their associates a privileged position as local agents for the provisioning of the garrisons in Upper Canada.

The chapter opens by providing a context for commercial finance in Upper Canada with a brief discussion of bills of exchange and promissory notes. These negotiable instruments developed as merchants began to trade over longer distances. They can be used both as credit and as payment mechanisms. The chapter then moves on to look at what is known about particular arrangements for commercial finance within Upper Canada. Unfortunately, there is very little information on how the financial system actually worked, since most of the scholarly focus has been on currency, exchange, and the development of banking (which did not happen in Upper Canada until 1821). The chapter will therefore
endeavour to bring together scraps of information about the kinds of financial and credit instruments that were used in Upper Canada, and to explore the meaning of barter in the period. This information is assembled from secondary sources, from printed primary sources, from some court records in manuscript, and from a limited survey of archival documents. The chapter also looks at some of the peculiarities of the Bon or merchant’s note. The Bon was a kind of commercial paper used in the Canadas. Its use in Upper Canada has not been much studied by historians even though claims regarding the use of the Bon and its consequences have entered into the historical record.

Commercial Finance

In comparison to England and Scotland, there has been little work done on the commercial finance system in pre-1812 Upper Canada. For example, the economic historian Jacob M. Price can explain to us that export merchants in London and Glasgow began to borrow on bond more frequently as they sunk their assets into long credit, because the length of time it took for their investments to return tied up their assets overseas, thereby increasing capitalization requirements. Price can also explain that despite this necessity, borrowing was sometimes more difficult for export than for domestic traders because the property of domestic traders was at home and that of the export traders tended to be overseas, and that many small bonds might be preferred to one big one since the small ones were unlikely to be all called in at the same time. Price can provide substantial detail from merchant records in England and Scotland to support his findings. It is impossible to write with the same level of confidence about the early Upper Canadian financial arrangements. This is partly because of a dearth of records, but also, one suspects, because of a problem identified by Price:

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1Price, Jacob M., Capital and Credit in British Overseas Trade: the View From the Chesapeake, 1700-1776 (Cambridge: Harvard University Press, 1980), 44.
2Ibid., 52-4.
Most economic historians find it rather trying to have to think about credit without banks. And so accounts of credit frequently start with the foundation of banks.\(^3\)

Banking in the Canadas did not begin until after the War of 1812. The majority of scholars (working in the English language) who deal with pre-1812 finance focus first on New France and the currency instability at the time of the English takeover, and then on the post-1812 world and the development of banks, with a comparatively cursory treatment of the period from the 1760s to 1812.\(^4\) The work that does exist concentrates on the currency issue and not on financial and credit arrangements.

Only two major studies cover the early Upper Canadian period. They are Adam Shortt's collection of articles, recently reprinted in one volume (1986), that appeared in the Journal of the Canadian Banker's Association, mostly between 1896 and 1906, with another series in the 1920s,\(^5\) and R. Craig McIvor's 1958 book, Canadian Monetary Banking and Fiscal Development.\(^6\) Neither provides much specific information on financing and credit practices.\(^7\) Shortt and McIvor were interested in currency problems and exchange rates, rather than in the mechanics of financial instruments and their legal regulation, and both identified the prevalence of credit primarily with lack of specie, or coins. Because of the lack of specie, they present Upper Canada as uniquely credit-dependent. But when Upper

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\(^3\)Ibid., 278.


\(^6\)R. Craig McIvor, Canadian Monetary, Banking and Fiscal Development (Toronto: MacMillan, 1958).

\(^7\)Neither did Bruce Wilson, who was more concerned with how Hamilton did business than with how he financed it. See Bruce G. Wilson, The Enterprises of Robert Hamilton: A Study of Wealth and Influence in Early Upper Canada, 1776-1812 (Ottawa: Carleton University Press, 1983).
Canada is looked at in the context of late eighteenth-century commerce, its dependency on credit does not seem to be out of the ordinary.

We know that specie, or at least good quality specie, was scarcer in Upper Canada than in Britain or the United States, but that did not mean that Upper Canada was more credit-dependent. Specie was scarce in those countries as well. There was no official paper money printed by central governments. Coins were scarce, and their value often degraded by the practice of clipping off bits of the precious metals of which they were made.\(^8\) Funds moved between the home country and the colony by way of bills of exchange, which were drawn by both government and private parties. The official money of account for British North America was Halifax currency, a unit of account that was not represented by any coin.\(^9\) Instead, the gold and silver coins of several countries were used, with ratings for each (relative to Halifax currency) were established by ordinance prior to 1792, and by legislation thereafter.\(^10\) Commerce inside of Canada was conducted using bills of exchange and promissory notes, a wide variety of coins of different value and condition, as well as Bons, IOUs and perhaps other kinds of paper that did not receive official legal recognition. People also conducted business by using their own memoranda books or the ledgers of the local store to keep track of what they owed and what was owed to them. With its lack of specie and constant use of credit for everyday transactions, Upper Canada was similar to like Craig Muldrew’s description of King’s Lynn in the late seventeenth-century, where sales transactions and employing on the basis of ongoing credit was prevalent because cash was in short supply.\(^11\)

Credit fulfilled more than one function in the late eighteenth-century North Atlantic world. Bills of exchange used credit to transfer sums of money. Local level sales credit

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\(^10\) Ibid., 67-80.

was kept track of, to be reckoned up and reconciled at intervals. Credit could be extended for investment, to capitalize a farm or a business enterprise; or it could be extended for consumption, of luxuries or of necessities. Goods were often supplied on credit because that was the only way to make sales. And people who dealt in foreign bills of exchange could make a profit from the exchange rate and discounting the bills.

Upper Canada was not uniquely credit-dependent, but its credit system did operate in peculiarly Upper Canadian ways. Before exploring what we can about the financial instruments that were used within Canada, it is important to briefly discuss bills of exchange and promissory notes.

**Legally Recognized Commercial Paper: Bills of Exchange And Promissory Notes**

Bills and notes are still in use today, in a similar form to 200 years ago. Bills of exchange were used as a mode of payment for goods, as well as to move money around. In their simplest form they worked as follows: if Abel in London owed £30 to Berg in Amsterdam, Abel would not ship a chest full of coins to Berg. Instead, he would go to see Cohen in London, because Dinsdale in Amsterdam owed money to Cohen. Abel would give Cohen £30, and Cohen would write to Dinsdale instructing him to pay £30 to Berg. The letter would be addressed to Dinsdale and signed by Cohen, it would state the exact sum and when it should be paid (usually on sight or 30, 60 or 90 days after sight), and the order to pay would have to be unconditional. Of course bills of exchange were also used in more complicated ways. For example, they could be made payable to order (a specific person) or to bearer, and the payee (e.g. Dinsdale) would not necessarily be indebted to the payor (Abel). Indeed, the payee was more likely to be a mercantile house who had dealings with the payor and therefore kept some of his money on account there. Dealings in bills of exchange in fact formed a very large part of the work of many mercantile firms; and there
was profit to be made both in working the exchange rates between different currencies and in discounting (cashing) bills.\textsuperscript{12}

Whereas bills of exchange started out as payment mechanisms, promissory notes were originally debt instruments in that they were a promise to pay, rather than an instruction to someone else to pay. Goode defines a promissory note as:

an unconditional promise made in writing by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.\textsuperscript{13}

According to Kyd, “at first these notes were considered only as written evidence of a debt; for it was held that a Promissory Note was not assignable or indorsible over.”\textsuperscript{14} Parliament intervened with the 1704 statute, An Act for Giving Like Remedy Upon Promissory Notes As is Now Used Upon Bills of Exchange,\textsuperscript{15} after which time the two instruments have been treated identically in law.

Bills and notes were legally enforceable so long as they met certain specific requirements of form. Conventional legal histories say that negotiable instruments law developed out of a separate law merchant which was gradually absorbed into the common law, especially during the tenure of Lord Mansfield as Chief Justice of the English King's Bench from 1756 to 1788. James Steven Rogers has recently challenged this conventional view, arguing that:

The judges of the English common law courts did not borrow the rules of the law of bills from sources external to the common law system. Rather, the


\textsuperscript{13}R.M. Goode, Commercial Law (Harmondsworth: Penguin, 1982), 520.


\textsuperscript{15}3 & 4. Ann, c. 9 (Eng.).
English law of bills developed within the common law system itself, in response to developments in commercial and financial practice.\textsuperscript{16}

According to Rogers, the most important legal characteristics of bills and notes in the late eighteenth and early nineteenth centuries were that they were assignable, and that consideration was presumed unless there were indications to the contrary.\textsuperscript{17} This system simplified the movement of money and credit. In particular, prior to the development of bills of exchange, it was difficult and sometimes impossible to assign or transfer debts or other money obligations.\textsuperscript{18} Assignability meant that the bearer (of a bearer instrument) or the payee (of an instrument payable to order) could endorse the bill or note over to another person (or to bearer), and the next endorsee or bearer could endorse it to someone else. This could happen over and over so that there were many endorsements on one instrument. This means that bills and notes were negotiable in the sense that they were "legally capable of being transferred by endorsement or delivery."\textsuperscript{19} In this period, however, they were not negotiable in the sense of the "twentieth-century...key definitional characteristic of negotiable instruments...in the sense of freedom from claims and defences,"\textsuperscript{20} or, as Barak puts it, "the capacity to be acquired free from equities of prior parties."\textsuperscript{21} The distinction is not important for present purposes, except to clarify that when referring to the negotiability of bills and notes, or other paper, I mean it in solely in the sense of \textit{transferability}, and not in the modern sense.

The presumption of consideration, by presuming that there had been value given in consideration for the instrument in all of the endorsement transactions, helped to simplify the process of assigning the bill to the next endorser. While useful, the system of multiple

\textsuperscript{16}Rogers, 2.
\textsuperscript{17}Ibid., 7.
\textsuperscript{19}Black's Law Dictionary, 6\textsuperscript{th} ed., s.v. "Negotiable."
\textsuperscript{20}Rogers, 7.
\textsuperscript{21}Barak, 52.
endorsement was not necessarily reliable. Eventually, the bill would be presented for payment to whoever was ordered to pay on the face of the instrument. If that person, or the person who had ordered payment, had become insolvent, or for various other reasons, payment could be refused. This led to consequences – mainly unpleasant – all along the chain of endorsement. Yet the practice of multiple endorsement was very common, and the consequences of dishonoured bills was an extremely important part of the law of bills and notes in the period.  

Negotiable instruments were very heavily used both to trade over distances and as credit instruments, in which case they also had a role as currency substitutes.

**Accounting And Exchange**

Early Upper Canadians kept a variety of different kinds of accounts. Farmers and artisans might keep a record of costs, work, expenses, and income in a small notebook, while retail partnerships often used just a daybook and a ledger. Many sole proprietors left “the impression that they kept accounts chiefly as a supplement to memory and as a record of sums due them, and often their accounts did not distinguish very clearly between themselves and their firms.” In contrast, larger enterprises, such as import-export houses “needed more complex accounts, on standard double-entry principles, to record their diverse activities more particularly.” Yet the functions performed in the books of rural stores were also complex, since a local storekeeper could serve as account-keeper for many different kinds of rural transactions. Key here is the understanding that, although many transactions – at the store or between individuals – were barter exchanges, they were most often valued in cash:

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22Rogers, 195.
24Ibid., 153.
25Ibid.
Many goods were exchanged for goods. A pound currency of wheat was exchanged for a pound currency of sugar, tea, or the equivalent sum in labour. No one owed two bushels of wheat: rather one owed a certain sum of money which might be paid off by its equivalent in wheat. In this sense from the very beginning Upper Canada's economy was cash-oriented.26

People often exchanged goods and services, periodically setting their claims off against each other, at which time one of them would end up as a net creditor. That credit could be carried forward into a new set of transactions or, if the creditor required payment, “it was often in the accounts of the merchant, with whom all had dealings, that balances were reconciled.”27 Farm produce could be sold or bartered in various ways: between individuals; to the store; through the store but between customers (that is, in the store's books); or to the store and assigned to another customer's debt or credit.28 For example, someone who owed money to a third party but had a credit with the store might transfer that credit to the third party, or “a merchant might accept as payment of a debt a claim on another person who also owed him money but which, for whatever reason, he expected to be able to collect eventually.”29

Under the relaxed evidentiary rules for business records in the colonies, entries in accounts were easily admissible as evidence of debt. In England, entries in accounts or shop-books were admissible only if attested to by the clerk who made the entry. Blackstone viewed the English practice as dangerous, for “it is a dangerous precedent to give credit to any memorandum by which the writer makes another man his debtor.”30 The dangerous


29McCalla, “Rural Credit,” 262-3.

practice was carried even further in the colonies, “where a man's own books of accounts, by a distortion of the civil law...with the suppletory oath of the merchant, amount at all times to full proof.”

This practice was explained by William Draper Lewis, who wrote the notes for the 1897 American edition of Blackstone's Commentaries:

In the United States, in the early periods of settlement, as business was generally carried on by the principal, and few shop-keepers kept clerks, the book of original entries, proved by the oath of the plaintiff, has, from the necessity of the case, generally, if not universally, been admitted. It has been confined, however, to the case of goods sold and delivered and work and labor done. It is necessary, however, that the book should appear to be the book in which the first entry was made contemporaneously with the original transaction which it professes to record. It is not necessary, indeed, that it should be in the form of a journal or day-book. Entries in ledger-form have been admitted, or in a pocket memorandum-book. Still, the entry must have been made within a reasonable time after the transactions, – not further than twenty-four, or at most forty-eight hours.

This was probably the practice in early Upper Canada as well. Given what we know about the casual nature of many account entries, it implies a wide reach for the law into transactions that may have appeared to be fairly informal.

Merchants, Banking Functions, And The Bon

Although the Bank of England was founded in the late seventeenth century, enterprises known as banks did not exist in the Canadas until 1817. The Bank of England had been “conceived...as a mechanism to provide money for government expenditure and to facilitate increased circulation of a limited amount of specie.” In addition to the Bank of England, by the late eighteenth century there existed numerous private banks in both London and the provinces. They provided a variety of services, some of which were

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31Ibid., 368-9.
32Ibid., 369.
different from the private banks in London. For example, although none of the London private banks issued bank notes, many of the provincial banks did.\textsuperscript{34}

Because of its connection with the government, the Bank of England also issued official bank notes. Although legal tender, these notes were not official in the same sense as the government currency we are familiar with today in the form of the British pound or the Canadian dollar.\textsuperscript{35} Legal tender denotes a medium of payment which creditors would have to accept in payment of a debt.\textsuperscript{36} Other than Bank of England notes, only gold or silver coins were legal tender in the period. "Bills of exchange, promissory notes or cheques are not proper tender and can be rejected."\textsuperscript{37} The notes issued by private banks in England were not legal tender.

Banks also lent money on promissory notes or other security, and they bought, sold, and discounted (cashed) bills of exchange.\textsuperscript{38} Merchants did those things as well.\textsuperscript{39} Although large-scale inter-regional and international dealings in the Canadas were probably confined to the Montreal import-export houses and to the very large Upper Canadian merchants,\textsuperscript{40} bills, notes, and other kinds of commercial paper circulated within Upper Canada, and merchants at all levels would have been involved. Early Upper Canadian merchants also kept track of and reconciled accounts and provided and received credit. This is one reason why they are often thought of as having performed banking functions or as having been at the centre of finance in early Upper Canada.\textsuperscript{41}

Less studied has been the role of Upper Canadian merchants in another banking function, the printing of small notes as a substitute for specie. Printing notes or producing

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\item \textsuperscript{34}Baskerville, xvii, xviii; Price, "Capital and Credit," 81-2.
\item \textsuperscript{35}Baskerville, ibid.
\item \textsuperscript{36}McCullough, 18.
\item \textsuperscript{37}C.R.B. Dunlop, \textit{Creditor-Debtor Law in Canada}, 2nd ed. (Toronto: Carswell, 1995), 19.
\item \textsuperscript{38}Price, "Capital and Credit," 87-91.
\item \textsuperscript{39}Price 1989, "What Did Merchants Do?; Baskerville, xviii-xxii.
\item \textsuperscript{40}Canadian Bankers' Association, 51-2.
\item \textsuperscript{41}Cohoe; McCalla, "Rural Credit, 256..
tokens to take the place of small coins was common in many parts of Britain and North America.\textsuperscript{42} In Upper Canada, the notes were known as Merchants’ Notes, or as “Bons,” so named because “the inscription on such notes invariably began with ‘Bon pour–’, the amount of the note then being specified.”\textsuperscript{43} Bons were used until the War of 1812, when they were replaced by army bills, which became legal tender in Lower Canada in 1812 and in Upper Canada in 1813.\textsuperscript{44}

Available evidence indicates that Bons were not simply used as small change. Bons were a form of commercial paper. They were issued by merchants, circulated, were negotiable, yet they did not fit the definition of bill of exchange or promissory note because they were not negotiable or discountable in the same way as bills and notes. Bills and notes could circulate anywhere. They were payable at a determinable future time as stated on the face of the note, and they were bought and sold at a rate of exchange which was either at, above, or below par but in any case varied according to local and international factors that effected exchange rates overall. In contrast, from what little we know about them, Bons circulated only in their district, and their payment was not unconditional.\textsuperscript{45} They were payable at par by the issuer only in October, and this lack of liquidity made them riskier than other, more conventional forms of commercial paper. At other times of the year, the issuer would redeem them at 12.5 per cent below par.\textsuperscript{46} Those restrictions on the circulation and negotiability of Bons were imposed by merchants and storekeepers. Bons have consequently been connected with credit created dependency and exploitative debt. It is


\textsuperscript{43}McIvor, 15.

\textsuperscript{44}McCullough, 83-5. Bons made a brief re-appearance in Upper Canada during the financial panic of 1837-8, when they were known as “shinplasters.” Ibid., 100.


\textsuperscript{46}Wilson, Enterprises, 17; McCullough, 77.
this, rather than their role as currency substitutes, that makes the Bon important for our purposes.

The Upper Canadian administration was well aware of the irregular legal form of the Bon. In January of 1794, Peter Russell, then receiver-general for Upper Canada, reported to lieutenant-governor Simcoe that:

as these Notes are generally made payable at one day in the year (10th October) and the Holder has consequently no means for securing himself should the Credit of the Drawer meet with any intermediate shock, they ought certainly to be suppressed if possible. For altho' the greatness of the Risk is manifest to everyone, yet their Circulation (Being of necessity submitted to for mutual convenience) will probably still continue to the ruin perhaps of many, unless Government can fall upon some means of rendering it unnecessary.  

In 1793 John McGill, commissariat officer for Upper Canada, reported to Simcoe that:

The nominal money in circulation here, for the payment of all kinds of produce, is nothing more than notes of hand (or what is termed Bons), on small scrips of paper from 3¾ Sterling to thirty six shillings Sterling issued by people in Trade payable on the 10th, 15th, & 25th October annually subject to no Interest, and generally pass in the neighbourhood where the issuer resides. It, however, not infrequently happens that the holder of some of this paper currency finds it necessary to realize it into specie, and for that purpose has recourse to the issuer, who will not give specie for his own notes unless he receives Nine Dollars for Eight or at a rate of 12½ per Cent discount though he had perhaps not long before paid those very notes as Cash to the person, who makes the Application, this added to a risk of the issuer's failure is a hardship on the Settler. 

Simcoe and McGill also thought that Bons in particular and the merchant monopoly in general, affected the price of provisions for the garrisons. McGill reported to Simcoe that the Bon system was:

a very great additional expense to Government, because the monopolizer receives the same price for flour in real cash that he allows the settler in

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47 Cruikshank, 2: 133.
48 Cruikshank, 1: 273.
nominal, consequently the supplies for Government are not had at the first but at the second market.\footnote{Ibid.}

McGill suggested that the government pay the farmers directly in “cash or transferable Certificates in ten or twenty days, thus introducing a certain medium of specie into circulation.”\footnote{Ibid.} He thought that this would prevent the large merchants from using their own paper to “engross” the market, thereby saving the government money by making supplies available without the intervention of a middleman.\footnote{Ibid., I: 273-4.} Simcoe suggested this idea to his superiors in England, but to no avail.\footnote{Ibid., 3: 67.}

Simcoe and McGill also thought that eliminating the Bon system would force merchants to be more competitive in pricing their goods, which would in turn cause prices to drop, thereby saving the government money because it could then pay less for flour.\footnote{Ibid., 2: 152.} Simcoe and McGill’s letters indicate that they perceived Bons to be widely used, and that eliminating them would be the key to eliminating the merchant monopoly. However, evidence is sparse that the Bon really was the severe and widespread problem that Simcoe and McGill thought it to be. Simcoe was vociferous in his opposition to the large merchants, particularly Hamilton and Cartwright. It is possible that Simcoe opposed Hamilton and Cartwright simply because they were sufficiently powerful to threaten him. Yet at the same time as Simcoe was embroiled in political battle with the merchants, the British government was giving them more power by providing them with a contract to provision the troops. It is by no means certain that the Bon was central to the power of the large merchants, but it is clear is that farmers and members of the assembly were opposed to that growing power.
The Judicature Bill of 1794

The Bon has been highlighted by historians because Simcoe connected it directly to the 1794 judicature bill that was brought forward by Simcoe and by William Osgoode, the first chief justice of Upper Canada. This legislation abolished the district Courts of Common Pleas and created a centralized Court of King's Bench on the English model.\(^{54}\)

The Courts of Common Pleas in Upper Canada began in 1788 when the British military government in Quebec created the first four districts of the future Upper Canada. The court heard civil actions, the vast majority of which were for debt. It sat weekly for actions of less than £10, and quarterly for larger claims. Several powerful merchants – including Robert Hamilton and Richard Cartwright – sat on these Courts in three of the districts.\(^{55}\) In the fourth district, which included the established business community of Detroit, the merchant appointees refused to serve and thirty-five English merchants memorialized the governor regarding the unsuitability of merchants serving as judges in an “almost exclusively commercial community where they were likely to be personally interested in many of the cases that came before them.”\(^{56}\) They requested and received a professional lawyer as judge of Common Pleas.\(^{57}\)

The judicature bill originated in the legislative council. Cartwright and Hamilton, both of whom were members of the council, vociferously opposed it. This created something of a stir at the time. The bill was introduced on June 9, 1794 and was debated two days later. “The Assembly expecting a field day, rose and attended the Council in a body to hear the debate.”\(^{58}\) In his speech to the council, Cartwright emphasized two points of opposition. First, the bill would unnecessarily complicate procedure. It would come

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\(^{54}\) An Act to Establish A Superior Court of Civil and Criminal Jurisdiction, and to Regulate the Court of Appeal. 34 Geo. III, c. 2 (U.C.).

\(^{55}\) Hilda M. Neatby, The Administration of Justice Under the Quebec Act (Minneapolis: University of Minnesota Press, 1937), 295.

\(^{56}\) Ibid.

\(^{57}\) Ibid.

“with all the glorius uncertainties of the law in its train, holding out wealth and distinction to the man of law, but poverty and distress to the unfortunate client” because of its “multifarious actions” and “hydra of demurrers, replications, rejoinders” and other complicated and obscure forms of actions and procedure. Second, actions would have to be originated and pleas filed at York, instead of in each District, occasioning much delay and expense. These problems, Cartwright predicted, were more likely to make lawyers rich than to efficiently administer justice. Nor was it calculated to foster good lawyering:

The business of the country is by no means equal to support respectable characters of the profession, and the House need not be told that the understrappers of it are the greatest pest that a society can be cursed with.

It is likely that Cartwright’s criticisms of the bill were at least as much sincere as they may have been self-serving. According to his historians, Cartwright was an exceptionally capable lay judge who was better versed in law than most, and he adapted English substance and procedure to the colonial context in a rational and consistent manner. Cartwright and Hamilton were both intelligent and well-educated, but Cartwright in particular has a reputation as an intellectual and an office-holder who worked for the common good (as he saw it) and not only for his own commercial well-being. In contrast to Hamilton, whose practice at the Home district Court of Common Pleas appears to have been problematic, Cartwright “was regarded as a conscientious, astute judge who added

59C.E. Cartwright, ed., Life and Letters of the Late Hon. Richard Cartwright (Toronto: Belford Brothers, 1876), 70.

60Ibid., 72.


'dignity to the court.' Cartwright was completely loyal to the empire and the Crown, but his belief that institutions and practices of governance should be adapted to the geographical and climatic conditions of Upper Canada brought him into conflict with Simcoe, whose rather grandiose plans for Upper Canada tended toward the replication of English institutions no matter what the circumstance.

Cartwright did, however, tend to identify the common good with that which was good for trade, especially his own:

Early in his life Cartwright had pondered the difficulty of distinguishing between schemes 'set on Foot' for the good of one's country and those advocated from 'some private consideration.' His conclusion, that it was impossible even for the individuals involved to distinguish between them, might aptly summarize the relationship between the interests of Upper Canada and those of Richard Cartwright.

Simcoe was determined to pass the judicature bill, in part because he considered that the administration of justice on the English model was part of the constitutional promise owed to the Loyalist settlers. Cartwright agreed that the Loyalists "should have the benefit of the English laws and form of Government," but he thought that those forms should be adapted to the conditions – especially the geography – of the new province.

The majority of the legislative councillors agreed with Simcoe. Before the bill went down to the house of assembly, Cartwright and Hamilton put forward a Dissentient in which they emphasized the geographic problems with the proposed reform and pointed out pointing out that the objections raised to a system of district courts would be removed by the appointment of professional judges. This attempt to distance themselves from

65 Rawlyk and Potter, 170.
66 C.E. Cartwright, 50, 49.
67 Cruikshank, 2: 271.
personal interest in defeating the judicature bill was to no avail; the house voted unanimously in its favour.

By setting up one centralized court for the entire province, the reforms were bound to bring expense and inconvenience. The members of the assembly must therefore have had some pressing reason for thinking the reformed system would be an improvement over the status quo. Riddell suspected that:

Simcoe and the Government party capitalized on the discontent of the farming community and the rural Members in the Legislative Assembly against Cartwright and Hamilton.68

There is ample reason to believe that Riddell correct in both his allegations; that is, that farmers and other rural people were discontented with Cartwright and Hamilton, and that Simcoe made use of that discontent for his own purposes.

The historian S.R. Mealing has made the unsupported assertion that Simcoe's "only important critic in Upper Canada, the Kingston merchant Richard Cartwright, stopped his criticisms after they had met. Earlier, the two had written bitter nonsense about one another."69 Mealing was clearly wrong. At the latest, Cartwright and Simcoe would have met at the first sitting of the legislative assembly and council in September, 1792. By 1794, for reasons that are explored below, Simcoe's antipathy was at a high pitch. Matters came to a head over the judicature bill. Although he won handily, Simcoe could not report on his victory without casting aspersions on Cartwright and Hamilton.

In a letter to Henry Dundas (then Secretary of State for the Home Department) Simcoe alleged that Cartwright and Hamilton opposed the judicature bill for the self-interested reason that they wanted to hang on to their judicial positions at Common Pleas. He contrasted their behaviour to the merchants at Detroit, who had excused themselves from serving "from the conscientious Plea, that it was impossible any cause could come

68Riddell, 94.
before them in which they should not be mediately or immediately interested." In Simcoe's opinion, Cartwright and Hamilton were not "actuated by the like scruples" when they accepted the judicial appointment. Simcoe characterized this as their reason for opposing the reform:

Every Art of misrepresentation was industriously exerted to render the Bill unpopular. As it was a question of great expectation the House of Assembly adjourned in order to attend the debate which took place on the first reading. The arguments used against the Bill were founded on general Topics of Inexpediency in the present Condition of the Province, while the population was scattered and the communications uncertain. The Bill was supported as a measure expected by the public, as one of the first objects of every Civil Establishment, & as a benefit enjoyed by every Colony connected with the British Dominion.

Simcoe added that "an unexpected attack" prior to the third reading of the bill:

provoked an Enquiry into the payment of the Notes issued by the Merchants which could never have prevailed so universally thro' the Settlement, had it not received the sanction of what was deemed to be authority. Some shameful abuses were pointed out by which the people have been hitherto most grievously oppressed & it was suggested that a Court comprised of persons regularly bred to the Profession of the Law would probably differ in their opinion from the present Expositors upon the time & place of payment of their Notes of hand.

This part of Simcoe's account implies that there was an outpouring of opposition in the assembly to the Bon; specifically that members of the assembly were incensed by the practice of redeeming Bons at face value only on certain dates, and that they felt that whereas merchant judges had enforced this system at common pleas, lawyers would not.

As we have already seen, Simcoe was preoccupied with the Bon, and for precisely those reasons. But was the assembly? It is hard to tell. It is difficult to be exact about dates in this matter because the Journals of the Legislative Assembly are missing for several

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70 Cruikshank, 3: 2.
71 Ibid.
72 Ibid., 3: 3.
73 Ibid.
years beginning June 13, 1794\textsuperscript{24} – just when the bill would have been debated in the assembly. Other evidence casts doubt on whether the assembly shared Simcoe’s precise preoccupation with the Bon or, if it did, whether the members believed that abolishing Common Pleas would have an effect on the Bon in particular. Specifically, there is no record of Bons ever being enforced by the Court of Common Pleas in any district.

**Evidence For Use of The Bon**

i. **At the Court of Common Pleas**

   The idea that the Bon system was specifically enforced at Common Pleas, and that this was a motivation for the abolition of that court, has been perpetuated by the authors of major historical studies of the period. In his study of Robert Hamilton’s business empire, Bruce G. Wilson shows that Hamilton rarely used the Court of Common pleas to sue his own debtors. However, “even more important to Hamilton than the enforcement of individual accounts through the court was the enforcement of the general mercantile system, specifically of the system of bons.”\textsuperscript{75} Wilson describes the system of redemption at par in October or at a discount at other times, and he quotes from Simcoe’s letter to Dundas regarding the ostensible propensity of merchant judges to enforce the system.\textsuperscript{76}

   W.N.T. Wylie also refers to the Bon in the context of the abolition of common Pleas. In his study of the civil courts in the Midland district, Wylie paraphrases Simcoe regarding the enforcement of Bons by merchant judges. He continues:

   Though there is no evidence of this in Midland, the practice there of relaxing standards of proof for notes and accounts of merchants reveals a similar leaning towards the interests of merchants.\textsuperscript{77}


\textsuperscript{75}Wilson, *Enterprises*, 55.

\textsuperscript{76}Ibid.

\textsuperscript{77}Wylie, 167.
Unfortunately, Wylie, the only historian who has looked at the Courts of Common Pleas in any detail, confined his study to the district of Mecklenberg (later Midland), where Richard Cartwright was a judge. That Bons were not mentioned in the Midland records, while he assumed they were enforced elsewhere, gave Wylie reason to laud Cartwright for not enforcing the Bon when others did. However, as Wylie points out, Cartwright did participate in what was probably the real issue in the debates: the pro-merchant leanings of the Courts of Common Pleas.

It is striking that I did not see the word “Bon” in my review of Court of Common Pleas records, nor did I find actions by other names that could be identified as being in regard to a Bon. I came to the latter conclusion on the basis of McGill’s possibly unreliable report that Bons were issued in denominations of “from 3½ Sterling to thirty six shillings Sterling.” There were no records of actions for amounts of thirty-six shillings or less. This is not surprising given that in the Midland district, it usually cost between £4 and £5 to bring a case at Common Pleas. More than half of that would be paid to an attorney or agent. Many people saved by representing themselves, but the costs would still have been greater than what McGill tells us was the value of any Bon. However, there is not much information given on the face of the records, and it is possible that there were suits on more than one Bon, or on a Bon in addition to other instruments, which would appear in the record as an action for a sum larger than thirty-six shillings.

ii. At the Courts of Request

In 1792, the weekly Courts of Common Pleas had lost their jurisdiction over sums of less than £2 to the new Courts of Request. Unlike the Court of Common Pleas, which heard matters of contract and tort as well as debt, Courts of Requests existed solely for the recovery of small debts. Costs were lower at the Courts of Request, usually less than
£1.\textsuperscript{82} Requests was also more accessible than Common Pleas, since there could be several courts in any district. Courts of Request were under the direction of the district magistrates. The magistrates divided their district into divisions, in each of which a court would be held twice each month, presided over by two or more Quarter Sessions magistrates. They could create as many divisions as they wanted and change them as often as they wished.\textsuperscript{83} This created a flexible system, but one that suffered because many of the magistrates were ignorant of both local conditions and legal procedure.\textsuperscript{84}

While ultimately under central control, the de-centralized Court of Requests system was not necessarily consistent in regard to what it called things or how it kept its records. In his study of 1819 to 1825 Court of Request Records from Bath, in the Midland District, W.S. Herrington notes that Requests had no court clerk. The magistrates kept the records themselves, switching off every three months and noting in the book’s pages which magistrate had the book and when.\textsuperscript{85} There is no such overt notation in the few surviving pre-1812 Court of Requests records, but there are distinct variations in how actions and transactions are noted in them. This renders any attempt to understand the basis for Court of Requests actions very problematic.

One of the Court of Requests records from the period, the Grenville (County) \textit{Minute Book}, 1798-1802\textsuperscript{86} show seven actions on Bons out of a total of approximately 143. These records show the difficulty inherent in any attempt to precisely delineate the debt instruments or, to put it another way, the evidence of debt, in actions at the Court of Requests. In particular, there were a total of eight later actions on notes “of hand.” Notes of hand are difficult to define, but some writers appear to associate them with Bons, and

\textsuperscript{82}Wylie, 179.


\textsuperscript{84}Ibid., 128.


\textsuperscript{86}Archives of Ontario, RG 22-411-0-8 Grenville (County) \textit{Minute Book}, Court of Requests, 1798-1802.
Bons were referred to as "notes of hand" by at least one contemporary source.\textsuperscript{87} According to \textit{Black's Law Dictionary}, a "note of hand" is "a popular name (now obsolete) for a promissory note."\textsuperscript{88} It is possible that the term "note of hand" was ill-defined in the period, referring both to promissory notes as formally defined, and to other notes of debt that did not meet the formal definition. To add to the confusion, thirty-three of the 143 actions at the Grenville Requests were explicitly stated to be on the basis of "notes," sometimes "promissory notes" and, once, a "promissory note of hand." To complete the picture, twenty-four of the Grenville actions were brought on the basis of "book," "book debt," or "book accounts," which almost certainly indicates the records of a store or other commercial enterprise (e.g. mill or tavern); and fifteen were simply on "account." Some actions on "account" may indicate debts owed to stores or other enterprises, but others may not, since there are references to the parties settling up by making a "ballance [sic] of accounts." However, even if the debt was between two individuals, it may still have been recorded in the account book of the local store. There were also twenty-two actions that were explained simply as "demands." Finally, there were 36 actions the cause for which fall into the category of "other." Twelve of these were either non-appearances by a party (defaults) or a non-suit for some technical reason, leaving twenty-four. Of these, fourteen gave no explanation for the debt. The remaining ten break down as follows: three were for costs related to the operation of the court or enforcement of its judgments; three were settled; two were for work performed; one for pasturage provided for horses; and the final one explained only by a cryptic reference to monies "due on protested order."

The seven actions on Bons all occurred in the first twenty-four of the fifty-three months covered by the record. Did the Bon disappear from use (or at least from law suits) in Grenville County after about 1800, or is it possible that some of the actions on notes or notes of hand may have been actions on the Bon by another name? The available evidence points to the first possibility, that the Bon disappeared after 1800.

\textsuperscript{87}Wilson, 55, 79-80; McCullough 77.

\textsuperscript{88}\textit{Black's Law Dictionary}, 6\textsuperscript{th} ed., s.v. "Note of Hand."
Records from the Grenville County Court of Requests to 1813 have also survived in the paper of Solomon Jones, one of the magistrates. None of the records from after 1800 mention the Bon. More important, the Solomon Jones papers include some of the more ephemeral pieces of paper that would have been relevant to an action at the court. These pieces of paper were often kept as loose papers between the leaves of the minute book. Among these are some examples of notes and notes of hand. Those notes are clearly not Bons.

Recall that Bons received their name because they began with the words “Bon pour,” or, in English, “Good for” or “Good to.” I have seen only one Bon from the pre-1812 period. It is from 1788 Quebec, before Quebec was divided into Upper and Lower Canada. It is a printed form with handwritten inserts, and it reads “Good to Thos. Ferguson for Two Shillings Value Received.” No payment date is indicated. The language on the notes in the Solomon Jones records is quite different. Whereas the key phrase in a Bon is “Bon pour,” the key phrase in the notes is “promise to pay,” and the promise includes the sum to be paid and a payment date.

The clearest example is provided by a November 6, 1802 action in which Daniel Jones, Esq. sued John Newman for “two pounds currency debt due from note of hand.” The associated piece of ephemera reads, “For Value Received I promise to pay to Dan’l Jones” with a specific sum and payment date. Unlike the Bon, this note contains most of the legal requirements for a negotiable instrument: it is an unconditional promise to pay a sum certain at a fixed or determinable future date and to a specified or specifiable person.

To sum up, first, since there are no other surviving Court of Requests records in the period, the evidence is sparse. The evidence that is available indicates that the magistrates at this particular Court of Request could tell the difference between a promissory note and a

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89 Archives of Ontario, F521 Solomon Jones Papers, Records of the Court of Requests, 1798-1813.
90 The Bon is reproduced in A.B. McCullough, Money and Exchange in Canada to 1900 (Toronto: Ministry of Supply and Services Canada, 1985), 57.
Bon, although it is still possible that the looser term “note of hand” may at times have referred to a Bon.

Second, it should be recalled that economic development in Upper Canada was uneven, and even if Bons fell into disuse in Grenville County by 1800, they may have continued to be used in the western districts. It may therefore be relevant that Grenville was in the eastern end of the province, since the eastern part of the province was the first to integrate into the export market and therefore to become less dependent on the garrison market. However, given the paucity of evidence, it is difficult to be more than speculative.

iii. Other Evidence for the Bon?

I had initially assumed that the sketchy information available in the legal records could be fleshed out if I had the opportunity to peruse archival collections of merchants' records and family papers. However, according to A.B. McCullough:

The evidence for the widespread use of bons in central Canada up to the period of the War of 1812 comes almost entirely from contemporary literature. There is little identifiable evidence in contemporary account books or in estate inventories of their use.91 McCullough credited Douglas McCalla with this information.92 The contemporary literature referred to by McCalla is the letters of Simcoe, McGill, and Russell. Although they are relied on over and over again in the secondary literature, many of the assertions in them are not supported by the legal records. There is not much trace of the Bon in merchants records,93 and no identifiable evidence that the Courts of Common Pleas enforced the Bon system, although Bons were enforced by the Courts of Request. Until research turns up more solid evidence, it must be concluded that the Bon in itself may not have been instrumental in creating dependant or exploitative credit relationships in the early period in Upper Canada.

91McCullough, 297.
92Ibid.
93I spoke to Professor McCalla in October of 1998. He told me that the literature referred to was the letters of Simcoe, McGill, and Russell, and that his work in merchants' records since the publication of McCullough’s book confirms his earlier assessment.
If this is so, there are two questions to be looked at regarding the Bon and the 1794 court reforms. First, what was Simcoe really upset about? Second, why might the members of the house of assembly have voted unanimously for the reform?

The Provisioning Contract, and Simcoe’s Feud with Hamilton and Cartwright

Simcoe’s attitude toward merchants in general, and Hamilton and Cartwright in particular, has often been attributed to the disdain of an aristocrat (or someone with aristocratic pretensions) toward persons in trade. That disdain no doubt existed, but it was only part of a more complicated picture in which it was intermixed with some genuine concern for the position of farmers, as well as with a fear that merchant power might eclipse the prerogatives of government.

A properly aristocratic disdain for trade may have been difficult to sustain in the tiny world of early Upper Canadian society, an elite group that attempted to personify the aristocratic values that they believed would balance and control the democratic inclinations held by many of the settlers. Leonore Davidoff has stressed the importance of “Society” in England as “a linking factor between the family and political and economic institutions” used to “place” individuals “based on common claims to status honour which were in turn based on a certain life-style.”

For the tiny Upper Canadian elite, living in the midst of a wilderness, the ideological importance of the ritualized distinctions of rank and precedence would have loomed even larger. “Simcoe and his wife Elizabeth deliberately cultivated a sophisticated, class-conscious society for the small official coterie.” Yet “society” in early Upper Canada was of necessity a mixed group. English officials and the Loyalist gentry were forced to mix on terms of equality with prominent merchants and with the mixed race children of fur trade marriages. For example, Catherine Askin, who married Robert


Hamilton, was the daughter of the fur trader John Askin and a First Nations woman. Her antecedents and trade connections were no barrier to her social prominence. In June, 1793 Catherine, as Hamilton’s wife, was ranked second only to Mrs. Simcoe at the grand ball in celebration of the King’s birthday.

This confusion created by social ritual would have been exacerbated by the real dominance of the large merchants. This dominance was both economic and logistical, because merchants had established communication and transportation networks. The first local appointments for Upper Canada were made by the central government at Quebec in 1788. The government was forced to rely on people with knowledge of local conditions in the new districts. At Niagara, for example, the government:

Turned for advice to the three organizations which had been closely connected with the upper country and which had knowledge of the new settlements: the army, the Indian Department and, to some extent, the fur trading community. The involvement of all three of these groups with provisioning and supply meant that their most direct contacts in settlements like Niagara had been with the local merchants who had participated in Laurentian trade.

Merchants were entrenched in the administrative hierarchy before Simcoe arrived in 1792. This was important because administrative power – in Niagara and likely elsewhere as well – was cumulative. “Those who received positions in the first year of settlements were often chosen for subsequent appointments or, equally, important, were consulted on such appointments.”

Simcoe was forced to contend, both socially and politically, with a group of prominent merchants who were already running the country. Although he had no choice but to appoint Cartwright and Hamilton to the legislative council, that necessity appears to have been distasteful to him. The evidence for this is drawn from Simcoe’s own letters, most of them written to his superiors at Quebec and London.

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97Wilson, 40.
98Ibid.
At first, Simcoe was merely perturbed by Cartwright and Hamilton's daring in attempting to contribute to policy. For example, one of Cartwright's first acts as a legislative councillor was to introduce a bill to regularize marriages performed, in the absence of Church of England clergy, by military commanders, justices of the peace, and other officials. Cartwright's own marriage was irregular in this way. Simcoe did not like the way the bill was written, and Cartwright withdrew it on Simcoe's promise that the matter would receive swift attention. There seems to be nothing startling here. Yet in a letter to Henry Dundas reporting on the first session of the legislature, Simcoe betrayed his antipathy with a reference to "a hasty and ill digested Bill...brought forward by a leading Character, who is personally concerned."  

In 1793, Isaac Todd's lobbying in London resulted in the awarding of "an exclusive sub-contract to victual the military posts on the Great Lakes" to Cartwright, Hamilton, and their associates. Simcoe switched into high gear, openly alleging to the home government that Cartwright and Hamilton were disloyal and dangerously powerful: Mr. Hamilton is an avowed Republican in his sentiments and altho' the merchants are justly obnoxious to the settlers of this Province, and He is particularly so, yet the ascendancy He and his friend, Mr. Cartwright must acquire, by being Agents for the Contract which supplies the King's Troops with provisions, is of that nature, that there is nothing to prevent them from exercising it to the detriment of Government, if they have any particular Object to promote, that may gratify their avarice, ambition or Vanity.  

There is no evidence that Cartwright or Hamilton were disloyal. The merchants did not see eye to eye with the lieutenant-governor on every detail, but their biographers are unanimous in affirming their loyalty to monarch and empire, and Cartwright in particular was a prominent Loyalist spokesman.  

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100 Cruikshank, 1:250.  
102 Cruikshank, 2: 55.  
103 Wilson, 101; Rawlyk and Potter.
Cartwright’s letters from the same period betray none of Simcoe’s vitriol, although they do leave the reader with the impression that Cartwright found Simcoe to be well-meaning, but perhaps a bit dim, and certainly over-ambitious in comparison to what could actually be accomplished. After hearing what Simcoe had been saying about him, Cartwright wrote Todd a hurt letter in which he expressed his outrage that his loyalty was questioned merely because he disagreed with Simcoe on how to adapt English structures and institutions to Upper Canadian conditions. In Cartwright’s opinion, he had been appointed to the legislative council because of his local knowledge:

To assist in framing such laws as might be most applicable to the situation of the colony; not merely to show my complaisance to the person at the head of the Government. Such, at all events, is the duty which I conceive that my appointment imposes on me; and do they expect that I should either approve of or be silent upon measures that are totally inapplicable to the state of society in this country, that are inconsistent with its geographical situation, and must shock the habits and prejudices of the majority of its inhabitants?

Even this loyal opposition was an affront. Simcoe’s grandiose plans were often rigid and eccentric, manifesting themselves in “zealous activity.” They were at times absurd, for example, Simcoe’s claims for the efficacy of trade with Upper Canada “involved him in the contention that Upper Canada, 250 miles upstream from the nearest port and separated from it by rapids over which the water was less than a foot deep, was in effect on the sea coast. Such illogic must have been deeply irritating to Cartwright.

But Simcoe’s antipathy towards Cartwright and Hamilton went beyond the personal. The major merchants – Hamilton, Cartwright, Askin, and their associates – did have a huge, if not completely monopolistic, trade advantage because of the networks they had developed, their control of portaging and forwarding, and the large scale on which they did business. According to Bruce Wilson, however, Simcoe paid little attention to the

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104 See C.E. Cartwright, 41-56, and especially 55.
105 Ibid., 57.
106 Mealing, 303.
107 Ibid., 305.
merchants until the new provisioning system began to be protested by people in the province. Although Simcoe’s concerns about the economic impact of the contract were genuine, “other implications struck closer to home: the contract might give merchants the power to challenge his political authority.”

Because he perceived it as increasing their power, it is likely that Cartwright and Hamilton’s position as holders of the contract heightened Simcoe’s suspicion of their political differences. Simcoe warned Dundas that the provisioning contract made the political opposition to the government too powerful. William Osgoode, the Chief Justice, agreed. In an undated memorandum headed “Secret & Confidential,” Osgoode advised anyone wanting to encourage opposition to the government to ensure that Hamilton and Cartwright retained the flour contract because, in a house of assembly that was dominated by farmers, this would retain “the whole patronage of Government in the Hands of Opposition.” Simcoe claimed that he had solved the problem when he reminded Hamilton and Cartwright that they depended on his goodwill for the continuation of their contract:

In the last year an Intimation from the Agent for the flour contract that [Cartwright] and Mr. Hamilton being subordinately employed in the branch of the Commissariat, depended upon my approbation, contributed to a very visible change in the language of those gentlemen.

In fact, this letter is dated June 15, 1794, the same week in which Hamilton and Cartwright were opposing the judicature bill in the council and the house.

The debate over the 1794 judicature bill, and Simcoe’s claims regarding that debate, must be viewed in the context of Simcoe’s overall antipathy toward Cartwright and Hamilton, and especially his fear that their power would be consolidated by the provisioning contract. Most of Simcoe’s claims regarding merchants arose in this context.

108 Wilson, Enterprises, 112.
109 Ibid., 113.
110 Cruikshank, 2:55.
111 Ibid., 2: 124.
112 Ibid., 2: 265.
As the data on which historians have based their views - either pro or con - of merchants in the early years of the province, Simcoe's claims are worth revisiting. But Simcoe's views are not the only ones of importance, and the finding that his claims were exaggerated and sometimes even untrue does not give cause to doubt that there was real anti-merchant sentiment in the province at the time.

**Wider Anti-Merchant Sentiment**

Simcoe and Osgoode's fears regarding the power that might accrue to Cartwright and Hamilton as a result of the contract were unfounded as far as the house of assembly were concerned. There were few merchants among the members of the assembly, and none from the Niagara peninsula, where Robert Hamilton's economic influence was pre-eminent. Throughout the first parliament, which lasted from 1792-96, "the agrarian element sharply and consistently opposed its interest to that of the merchants." When Cartwright and Hamilton took a strong stand in opposition to the judicature bill, the house voted unanimously on the government side, despite indications that the new system would make litigation more expensive and less accessible. The members probably did believe that legally trained professional judges would break the power of the merchants at the courts, and perhaps also that a centralized system based on the English model could disrupt the entrenched institutional structure of the districts, where the merchant interest dominated among local officials. And, they were genuinely upset about the provisioning contract.

Provisioning contracts were awarded in London, and the contractees there would appoint agents in Quebec. The new contract added a new level of local agents – Hamilton, Cartwright, Askin and their associates:

These local agents were to arrange the collection of the requisite quotas of flour at each of the major posts; in return, they were to be given first option in the provision of supplies within their respective regions.\[^{115}\]

\[^{113}\]Wilson, *Enterprises*, 106.

\[^{114}\]Ibid.

\[^{115}\]Ibid., 112.
This gave the large merchants (who were already judges of Common Pleas and Quarter Sessions, as well as members of the District Land Boards) another level of official power, which was quickly protested by the settlers. By May of 1793, settlers at Detroit memorialized Simcoe “that they were being injured by the new arrangements” and the contract was “heatedly discussed” by the legislative assembly. According to Wilson, “Upper Canada's first provincial political agitation was under way.”

In some ways, the contract may not have been particularly beneficial to Hamilton and Cartwright:

Rather than using the contract to destroy all competition and beat down the price they paid for grain, Hamilton and Cartwright feared that, given the erratic nature of Upper Canadian supply, they might find themselves committed to providing more than they could collect and consequently lose on the enterprise. In 1794 they gladly accepted the interpretation of the contract that they should have first preference in supply rather than a monopoly.

If the large merchants were benefiting unfairly from the contract, it may have been as much at the government’s expense as at farmers. As the contract agents who supplied the garrisons, the merchants:

Were paid once yearly in specie on bills drawn in Quebec and received additional profit since interest was paid on the sum owed. The mode of payment by Hamilton and other merchants to farmers, however, was different: they paid for produce received by notes of hand (bons) due annually in October and subject to no interest whatsoever. Not only farmers, but small merchants who wished to deal with the garrison found themselves obliged to sell their produce through an intermediary; they too found themselves drawn to Hamilton's enterprises.

The interest collected by the large merchants was not passed on to the farmers, and this would have been a legitimate cause for grievance, as would the other differences between bills and Bons.

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116Ibid.
117Ibid., 80.
118Ibid., 79-80.
Even after the term of the provisioning contract was over, the problems with monopoly continued, in part because the army would not accept small lots of flour, even though small lots were all that could be produced by the majority of farmers. In 1803, Robert Hamilton calculated that the average surplus that could be produced by most farmers on the Niagara peninsula was 14 barrels of flour. Yet the policy at the Niagara garrison was to refuse lots of less than 50 barrels and, in practice, it contracted for much larger amounts.\textsuperscript{119}

Were Bons in themselves the problem? The new provisioning contract did make the distinctions between Bons and conventional bills of exchange more explicit. This kind of unfairness, however, is more likely to milk government coffers than to pick the pockets of local farmers.

This does not mean that there was no dependency or exploitation. On the contrary, as argued in the last chapter, there is considerable evidence that there were such relationships, especially in the earliest period when the garrisons were the primary market for Upper Canadian produce. But, as pointed out by both Adam Shortt and Bruce Wilson, the Bon system was not necessary in order to create the kind of monopoly and dependency that existed in Upper Canada at the time. As emphasized in the last chapter, there are several conditions that tend to create dependency, and others that tend to mitigate it. Both kinds of conditions existed in Upper Canada, especially in the early period when the garrisons were the major market for local produce. The allegations concerning the Bon are important because, if true, they would indicate that something like a truck system existed in Upper Canada. But truck is not the only kind of credit-related dependency, nor is the variety of credit relationships in any situation either dependent or not dependent. We may never know just how prevalent Bons were or how they were used. We do know that Bons were not necessarily what Simcoe and McGill reported them to be. The easy answers provided by the assumption of a truck system are no longer possible. They must give way

\textsuperscript{119}Ibid., 79.
to questions rooted in a more complex understanding informed by the knowledge that there was competition among merchants as well as over-arching domination by a powerful few.

In discussing Simcoe’s plea for a provincial currency, Shortt asserted that “under the conditions of the time whatever competition there was operated through the system of barter and bouns quite as well as under a system of cash sales.” Shortt saw the problem as one of limited surplus and difficult transportation; that is, lack of capital rather than of currency. In a different vein, Wilson has pointed out that:

A merchant as well established as Hamilton...did not rely exclusively on his bouns to hold his trade; his retailing operations were of such a scale that they had developed a dynamic of their own. Pioneer farmers in the Niagara peninsula, bouns or no, would no doubt have found themselves drawn into Hamilton’s extensive trade network.

Even if they did not specifically enforce Bons or the Bon system, there is considerable evidence to indicate that the Courts of Common Pleas fostered and supported the mercantile interest. It is little wonder that the house of assembly voted unanimously for the abolition of that court, especially when it was to be replaced with a system mirroring the English court system, with the expectations for the substance of British justice that the English forms would raise.

Credit, Dependency, And Legal Doctrine

Merchant domination of the system of justice was not a new problem, and it was a source of grievance to Loyalist settlers who had expected the benefits of a British system. As early as 1787, the governor commissioned an inquiry into Loyalist grievances in the Kingston and Cornwall area. The commissioners reported that:

In the course of our Enquiry We were led from public Rumour to expect much complaint in the 5th Township, New Oswegatchie, of the Conduct of Justus Sherwood Esquire in the 3rd Township of Cataracaui, against Jeptha Hawley Esqr as tradeing Justices, but to our great Surprise not a Complaint was heard in either Township and from our personal Knowledge of the

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120 Canadian Bankers’ Association, 54.
121 Wilson, Enterprises, 119.
Parties we are apprehensive that Complaint has been suppressed by means however which we cannot account for.\(^{122}\)

Yet the dominance of merchant interest on the courts should not be attributed solely to the number of merchants on the bench. It was built into the form and structure of the law itself, and it is conceivable that the promissory note, a conventional and legally recognized negotiable instruments, was more characteristic of this problem than was the unconventional Bon.

Bills of exchange and promissory notes have many of the same legal characteristics, yet Wylie found that in the Midland district there were fifty actions on notes, and only five on bills.\(^{123}\) These statistics are borne out by the records of the Johnstown Court of Requests. Many of those actions were on notes, and none were on bills. A clue to this discrepancy might lie in the accounting and debt collection practices of the time. Although both kinds of instruments were negotiable, meaning that they could and did circulate widely, they were initially drawn up to express different kinds of relationships. To reiterate, the drawer of a bill was drawing on the funds of drawee to pay a third party, while the signatory of a promissory note was him or herself making a promise to pay. In Upper Canada, promissory notes were often signed after a storekeeper who had been carrying a particular debtor on his books for some time consolidated those debts into note form.

In addition, promissory notes were produced and used locally, whereas bills of exchange tended to be used for transactions over longer distances. Virtually all international commerce went through Montreal firms, and it is likely that Montreal courts would have heard any cases of dispute over bills moving in and out of the Canadas. According to Wylie, even litigation between the four districts in Upper Canada was rare and commercial contact between the districts was mainly confined to the major merchant/forwarders like Cartwright, Hamilton, and Askin.\(^{124}\) In a context where


\(^{123}\)Wylie, 101.

\(^{124}\)Ibid., 133.
population was scattered and isolated and merchants dominated in official positions, including on the courts, an unconventional instrument like the Bon would not be a necessary prerequisite for credit based dependency.

Finally, the relaxed evidentiary rules in the colonies should also be considered. Promissory notes were theoretically ‘better’ evidence of a debt because they were almost irrefutable. However, in practice it was just as easy to get a judgment for a book or an account debt. There were more debts collected on the basis of books or accounts than on notes at both Midland Common Pleas and the Johnstown Court of Requests.

The change from the Common Pleas to the King's Bench system did create the hazards of expense and inconvenience that had been predicted by Cartwright and Hamilton. It also created new expectations for a standard of British justice: objective, fair, non-arbitrary, and dispassionately administered by professional judges – in contrast to the “tradeing justices” and the merchant magistrates who had been the cause of many grievances.

These expectations were to take a beating over the next two decades. The differences between the large merchants and the government would prove to be short-lived. Simcoe relied on the large merchants’ expertise even when he was politically hostile to them, and that reliance grew as tensions eased. In 1792, Simcoe set up a system of county lieutenants to head up local governments. When one of the incumbents on the Niagara peninsula died in 1796, Simcoe appointed Robert Hamilton as his successor. Simcoe also accepted Hamilton’s recommendations – all of them merchants – for the important office of justice of the peace. If Simcoe’s victory over the merchant interest was primarily symbolic, their mutual accommodation was very real.

The real power issue, then, was not so much between merchants and government as it was between those two groups and others who did not agree with their essentially

125 Wilson, Enterprises, 124.
126 Ibid., 127.
conservative views. This chapter has tried to demonstrate some disingenuousness in Simcoe’s frequent denunciations of the merchants by showing that the Bon in particular could not have the importance he claimed for it in respect of the 1794 court reforms. Hostility towards both merchants and government had deeper roots than did any hostility among those two groups toward each other.

Justice continued to be administered to the advantage of creditors. Although this was a feature of creditor/debtor law that pre-existed settlement in Upper Canada, the growing wealth and power of the large merchants provided a focus for anger. The issue of the seizure of land for debt was particularly ideologically charged. As will be explored in the next chapter, that issue would become the focus for widespread agitation before the decade was over.
Chapter Five

LAND SEIZURE AND LEGAL IDEOLOGY

The narrative of this chapter ranges from 1798, when the seizure of land for debt was first litigated at the Court of King's Bench in Upper Canada, to 1809, when the Judicial Committee of the Privy Council affirmed that land would remain open to seizure for debt in Upper Canada. The argument throughout is that the legal issue was highly politicized because it highlighted constitutional distinctions between England and Upper Canada, and because seizing land for debt was – or was thought to be – advantageous to merchants and oppressive to farmers. In combination, these two factors disappointed many people whose had expected that 'British Justice' would enhance fairness and equality in the province. As I argued in the last chapter, those expectations would have been enhanced by 1794 judicature act, which abolished the legal structures set up by the Quebec Act and replaced them with English legal forms and institutions.

Legal Basis And Political Background to Land Seizure

The fact that land was open to seizure for debt in Upper Canada stood in glaring contrast to English legal tradition. In England, creditor's remedies were generally limited to either execution against personal property, that is, its seizure and sale by the sheriff; or execution against the person, that is, imprisonment for debt. There were some remedies available against land, but they did not result in its seizure and sale. Instead, creditors were limited to various ways of obtaining an interest in the debtor's land as security.\(^1\) Alternatively, a creditor could obtain a writ of eligi or of levari facias, "writs which reached the rents and profits of the judgment debtor's land,"\(^2\) providing the creditor with a proportion of the profits until the debt was paid off.

Land was open to seizure for debt in Upper Canada because of a 1732 English statute which applied to all of England's North American and Caribbean colonies. The

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\(^2\) C.R.B. Dunlop, Creditor-Debtor Law in Canada, 2nd ed. (Toronto: Carswell, 1995), 80.
statute, An Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America, was passed in order to make recovery of debt in the colonies easier for creditors in England. This, its framers were convinced, would, "tend very much to the retrieving of the credit formerly given by the trading subjects of Great Britain to the natives and inhabitants of the said plantations, and to the advancing of the trade of this kingdom thither."4

Although the statute applied to all of the colonies, land was already open to seizure for debt in most of them, and the legislation was aimed primarily at perceived mischief in Virginia, where the law was generally lenient toward debtors:6

In 1732 Parliament had come to the assistance of British creditors who complained that they were compelled at great expense to make an appearance in the local courts of the province, but found when doing so that they could not secure attachment of lands, houses, or slaves of the Virginia planters since these were not regarded technically as 'assets.'7

The English Parliament's remedy had two substantive provisions. First, the statute eased the burden on creditors in England by providing for their affidavit evidence to be accepted in colonial courts with the same force and effect as viva voce evidence.8 Second, the statute provided that:

The houses, lands, negroes, and other hereditaments and real estates, situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of

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3An Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America, 5 Geo. II, c. 7 (Imp.).
4Ibid., s. 1.
7Gipson, 261n-262n.
85 Geo. II, c. 7 (Imp.), s. 1.
what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof.\textsuperscript{9}

This was a substantial departure from English law. In England, land was sacrosanct, ostensibly because it was scarce, and because the system of land tenure supported the aristocracy, who were an essential part of the constitution. Whatever the reasons for the sanctity of land in England, the fact that it was not to be so in North America became a political issue, at least in some of the colonies. When the 1732 statute was first proposed, the governor of the Virginia colony wrote that the proposal “would treat the people in the colonies as if they were not English subjects, since land would then be held by a different tenure in Virginia than in England.”\textsuperscript{10} And, according to Gipson, high rates of indebtedness of Virginia planters to British merchants must be taken into consideration in regard to the beginnings of the revolutionary movement in Virginia.\textsuperscript{11}

The seizure of land for debt proved to be very controversial in Upper Canada. The judges on the court of King’s Bench were divided on the issue until 1809, when the Privy Council affirmed that the 1732 statute did apply in Upper Canada. This controversy was not limited to the judiciary. The judges who refused to validate the seizure of land for debt were both reacting to and catalysing widespread discontent, a discontent sparked by the contrast between expectations for the benefits of British justice and the arbitrary authority and abuses of land policy that were practised by the colony’s administrative and mercantile elites. The legal issue regarding the seizure of land for debt focused on whether ‘English law’ comprised the law as applied in England or whether it meant the law as England decided it should be applied in the colonies. This was a constitutional issue, and as such it impinged on the ideologically charged area of how ‘British justice’ and the rule of law should be understood in Upper Canada.

The judicial activism and the widespread discontent were both connected to the concerted and organized opposition led by a small group of prominent: the King’s Bench

\textsuperscript{9}5 Geo. II, c. 7 (Imp.), s. 4.
\textsuperscript{10}Morton, 508-9.
\textsuperscript{11}Gipson, 259.
judge Robert Thorpe; the Home District Sheriff Joseph Willcocks; the lawyer and member of the Legislative assembly William Weekes; and the province's Surveyor General Charles Burton Wyatt. They were aided by John Mills Jackson, a wealthy Englishman who spent some time in Upper Canada, then returned to England to agitate there. These men were not revolutionaries, or at least not at the beginning. They were whigs and, as such, they were as devoted to the empire and to the monarchy as were the Loyalists and Tories who dominated the elite, differing primarily in their vision of the constitutional relationship between England and the colony. Loyalists and Tories considered the Imperial parliament to be sovereign over all of the colonies. In contrast, whigs thought and acted as if the Upper Canadian legislature, although subordinate in regard to matters affecting the empire, was sovereign for Upper Canada. Their vision of British justice was one in which the colony enjoyed all of the perceived benefits of the British constitution, including a local and responsible government and the non-arbitrary rule of law.¹²

The Importance of 'English Law' in Early Upper Canada

Some historians have recently begun to view the issue of land seizure in relation to expectations for justice and constitutional understandings. The only substantial treatment in this vein, however, is Paul Romney's exploration of the persecution and swindling of Robert Randal by a coterie of Niagara and Montreal merchants, aided by D'Arcy Boulton, an Attorney-General who was Randal's lawyer until he was elevated to the bench, D'Arcy's son Henry John Boulton (who took over as Randal's counsel and almost immediately sought judgment against him for a debt comprised of the legal fees owed by Randal to both Boultons), and John Beverley Robinson. Randal's troubles stemmed from the ability of his creditors to seize his land for debt, and from his inability to fight them on equitable grounds because the province had no court of equity prior to 1837. Although the swindling took

place in the pre-war period, the Randal litigation did not begin until 1815. Romney's account therefore deals primarily with the consequences of the seizure of land for debt in Upper Canada, and only secondarily with the earlier controversy over whether land should be open to seizure for debt in the colony.

Robert L. Fraser has also been attentive to the constitutional and “rule of law” elements of the development of creditor/debtor relations in Upper Canada. He goes farther than Romney, connecting the 1798-1809 controversy over the application of the 1732 Act for the More Easy Recovery of Debts directly to widespread anti-monopoly and agrarian concerns, and to the opposition movement led by Willcocks, Thorpe, Weekes and Wyatt. Fraser notes that Willcocks, Thorpe and Weekes were personally involved in the two major legal challenges to the statute. In the remainder of this chapter, I attempt to build on the work of Romney and Fraser in order to supply a fuller account of the controversy from a perspective that incorporates expectations of British justice and constitutional issues.

Gregory Marquis has shown how ideals of British justice, which legitimated the law, were not confined to the Upper Canadian elite, arguing that “the nineteenth-century term ‘British justice’...links law and legal institutions to political culture.” He notes that, even though it was largely ignored or selectively honoured, “the culture of constitutionalism stressing the benefits of English law was an important ideological force in the eighteenth and nineteenth-century British world.” The rhetoric of British justice was used by government to defend the status quo, or by merchants to aid in their economic goals. But the rhetoric, and the ideas it evoked, were not confined to the elite:

14Robert L. Fraser, “‘All the privileges which Englishmen possess’: Order, Rights, and Constitutionalism in Upper Canada,” in Provincial Justice: Upper Canadian Legal Portraits from the Dictionary of Canadian Biography, ed. Robert L. Fraser (Toronto: University of Toronto Press, 1992), lv.
16Ibid., 52.
Despite the class inequalities of British North American society, British justice and British liberty were not simply pillars of elite ideology or state hegemony, but concepts deeply enshrined in popular culture.\textsuperscript{17}

For the non-elite, who were often debtors, the deviation from British justice represented by execution against land may have been genuinely shocking. As Paul Romney has observed, "it is conceivable that nothing did more than this aspect of the law of debt to poison relations between the mass of agrarian smallholders, on the one hand, and the provincial elite on the other."\textsuperscript{18}

Before Upper Canada was founded in 1791, civil litigation in both the old and new districts of Quebec was conducted in the Courts of Common Pleas, an apparatus that was set up under the 1774 Quebec Act, the provisions of which were always considered suspect by English merchants in Lower Canada. While the few English in the lower province had agitated and hoped for what they considered to be the benefits of British justice, their expectation that they would get it would have been heightened by the Loyalist immigration which created English dominated districts in which the population shared their attachment to the British system. These expectations among the Loyalists would have been heightened by the founding of Upper Canada in 1791, and again by the abolition of Common Pleas and creation of King’s Bench in 1794. Before 1791, however, the Quebec Act and its structures were business as usual. This may help to explain why the seizure of land for debt appears to have been uncontroversially enforced by the courts of Common Pleas between 1788 and 1794.\textsuperscript{19} For example, on September 1, 1791, William Drummer Powell, the judge of the Western District Court of Common Pleas and one of only two trained lawyers in Upper Canada, declared that:

\textsuperscript{17}Ibid., 60.
As the law stands the judgment of the Court is to be satisfied out of the lands and tenements of the debtor, failing his goods and chattels. The judgment, if for more than ten pounds sterling, hypothecates all the real property of the debtor.

In fact, the English regime in Quebec prior to the 1791 division of that province into Upper and Lower Canada had made itself clear on the issue starting in 1764, when it promulgated the first of a series of statutes and ordinances either presuming or declaring that execution against real estate was available, and providing sometimes very detailed procedures. These provisions had to be spelled out very clearly in order to prevent abuses of execution against land. By February 1, 1770, An Ordinance, for the More Effectual Administration of Justice, and for Regulating the Courts of Law in this Province stated that:

Great and manifold inconveniences and Losses, have arisen to the proprietors of real Estates in this Province, by having their Houses and Lands taken in execution, and exposed to Sale, for the payment of small debts, and also from the hasty and Informal methods, of setting the same to Sale even in cases where the Extent of the Judgement will admit of no other Satisfaction.

To remedy this mischief, the ordinance stipulated that execution should not issue against real estate for debts of less than £12, and then only if the judgment could not be satisfied out of personal property. It also provided a specific procedure for advertising the sale (in both English and French), including where the advertisement should appear and what information it should contain; and that the sale could not take place until six months after it was advertised. This indicates that inadequate advertising of sales had already created an advantage for creditors, as would still be the case fifty years later in Upper Canada.

In 1791, then, Justice Powell was simply enforcing what had already been the law for decades. He took this approach with him into the King's Bench, to which he was

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21 An Ordinance, for the More Effectual Administration of Justice, and for Regulating the Courts of Law in this Province, February 1, 1770 (Que.).

22 Romney, Mr. Attorney, 78.
appointed when that Court was organized in 1794. A few years later, in 1799, the legal issue became overtly politicized when it was heard for the first time at Upper Canada’s Court of King’s Bench, a venue in which the organization of the administration of justice “upon English models using, for the most part, English forms and procedures” had some impact on popular expectations for British justice.

King’s Bench Litigation

According to Riddell, the first King's Bench judgment involving the seizure of land for debt was Robert Hamilton v. Francis Ellsworth in July, 1798. This case pitted the great merchant against a man who was well known to Hamilton. Francis Ellsworth appeared before Hamilton at the Home District Court of Common Pleas nine times between 1788 and 1794, five times as plaintiff and four times as defendant. In a court where plaintiffs almost always prevailed, Ellsworth was unusual because he lost two of the five law suits that he initiated.

When Hamilton v. Ellsworth came to the King’s Bench in July of 1798, William Drummer Powell was on the bench, along with John Elmsley, the English-born chief justice. The record says only that “the Court gave no opinion in this case, because it was an argument to ascertain whether lands can be taken in execution and sold for debts.” Riddell made the unsubstantiated claim that “the real difference of opinion was, apparently,

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23 R.L. Fraser, xlii.
25 Metropolitan Toronto Public Library, Upper Canada. Court of Common Pleas. Nassau District. Minutes. 14 Oct. 1788 - 10 April 1794. This record also includes some minutes from the Court of Quarter Sessions of the Peace. In the October term of 1789, that court bound a Mrs. Elizabeth Elsworth over to keep the peace after she allegedly assaulted a Mrs. Frelich. Names are not spelled consistently in the old court records. It is probable that Elizabeth Elsworth was a relation of Francis Ellsworth’s, the more so because in January term of 1790, Francis Ellsworth successfully sued John Frelich on a bond in the amount of £35.9.6.
as to the form of the writ.” The writ referred to is fieri facias lands, the colonial companion to fieri facias goods. “Fieri facias,” commonly referred to as “fi. fa.,” means “cause it to be done.” It is an instruction from a judge to the sheriff to seize and sell the goods or the land of a judgment debtor.

When the issue came up again a year later in Bliss v. Street, it involved another prominent Niagara merchant. Samuel Street, Sr. was a member of the house of assembly “whose entrepreneurial activities in the [Niagara] peninsula stretched back into the Revolutionary period.” Street wanted a writ of fi. fa. lands against the plaintiff, Daniel Bliss. By this time, Powell and Elmsley had been joined on the bench by another English-born judge, Henry Allcock. The case was argued twice because at first, although Powell and Elmsley agreed that the 1732 statute applied in Upper Canada, they again disagreed about the form of the writ. When the case was re-argued, Elmsley and Powell had worked through their differences on the form of the writ and were ready to allow it to issue.

Allcock dissented. For him, the law of England meant the law as applied in England. The 1732 statute, he said, had applied only to merchants in the home country who were trading to the colonies, and it no longer applied since the first act of the Upper Canadian legislature introduced English law. In addition, the judicature act of 1794 had bestowed on the Upper Canadian King's Bench the same powers as held by the King's Bench in England, but no more. Therefore, since lands could not be taken in execution by a

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28 Cited by Riddell as Ellis v. Street, ibid., the case is Bliss v. Street, King’s Bench Term Book (Transcripts), 89, 94, 98.
29 Wilson, Enterprises, 148.
30 The following account of legal arguments in the case is based on excerpts published in the Upper Canada Gazette on November 16, November 30 and December 7, 1799.
32 An Act to Establish A Superior Court of Civil and Criminal Jurisdiction, and to Regulate the Court of Appeal, 34 Geo. III, c.2 (U.C.).
judgment creditor in England, the same held for Upper Canada, unless and until the Upper Canadian legislature said otherwise.

The majority held that the 1732 statute did apply, and that it applied to debts between Upper Canadians as well as those owed to creditors in England. The statute was applicable according to the provisions of s. 18 of the Quebec Act of 1774, which retained in force all acts of the English Parliament made “for prohibiting, restraining, or regulating the trade or commerce of His Majesty’s Colonies and Plantations in America.” Section 1 of the first act of the Upper Canadian legislature, said the majority, repealed only s. 8 of the Quebec Act, which had made the laws of Canada (meaning those of the French regime in Canada before 1763) the rule of decision in matters respecting property and civil rights. The Upper Canadian legislature had substituted English law as the general rule, but this did not touch on the particular provisions in s. 18 of the Quebec Act.

Bliss v. Street “aroused intense interest among farmers and merchants alike.” At this time, the province was at a high point of furore over the monopolistic practices of large merchants, sparked off by a proposal from Robert Hamilton and two others that they would engage in major road improvements in the Niagara region and build a canal linking Lake Erie to Lake Ontario in exchange for gaining a monopoly over tolls. Excerpts from the arguments in Bliss v. Street were published in the Upper Canada Gazette on November 30 and December 7, 1799, and the result in the case was opposed in the columns of the Canada Constellation, where “Acres” observed that, “if lands are taken by execution, it will ruin this country.” A lengthy reply from “A Friend to Justice” was published in the Gazette on May 2, 1800. Unfortunately, there are no surviving legible copies of the number of the Constellation in which the letter from “Acres” appears, and “A Friend to Justice” quoted

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33 An Act for Making More Effectual Provision for the Government of the Province of Quebec, in North America, 14 Geo. III, c. 83, s. 18 (Imp.).
34 32 Geo. II, c. 1, s. 1 (U.C.).
35 R.L. Fraser, xlix.
36 Ibid., xlvii-xlxi.
37 Quoted ibid., xlix.
only the one phrase, using it a jumping off point to attack “Acres” on moral grounds and to expound upon the differences in social and economic structures as between England and Upper Canada.

Every honest debtor, according to “A Friend to Justice,” looks upon his debt as sacred. Imprisonment for debt, he said, was no substitute for the seizure and sale of property, because imprisonment cannot get the debt paid. In a country like Canada, where land is abundant, the land of a farmer, the wares of a manufacturer and the profits of a merchant “though nominally different, is in effect the same and should consequently be liable to attachment for their bona fide debts.” Yet “A Friend to Justice” clearly saw not just a practical but a political distinction between the two countries, because the exemption of landed property from seizure for debt in England was necessary for the support of the aristocracy, whose survival was considered a constitutional necessity. In England:

The number of freeholders is comparatively small to the tenantry; the lands principally the properties of the nobility and gentry, the families of these are educated according to their rank – (the constitution renders certain ranks necessary) on what can they depend for the preservation of this rank, but upon the preservation of their estates. The government by its fostering care, may have made this wise provision, that a permanent property be secured to such families, and that the public (knowing the statute) might not be deceived. In that country, I believe, that estates and titles devolve hereditarily – the oldest son is generally considered the heir; if there be co-heirs the estate must support them, it must also provide for them. – Cruel indeed would it be, if, through the indiscretion and prodigality of one member, the little community should be reduced to want.38

But not cruel, one supposes, to take away the livelihood of an Upper Canadian farm family? Perhaps not, at least for “A Friend to Justice.” Elite belief that land was widely available at virtually no cost appears to have persisted despite evidence that many in the province resented the required administrative fees and found them a burden to pay. The labour that a farm family may have put into clearing and improving the property is another factor that was left unconsidered. It seemed to contemporaries that the alternative to execution against property was not the cancellation of the debt, it was rather execution against the body, and

38Upper Canada Gazette. May 2, 1800.
Richard Cartwright's opinion that it was morally preferable to take "a person's land rather than his body" was probably representative of many people, or at least of many creditors.

The issue came up for the final time in *Gray v. Willcocks.* John Gray was a prominent Montreal merchant (he would become the Bank of Montreal's first president in 1817). William Willcocks was a minor merchant and a magistrate, who was related to both the opposition leader Joseph Willcocks, and to Peter Russell, who was administrator of Upper Canada from 1796 to 1799. In 1800, William Willcocks had borrowed £500 from John Gray. Willcocks's business interests soured and he was unable to pay the money back. Gray obtained a judgment and a writ of fi. fa. goods against Willcocks. When the execution against goods did not realize enough to satisfy the debt, Gray sought a writ of fi. fa. lands.

Elmsley had by this time departed from Upper Canada and, with Allcock and Powell alone on the bench, the court split. The case was re-argued before Allcock, Powell, and the newly-appointed judge, Thomas Cochrane, who agreed with Allcock that fi. fa. should not attach to lands. Cochrane drowned in October of 1804. His replacement on the bench was Robert Thorpe, an Irish-born judge who had served as Chief Justice of Prince Edward Island and would soon become a leader of the opposition in Upper Canada. When the case was re-argued in 1806, Thorpe took the same position as had been taken by Allcock, who had by then also left the colony. Powell stuck to his original opinion that the writ of fi. fa. lands could and should issue. The Court of Appeal agreed with Thorpe, but Gray appealed to the Privy Council who, in 1809, affirmed that the 1732 statute did apply in Upper Canada, vindicating Powell. William Renwick Riddell concluded that "since this judgment, there has never been any doubt in the matter."

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Henry Allcock: English Judges And Constitutional Politics

For this thesis, the legal correctness of the decision that land would be open to seizure for debt in Upper Canada is less relevant than the social and political forces behind the issues, the arguments, and the decisions. Assessing which legal answer is correct depends on which constitutional understanding is brought to bear on the matter; that is, whether the Imperial parliament retains sovereignty over all questions, or whether the provincial legislature is sovereign in matters respecting the province.

Henry Allcock's role in the fight against fi. fa. lands is key to understanding the connections between the narrow legal issues and popular political and constitutional expectations for the rule of law among Upper Canadians. The other individuals involved in Gray v. Willcocks are also important to this analysis, but Allcock is highlighted because received understandings of his role has allowed have obscured those important connections. The dominant perception amongst historians appears to have derived from the work of William N.T. Wylie, whose 1980 doctoral thesis is the most substantial existing study on creditor/debtor relations in early Upper Canada. Wylie's study is based mainly on work with primary sources, and as such it remains very valuable. Other studies are few, and they tend to depend on Wylie's assessments of various factors. For instance, Robert L. Fraser, who perceptively situates Bliss v. Street in its context of popular and justified discontent, takes his assessment of Allcock from Wylie, so that even in the midst of his generally perceptive discussion he reduces Allcock's role to that of an old-fashioned and uncreative judge, telling us that "Allcock was only defending the landed basis of an aristocratic society." This assessment misses the way that common law doctrine and expectations for British justice were used to fight back against what was perceived at the time as the arbitrary use of power.

Attitudes toward merchants and mercantile practices were a central factor in Upper Canadian politics at this time, especially in regard to creditor/debtor issues. Merchants were perceived as acquiring vast tracts of land either through seizure and sale, or, perhaps

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42R.L. Fraser, xlix.
even more often, settling for the land in payment for the debt.\textsuperscript{43} Paraphrasing Allcock, Wylie wrote, "caught in a web of debt, many small property owners were being robbed of their birth-right by the major merchants who were acquiring vast tracts of land."\textsuperscript{44} As discussed in earlier chapters, the accuracy of this perception is controversial. What is important here, however, is the perception itself:

The political world of Upper Canada was shaped as much by perception as by reality. And the perception of monopoly and its equation with oppression was heady stuff. Merchant-bashing, or rather monopoly-bashing, was simply good politics. Its language had a calculated appeal and was used to manipulate voters for political ends.\textsuperscript{45}

The underlying issue was the fundamental question of what kind of society should be built in Upper Canada. This implicates the attitudes of the official as well as the mercantile elites, and the popular reaction to both. S.F. Wise identified two strains of conservatism in early Upper Canada:

One was that brought by the Loyalist founders of the colony: an emotional compound of loyalty to King and Empire, antagonism to the United States, and an acute, if partisan sense of recent history. To the conservatism of the emigre was joined another, more sophisticated viewpoint, first brought by Simcoe and his entourage, and crystallized in the Constitutional Act of 1791: the Toryism of late eighteenth century England. What Upper Canada received from this source was not merely the somewhat creaking intellectual edifice of Blackstone and Warburton, but a conservatism freshly minted into a fighting creed through Edmund Burke's philippics against the French Revolution.\textsuperscript{46}

A common thread for both Loyalists and Tories was the sovereignty of the British crown and constitution, even though each emphasized a subtly different component.

For Loyalists, as George Rawlyk and Janice Potter explain, the British system of government symbolized orderly traditions and institutions, which contrasted with the chaos

\textsuperscript{43}Alan Greer, \textit{Peasant, Lord, and Merchant: Rural Society in Three Quebec Parishes 1740-1840} (Toronto: University of Toronto Press, 1985), 174; Wylie, 225.

\textsuperscript{44}Wylie, 221.

\textsuperscript{45}R.L. Fraser, lxxxvi.

and conflict they had experienced in the United States. The other important dimension of Loyalist belief was the unity of the empire, manifested, for example, in Richard Cartwright's "conviction that the many different branches of the British empire should be united under the authority of [the English] parliament, which ensured order, stability, and a uniformity of interests throughout the empire's various parts." Although they believed that ultimate authority should rest with the English parliament, Loyalists, being American born, had experience with legal and administrative structures that were adapted to colonial conditions, and this was the system under which they wanted to live. For example, in 1784 a group of Loyalists from New York who were slated to be resettled at Cataraqui petitioned the governor of Quebec with a detailed list of the supplies and equipment they would require. Included in the petition was a request that they be given "a Form of Government As nearly similar to that which they Enjoyed in the Province of New York in the year of 1763 As the Remote situation of their new settlement from the seat of Government here will at Present Admitt of." Tories, on the other hand, brought with them a notion of the English constitution "composed of the three classical forms of polity: monarchy, aristocracy, and democracy, represented respectively by a lieutenant-governor, an appointed legislative council, and an elected legislative assembly.... A proper aristocratic emphasis would allow the newly erected colonies to hold the democratic element of the constitution in check." Of course an aristocracy did not develop in Upper Canada, even though the Imperial act which divided Quebec into Upper and Lower Canada made provision for one.

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49 R.L. Fraser, xxvii-xxix.
What does this have to do with Henry Allcock? Wylie has characterized the controversy over execution against land as between those who wanted commercial development and those who wanted an aristocratic type of order in the province. He minimizes conflict and asserts that the opposition were mere opportunists who manipulated and misguided the disaffected elements in the population. Wylie’s analysis instead focuses on a dichotomous contrast between British and American born judges. In Wylie’s view, British born judges, prominently including Allcock, were resistant to adapting the law to colonial conditions, whilst American born judges like William Drummer Powell and Richard Cartwright (as a lay judge of Common Pleas) were innovative and adaptable.

Cartwright in particular emerges as an almost heroic figure for Wylie, ready to cast aside Blackstone and draw on Lord Mansfield’s work on commercial law in England and his own background as the scion of a merchant family in upstate New York to propound innovative civil law forms and practices appropriate to the development of a commercial economy. Cartwright was unusually intelligent and innovative but, as Rawlyk and Potter suggest, he did not always distinguish between what was good for him and what was good for Upper Canada. Cartwright was a leader among those lay judges of Common Pleas who “exhibited a preference for the interests of justice over the prerequisites of procedure (at least insofar as justice served the interests of large merchants).”

In contrast to American born judges, Wylie sees English born and trained judges as resistant to law reform:

Resistance was encouraged by their professional training. They had been schooled in England and in the virtues of the common law and led to believe that reform of any part of the system would threaten the certainty and precision of the whole. This was a popular opinion in English legal circles.

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51 Wylie, 217.
52 Ibid., 44-6.
53 Rawlyk and Potter, 170.
54 R.L. Fraser, xli.
despite the inefficiency of some procedures and the recent challenges to tradition offered by Chief Justice Mansfield.\textsuperscript{55}

Wylie sees Allcock as exemplary of this judicial style.\textsuperscript{56} This is far too simplistic a view. If Allcock feared disrupting the ancient edifice of the common law, he appears to have been motivated by its potential for use as an instrument in defence of the rule of law and against the growing and arbitrary authority of the Upper Canadian elite, an elite increasingly empowered by the mercantile wealth of figures like Cartwright and Hamilton. If we are to take contemporary notions of the rule of law as seriously as Paul Romney suggests they should be for Upper Canada,\textsuperscript{57} then surely it is wrong to dismiss judges like Allcock, who clung to the ancient common law doctrines, as merely hidebound, uncreative, and anti-progressive.

In 1801, Elmsley and Cartwright introduced a bill which stipulated the procedure to be followed by Sheriffs carrying our executions against land, thereby implicitly enshrining the practice into the statute law of the province. An opposing bill, introduced by Allcock, received considerable support from the members of the assembly. The house split evenly, and the Speaker, who broke the tie, voted in favour of the Cartwright/Elmsley bill.\textsuperscript{58} Allcock, who was the chief legal advisor to the lieutenant-governor, Peter Hunter, persuaded Hunter to have the bill reserved for royal assent. This kept it from coming into force until 1803.\textsuperscript{59} According to Wylie, Allcock, in a letter of June 12, 1801, persuaded Hunter to reserve the bill “on the grounds it sought ‘to confirm by a side wind the Decision of the Court of King’s Bench’, which should first have been appealed to the provincial Court of Appeal and then to the King in Council in Britain.”\textsuperscript{60} This implies that Allcock

\textsuperscript{55}Wylie, 230.
\textsuperscript{56}Ibid.
\textsuperscript{57}Romney, “Very Late Loyalist Fantasies.”
\textsuperscript{58}Wylie, 226.
\textsuperscript{59}Romney, Mr. Attorney, 78-9; Wylie, 227. The resulting statute was An Act to Allow Time for the Sale of Lands and Tenements by the Sheriff, 43 Geo. 3, c. 1 (U.C.).
\textsuperscript{60}Wylie, ibid.
persuaded Hunter to reserve the bill because so great a deviation from English law should first have approval from England. Romney, however, found a different set of motivations in the same June 12, 1801 letter:

In criticizing the bill of 1801, Allcock had stated two main objections. First of all, the sale of land in execution of judgments for debt was calculated to deprive the farmer of his best means of paying off his debt — the produce of his land. Second, since the scarcity of specie and abundance of land made land prices very low, the vindictive creditor would be able to strip a debtor of his land in order to buy it himself at auction for a song.61

This position is not incompatible with a determination to uphold English law in order to develop an orderly, hierarchical society, but it is certainly more complex.

If Wylie's dichotomous view of the differences between English and American born judges in the period was too simplistic an assessment of Henry Allcock, it is equally so as regards Robert Thorpe, who in addition to his dissent on the bench was a leader of both the parliamentary and the extra-parliamentary opposition in Upper Canada. The dichotomous view is also, as Wylie admits, inapplicable to John Elmsley. Elmsley was one of Richard Cartwright's closest friends, and was influenced by Cartwright on matters involving land.62 Wylie describes Elmsley as an "unusual English bureaucrat" who "was strongly aligned with the major merchants on most issues and deeply involved with them in colonial land speculation."63 In Elmsley's opinion:

Labour would become more plentiful as land became dearer. Thus the means of employing capital to advantage would be increased. "While land can be had as cheaply as at present that true proportion between capital and labor which is the only source of wealth in any country will never be attained in this," wrote Elmsley. "Instead of opulent farmers we will have miserable cottagers who cannot afford to cultivate their land properly, scraping a

61Romney, Mr. Attorney, 78.


subsistence for an acre or two.... What is capital,” he concludes, “but property unequally distributed?”64

Wylie’s view of English judges other than Elmsley appears to derive in part from his view of the judicature reforms of 1792-4, and especially the creation of King’s Bench. For Wylie, the Upper Canadian administration (Osgoode and Simcoe in particular) wanted to foster an English-style judicial administration, with English trained judges and using English precedents in order to encourage English values, by which “the early administrators also hoped to instill a respect for authority which, when combined with the centralized structure of the provincial bureaucracy, would serve to consolidate their control over the colony and discourage the growth of American influence.”65

This may have been what the administration wanted, but judges were not necessarily willing to cooperate. Allcock may have had some ideological affinity with the lieutenant-governor and the administrative elite, but positing ideological affinity with the administration as a characteristic of British judges as opposed to those born in British North America seems somewhat far-fetched, especially when Allcock is contrasted with the American born William Drummer Powell. Allcock remained in Upper Canada for only seven years, whereas Powell had one of the longest judicial and administrative careers in Upper Canada. Powell was justice of the Western District Court of Common Pleas from 1788 to 1794, when he was appointed to the new Court of King’s Bench. He sat on that court until 1825, and was Chief Justice from 1816. Yet, because Wylie confines his analytical paradigm to the binary pair of either commercial development or aristocratic order, Allcock and Powell must each fit into one opposing side, and any conflict that does not derive from one of those sides falls out of the picture. Instead of taking grievances and conflict seriously, Wylie portrays discontented Upper Canadians as “easily manipulated by persons seeking to encourage opposition to the government.”66

64Lillian F. Gates, Land Policies of Upper Canada (Toronto: University of Toronto Press, 1968), 47.
65Wylie, 193.
66Ibid., 277.
Upper Canada’s Early Opposition

Wylie’s view of the opposition is in some ways understandable, since it is consistent with what was, until recently, the dominant interpretation of the motivations and activities of a group of pre-1812 opposition leaders in Upper Canada. This group has been discounted in conventional histories as opportunistic and disgruntled marginal office holders who made trouble because they were not admitted to the centres of power. For Gerald M. Craig, author of the standard history of Upper Canada, they were:

A particularly active little group of smoke-makers, busy at their self-appointed task of making the most of existing controversies and of seeking to raise up new ones. These men were all recently arrived from the British Isles, and they all felt that they were deserving of better and more lucrative posts than they had so far received.67

In fact, the members of the group, however disgruntled, all held prominent posts. Robert Thorpe was a King’s Bench judge, Charles B. Wyatt was Surveyor-General of Upper Canada, Joseph Willcocks was sheriff of the Home District and a member of the legislative assembly and William Weekes was an MLA and one of the few barristers in the province.

They were, admittedly, not a very pleasant collection of people. Thorpe was arrogant and genuinely resentful that he was a mere puisne judge and not Chief Justice. Weekes must also have been arrogant, sufficiently so to have been killed in a duel in October of 1806. Wyatt was notorious among the ladies of Upper Canada for beating his wife, Mary Rogers, “a lively good humoured pretty little girl, being only about seventeen.”68 Charles and Mary may have had political differences, as indicated by her provision of information regarding Judge Thorpe’s activities to the lieutenant-governor, Francis Gore.69 Wyatt was reputed to have blamed his wife when he was stripped of his office as a result of his political activities. Mary paid for her husband’s blame with

67Gerald M. Craig, Upper Canada: The Formative Years, 1784-1841 (Toronto: McClelland and Stewart, 1963), 59.
"confinement to the bedpost, locking up in the Cellar, bruised Arms & broken head." She divorced him for cruelty in Scotland in 1811.

Weekes was dead, and Thorpe and Wyatt returned to Britain after they lost their struggle with the Upper Canadian government. Joseph Willcocks stayed in Upper Canada and remained politically active. After he was removed from his sheriff’s job in 1807, Willcocks founded an opposition newspaper and published it until 1812. Also in 1807, he won a by-election for an assembly seat. Willcocks was jailed for most of the first legislative session after he was elected. The government, angered by his paper, had moved to prosecute him for seditious libel. It changed its tactics after Willcocks’s election, for fear that his evident popularity would make it impossible to find a jury that would convict him. Willcocks was instead tried by the house in a proceeding that lacked the usual protections of formal legal process. Willcocks remained popular, and was re-elected in 1808 and 1812. His paper was a continuing thorn in the government’s side:

Judge William Drummer Powell complained in 1809 that it was in almost every house, and Gore lamented the “vulgar attacks” by the “Seditious Printer” which were “relished too much, by the good people of Upper Canada.”

Willcocks himself remained central to an informal but sustained opposition group in the house. In 1812-13, Willcocks was at the forefront of resistance in the house against government efforts to put the province on a war footing by refusing to pass legislation suspending civil liberties such as habeas corpus. At the same time, he aided the war effort in other ways that did not affront his constitutional principles. By 1813, however, there had been several battles fought on Upper Canadian soil and the government was able to push its war measures through the assembly. “The collapse of virtually all resistance to the

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70 Powell Papers, Anne Powell to George Murray, Feb. 13, 1807, quoted in McKenna, “Social Status,” 200.
72 Jones, 856; Wright, 278-83.
73 Jones, ibid.
74 Ibid., 857-8.
erosion of the constitution by the executive dashed [Willcocks’s] hopes for the province.”

For Willcocks, Upper Canadians were not willing to defend their constitution or the independence of their assembly. Although he did not consider himself to be pro-American, Willcocks was “certain” that the Americans “would never challenge or subvert the supremacy of the local legislature.” He went over to the American side in 1813, where he raised and commanded a unit of expatriate Canadians. He was killed in action in 1814.

Sexist, violent and arrogant behaviour was hardly confined to the men of the opposition. Those traits should not be used to discredit the politics of the opposition in a context where the men of the establishment, who were equally culpable, are not subject to criticism on the same grounds. In fact, the politics of the opposition group were not always discredited. Graeme Patterson suggested in 1975 that the group was, at one time, viewed as part of the provincial reform tradition. The negative portrayal that comes across in standard histories like Craig’s reflects the views of the group’s enemies in the pre-1812 Upper Canadian establishment. It is a view of the opposition that:

Began to re-emerge in 1892 when Douglas Brymner published transcripts from official files relevant to ‘The Political State of Upper Canada 1806-7,’ a period in history about which writers then knew remarkably little. In the pages of Brymner the conduct of the Thorpe group stood out in stark contrast against the stereotyped, sober, judicious behaviour then believed to have

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75 Ibid., 858.
76 Ibid.
77 Ibid.
79 Patterson, 26.
been the norm of 'constitutional reformers.' Thorpe and his friends seemed self-revealed as a turbulent, half-crazed handful of discontented placement given to a violent but cliched rhetoric out of all proportion to all known grievances.\textsuperscript{80}

My reading of the Brymner file\textsuperscript{81} in 1998 reveals a unanimity of tone and stridency as between the opposition and the dominant members of the elite. Both sides wrote frequently to the Colonial office in England, telling tales and attempting to set each other up for a fall. The reprinted file, over one hundred printed pages long, consists mainly of letters sent to the colonial secretaries and under-secretaries in England by members of the government and their supporters, and by the opposition. This is supplemented by addresses (public statements) made by people in Upper Canada to each other and to the government, replies from the government, and copies of letters between Upper Canadians that were enclosed in the correspondence to England.

It is perhaps ironic that the opposition, whose vision of the Upper Canadian constitution involved local sovereignty over local matters, made frequent appeals to Imperial authorities. The paradox is lessened by when we recall that they believed British justice existed in England, and that it could exist in Upper Canada, if not for what they saw as its continual frustration by the arbitrary actions of the Upper Canadian authorities. The opposition group of politicians and agitators for several years significantly disrupted the attempted hegemony of the Upper Canadian elite by their actions in the assembly and elsewhere, yet they were reformers who all remained loyal to the crown until at least 1809,\textsuperscript{82} and probably later. The opposition believed that exposing the arbitrary and unfair practices of the Upper Canadian administration would cause the Imperial government to step in and restore the rule of law. Contrary to this expectation, the Imperial authorities in the main allowed and facilitated the colonial government's suppression of the opposition. In the atmosphere of Upper Canada at the time when the government perceived itself to be under

\textsuperscript{80}Ibid., 26-7.
\textsuperscript{81}Brymner, ed., 32-135.
\textsuperscript{82}Patterson, 30.
siege from seditious movements emanating from the United States, France, and Ireland, the administration was very much motivated by “official anxiety about apprehended insurrection,” and the pre-war reformers were perceived by the rest of the Upper Canadian elite to be dangerous revolutionaries.

This perception may have been exacerbated by the fact that Wyatt, Weekes, Willcocks and Thorpe were all Irish. Politically, the group’s beliefs were similar to those of the Irish whigs, an opposition group in the Irish parliament whose members “desired a voluntary association of Ireland with Great Britain and undiminished loyalty to the Crown, but...demanded legislative autonomy for Ireland.” This view of the constitution is similar to the Upper Canadian opposition’s insistence that their own legislature should have supreme power over the internal affairs of the province. In 1791, an extra-parliamentary opposition began to organize in Ireland. Known as the United Irishmen, “they adopted as their emblem the harp without the crown, indeed with a cap of liberty in place of it.” They armed themselves, supported the French Revolution, and were eventually forced underground, then provoked into open conflict. Rebellion erupted in May of 1798. General Peter Hunter, who was lieutenant-governor of Upper Canada from April 1799 to August 1806, “played a prominent role” in putting down the rebellion.

Although their politics were whig, the members of the opposition group steadily denied membership in or support of the United Irishmen. The authorities, however, believed them to be disloyal and associated them with the United Irishmen. Lieutenant-

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85Ibid., 294.

86Wright, 231.

87Brymner, 72, 80, 81, 86, 115

88Ibid., 63, 68, 77, 113, 118
governor Gore intercepted the correspondence of members of the group and had an agent spy upon Willcocks during a trip to New York in 1807.89

**Opposition to Land Policy**

There is little direct evidence that the opposition was specifically interested in land law in regard to the seizure of land for debt as a political issue. Apart from articles on the members of the group in the *Dictionary of Canadian Biography*, the most substantial recent treatments of the group are provided by Wright, Greenwood, and Romney, whose focus is on state trials and security proceedings, not on land issues.90 There is, however, considerable evidence that general opposition to land policy and its abuses was a major area of activity for Thorpe, Wyatt, Weekes and Willcocks. According to Elwood H. Jones:

What in practice sparked the rise of a political opposition in Upper Canada was the widespread reaction against government changes in land policy, implemented between 1802 and 1804, which increased the fees for land grants and tightened the rules concerning the eligibility of Loyalists for free land grants.91

As sheriff of the Home District, Joseph Willcocks “had seen many people forced to sell their land at auction to pay off debts to merchants.”92 According to Barry Wright, one of William Weekes' early attempts to “stir the pot on the legal front” was in regard to what he alleged were illegal official proceedings in a land case.93 Further, Charles Burton Wyatt “was important because his knowledge of land issues as Surveyor-General provided

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89Ibid., 104, 113


92Ibid.

93Wright, 234.
damaging concrete evidence that powerfully demonstrated the validity of broader constitutional arguments made by the others."94

Weekes, Thorpe and Wyatt turned the 1806 session of the Upper Canadian assembly upside down. Weekes, a member of the assembly, was advised by Thorpe, who, although not a member, was present in the house every day. Weekes began his agitation over the issue of fiscal irregularities in the administration of Peter Hunter, the late lieutenant-governor who had died in office, and of Alexander Grant, the interim administrator of the province. Although Grant was conciliatory, he prorogued the assembly. When it reconvened, Weekes moved successfully that the house form a general committee on the state of the province. This was a significant assertion of local authority on the part of the assembly and “a significant step in defiance of the government.”95

The opposition initially had high hopes that Francis Gore, who was sworn in as lieutenant-governor in August of 1806, would support them,96 not least because Gore and his wife Annabella were related to the higher ranks of the English aristocracy.97 They were quickly disappointed. In a December, 1806 letter to Sir George Shee, Under-Secretary of State for the Colonies, Thorpe complained that Gore was:

Surrounded with the same Scorch Pedlars, that had insinuated themselves into favour with General Hunter, & that have so long irritated & oppressed the people; there is a chain of them linked from Halifax to Quebec, Montreal, Kingston, York, Niagara & so on to Detroit – this shopkeeper Aristocracy has stunted the prosperity of the Province & goaded the people until they have turned from the greatest loyalty to the utmost disaffection.98

Changes in land policy of 1802-4 had ended the previous open-door policy of the Simcoe government by raising fees on land grants and tightening eligibility rules. Wyatt co-operated with the general committee of the house, appearing before it and producing the

94Ibid., 248.
95Ibid., 244.
96Brymner, 52.
98Brymner, 57.
records from the Surveyor-General's office. This so incensed the Gore administration that Wyatt was removed from his office. In co-operating with the general committee of the house, Wyatt was acting in accordance with his whig politics. As Gore put it in a letter to the colonial authorities in Britain:

Mr. Thorpe's intimacy with the Surveyor General, and the influence he had evidently over him, taught him to mistake the Functions and to overrate the Power of the House of Assembly for, when I represented to Mr. Wyatt that his conduct had been highly improper and offensive to the Government, he told me 'that the House of Assembly was omnipotent, and that it was his duty to obey it.'

Wyatt's information accused the government of arbitrarily cutting off land grants to incoming United Empire Loyalists and of administering the new scheme unfairly by giving themselves all the best land and charging fees to some people but not others. Wyatt also exposed official misconduct on government land transactions with the Mississaugas First Nation, which held the only remaining native title on the north shore of Lake Ontario, and with government restrictions on the sale of parts of the Grand River reserve by the Six Nations. The Six Nations had appealed to the Imperial government on this issue. Before leaving England, Wyatt had met with the Iroquois representative who had travelled to London to make representations to the government there. Thorpe and Weekes may also have been involved in supporting the Six Nations.

The Link to Creditor/Debtor Relations

The other evidence derives from the involvement of opposition figures in the King's Bench litigation on the issue. Of the four leaders, Wyatt is the only one does not appear to have been closely connected to Gray v. Willcocks. Of the other three, Joseph Willcocks was cousin and Weekes was counsel to the defendant, William Willcocks, and Thorpe was

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99 Brymner, 62.
100 Brymner, 62.
101 Wright, 248-51.
102 Wilson, 106.
the judge whose opinion that land could not be seized for debt in Upper Canada was appealed to the Privy Council. William Willcocks was also a political supporter of Thorpe. The controversy over Bliss v. Street occurred in 1798-9, just when Weekes arrived in the colony, and several years prior to the arrival of the others. They would all have been aware of the case, however, especially since both Weekes and Willcocks were close to Henry Allcock, the dissenting judge in the case.\textsuperscript{103} It is likely that the group jumped at the chance to get involved in the legal issue, especially when it involved defending the interests of one of their own against a wealthy Montreal merchant and financier.

Acknowledging the opposition’s personal interest in the case should not take away from seeing it as also political. Patterson has noted that "the extent to which such men were attached to, and actuated by, their varying concepts of law is seldom appreciated, and has usually been dismissed as irrelevant."\textsuperscript{104} Those varying concepts were illustrated by the controversy over the seizure of land for debt in Upper Canada, much of which was focused on the perception that seizing land for debt gave merchants another way to oppress farmers and engage in large and harmful land speculations. The crux of the dissenting legal argument in Bliss v. Street was that when the Upper Canada legislature introduced the law of England as the rule of decision in property and civil rights, it meant the law of England as applied in England, an argument carrying the necessary implication that the Upper Canada legislature had sovereignty over its internal matters. This idea of a sovereign legislature (as opposed to a “balanced” constitution) was not mainstream English constitutionalism at the time. But the dissenting argument was also laden with the ideology of British justice, because the issue in the case and the choice to be made in deciding it confronted Simcoe’s promise that Upper Canada would be:

Singularity blessed, not with a mutilated constitution, but with a Constitution which has stood the test of experience, and is the very image and transcript of that of Great Britain, by which she had long established and secured to her

\textsuperscript{103}R.L. Fraser, lv; Jones, 855.
\textsuperscript{104}Patterson, 42.
subjects as much freedom and happiness as it is possible to be enjoyed under the subordination necessary to civilized Society.¹⁰⁵

In the opposition’s view, merchants had too much influence over the aristocratic elements in the government, and this had led to the land-grabbing policies and arbitrary and repressive actions of the government. If the establishment stereotyped the opposition as Irish revolutionaries, the opposition stereotyped the merchants as clannish Scots. The hook on which this stereotype was built was probably Robert Hamilton. Hamilton expanded his business by bringing many of his relatives over from Scotland. This kinship network brought over many other Scots. Hamilton also consolidated his network by marrying Catherine Askin, daughter of John Askin of Detroit and widow of another Scot, Samuel Robertson. Samuel was the brother of William Robertson, a close associate of Askin’s and partner with Cartwright and Hamilton in the 1793 provisioning contract.¹⁰⁶

Family based business organization was typical at the time in both Upper Canada and England,¹⁰⁷ but the Upper Canadian opposition saw the Scots merchants as closely attached to government. Their views were probably coloured by the fact that Peter Hunter, a Scot, had been lieutenant-governor from 1799 to 1806, the period during which the opposition thought that the administration had become arbitrary and abusive of land policy. Hunter’s administration replaced that of Peter Russell, Irish and a distant cousin of Joseph Willcocks.¹⁰⁸ A military man, Hunter had participated in crushing the United Irish rebellion in 1798. He died in office in 1805. William Weekes’s fatal duel was fought over an insult to the memory of Hunter, and against William Dickson, one of Hamilton’s relatives. Dickson and Weekes appeared as opposing counsel during the Niagara assizes of 1806 when, before judge Thorpe, Weekes launched into an attack against Hunter’s character, calling him a “Gothic Barbarian whom the providence of God...removed from this world for

¹⁰⁵ A. Fraser, Sixth Report, 18.
¹⁰⁶ Wilson, Enterprises, 58-67.
¹⁰⁷ Ibid., 65; Leonore Davidoff and Catherine Hall, Family Fortunes: Men and Women of the English Middle Class, 1780-1850 (London: Hutchinson, 1987), 201.
¹⁰⁸ Jones, 854.
his tyranny and Iniquity." Thorne declined to censure Weekes, and Dickson protested. Insulted, Weekes challenged Dickson and lost his life.

The opposition, then, had a dense assortment of political, personal, and legal/constitutional reasons to oppose the merchant interest. My purpose here has been to sketch out enough of the constitutional beliefs and political attitudes of the opposition group to show that they likely took the issue of the seizure of land for debt very seriously and they may have been instrumental in bringing forward cases that challenged the application of the 1732 statute in Upper Canada. Far from being a narrowly economic issue, land policy, and, by extension, creditor/debtor relations, was intertwined with the early constitutional issues that helped to shape the legal and economic history of Upper Canada. The constitutionalization of the issues surrounding the seizure of land for debt provides one illustration of how a narrow legal or economic analysis of creditor/debtor relations can fail to perceive the broader context of inequality in which a credit system operates.

Chapter Six

FRAMEWORKS FOR THE STUDY OF CREDIT

This thesis has framed its arguments in terms of conflict and of power relations. This was done in deliberate contrast to conventional views of credit as consensual, but it was not my intention to set up an essential dichotomy between conflict and consensus. There are many obvious consensual elements to credit relations, but part of my point has been that many of the elements that appear as consensual when they are viewed through a narrow perspective on economic or legal relations look less consensual when that perspective is widened to include the unequal economic system of which the credit relations are a part.

It has been a specific argument of the thesis that credit relations in Upper Canada were from the beginning imbued with unequal power relations and that this inequality impacted upon early constitutional politics in the province. Recent historical writing, in seeking out the community based nature of creditor/debtor relations has often tended to overlook the extent to which social, political, and economic conflicts were also played out in the arena of credit and debt. In early Upper Canada, matters relating to credit and debt were not infrequently the focus of conflicts about constitutionalism and the rights of colonial subjects. Unfortunately, the conventional historiography of the period has failed to acknowledge this dynamic, favouring instead narrow economic arguments regarding the desirability or otherwise of merchant capital, in a debate primarily based upon the recorded views of officials. Chapters three and four of this thesis have critically reviewed that debate. Chapter three nuanced the debate by differentiating between large and small merchants. Chapter four then focused on large merchants, particularly Robert Hamilton and Richard Cartwright, who held a great deal of economic and political power. The chapter demonstrates that the anti-merchant rhetoric of John Graves Simcoe, the first lieutenant-governor, was used propagandistically in an effort to propagate his own often unrealistic vision for the province. Once the detritus of historiographic debate over Simcoe's claims is cleared away, it is possible to begin uncovering the wider anti-merchant sentiment in the province, a sentiment that was focused on the large merchants, who soon became a part of
the governing elite. Chapter five follows through on these arguments by focusing on the seizure of land for debt in relation to constitutional politics. Land was not open to seizure for debt in England, settlers in Upper Canada had been promised a constitution that was the "image and transcript" of England's, and there were massive abuses of land policy on the part of the elite. These factors resulted in an "extraordinary interest" in the legal cases regarding whether land should continue to be open to seizure for debt in the new colony. As we have seen, the arguments in the cases put the issue of the local sovereignty for the Upper Canadian legislature squarely on the agenda. In the end, however, the Judicial Committee of the Privy Council affirmed that land would remain open for seizure for debt.

The story of creditor/debtor relations in early Upper Canada is therefore a tragic one; tragic because the expectation that a British legal system would bring economic justice was disappointed. The creditor/debtor system in Upper Canada went from bad to worse as the seeds of unfairness that were sown in the early years bore the fruit of continued corruption in the 1820s and 1830s. The practice of seizing and selling land for debt, in combination with the lack of a court of equity until 1837, would prove to be an especially potent weapon in the hands of the powerful.2

The tragedy of legal and economic inequality is a commonplace story, but it is worth retelling in its myriad versions for the sake of trying to understand how it is that the story keeps repeating itself. Simply retelling the story it is not enough. It is also necessary to re-visit the assumptions that condition how the story is told. This thesis is, I hope, a contribution toward that re-examination, but the re-examination has been limited by the terms of the debate, in particular the debate between neo-classical economic theory and left-

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1Robert L. Fraser, ""All the privileges which Englishmen possess": Order, Rights, and Constitutionalism in Upper Canada," in Provincial Justice: Upper Canadian Legal Portraits from the Dictionary of Canadian Biography, ed. Robert L. Fraser (Toronto: University of Toronto Press, 1992), lv..

wing political economy. Some of the problems that arise from those limited terms have been touched on in the thesis. Here, I will attempt to expand on those problems and to sketch some directions for further work.

**Problematizing The Terms of The Debate**

The issue of "development" or "dependency" cannot be left behind without delving into the concepts that have so far formed the terms of the debate. As explained in chapter three, there has been a debate over whether merchant credit in early Upper Canada contributed positively to the economic development of the province by facilitating capitalization, or whether it had the negative effect of creating dependency because an economy based on the extraction of staples fails to develop its own industrial infrastructure. Both sides, however, have presented arguments based on the assumption that development is unproblematically desirable. But development cannot be assumed to be desirable, and issues of dependency are not confined to those that may arise between a merchants and the head of a producing household. This section of the thesis therefore seeks to problematize the pro-development bias and truncated consideration of dependency that has been shared by both neo-classical economics and many of the political economists.

The debate has thus far locked the terms "development" and "dependency" into a binary relationship. Those binary terms are linked by the relationships of subordination that are subsumed within each of them, relationships that can begin to be exposed if we ask the question: development for whom, and at whose expense? Clearly, indigenous peoples paid much of the price for the development of North America. As for dependency, Daniel Vickers pointed out in a short commentary on McCalla’s and Innes’s papers on rural credit, 

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4 Those papers were discussed in chapter three.
“so far as one can speak of labour strategy in this context, credit had a very real connection to unfree labour forms.”

He explains:

The relationship between merchants and heads of families might well have been relatively free, open and competitive, but that did not mean that the relationship between credit and economic power was unimportant in these agricultural communities. Crucial power relationships that credit facilitated were, for example, those between planter and slave, father and son, mother and daughter.

Much (although not all) of the debate between the two positions has centred on whether merchant capital developed Canada’s independence or led it into dependency on its trading partners. This narrow focus on the role of merchant capital, because it focuses on economic activity as conventionally defined, accounts in part for the neglect of differences between larger and smaller merchants on the part of some historians working in the political economy tradition. McCalla’s work on the local economy appears to have been motivated by the insight, derived from neo-classical methods, that “focusing on staples alone yields an oversimplified and fundamentally inaccurate view of the process of economic development in Upper Canada.”

Yet the focus on local economy has moved the debate only so far, onto yet another stage on which (male) family heads, whether merchant or farmer, are the economic and legal actors. R.W. Sandwell’s 1994 review article notes that although historians like Douglas McCalla have challenged the staples thesis by highlighting the role of the local economy in sustaining growth even when the wheat market was depressed:

Recent studies suggest...that theories placing local markets at the centre of economic activity in Canada are as vulnerable to attack as the deposed wheat staple theories. Specifically, theories positing the predominance of local market activity fail to account for the inconclusive role of ‘the market’ in agriculture or that of farming in rural life.

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6Ibid.
A crucial fact that is neglected by an exclusive focus on either local economy or on staple exports is that the nuclear family was the key resource for labour in the period.\(^9\) Frustratingly, that aspect of the problem continues to go unrecognized by the majority of historians, so that, to paraphrase Joan W. Scott, the category of recipients of rural credit attains its stability by resting on both inclusions (white male heads of families) and on exclusions. The exclusions include those Scott identifies in her discussion of working-class history as “those who held no property in their labor, women and children.”\(^10\) In early Upper Canada, the category would have also excluded First Nations people and enslaved Blacks. European women and children, First Nations people and enslaved Black people would all have had separate and particular relations to legal structures and day-to-day practices of credit and ownership. As Vickers pointed out, members of those groups formed the majority of the population.\(^11\) Yet they have been largely left out of debates on merchant credit and Canadian economic development.

The unspoken issue in the debate between McCalla and the political economists is over which group contributed most to capitalist industrial development. Was it the workers? Or was it the merchants/entrepreneurs? Both sides take it for granted that capitalist industrial development is a good thing.\(^12\) The political economists do so because, for the form of economist marxism of which some of them were exemplary, industrial

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\(^11\) Vickers, 316.

\(^12\) For an example of what I am criticizing in the “political economy” historiography of Upper Canada, see Gary Teeple’s argument that the dominance of mercantile capital in Canada held back development because merchants accumulate capital in the process of circulation of goods, rather than their production, and only production-based accumulation can provide the basis for industrialization. The problem with the argument is the presumed positive nature of industrialization. Gary Teeple, “Land, Labour, and Capital in Pre-Confederation Canada,” in *Capitalism and the National Question in Canada*, ed. Gary Teeple (Toronto: University of Toronto Press, 1972), 60.
capitalism is a necessary precursor to socialism; the neo-classical economists do so because for them industrial capitalism equals growth, an end in itself. Both views distort history by forcing it to fit into pre-conceived categories organized in accordance with capitalist industrialism, and its peculiar paradigms of profit and growth. Historians who share this preoccupation are guilty of a kind of presentism for the way they seek particular kinds of economic relationships or categories which they can call ‘capitalism’ or ‘working class.’ Among marxist scholars, this is known as ‘economism’ because certain economic categories are pre-imposed.

When and how capitalism emerged is a legitimate and important question for historical study, but it is not the only or always the best way to understand the social and economic relationships of the past. Assuming that all economic relations exist in reference to capitalism or are on their way to becoming capitalist, presents a problem for historians who are concerned with the economic relations of the past. If capitalism is assumed to be what everything is necessarily becoming, then economic development narrowly construed will retain its central and privileged position in the preconceptions that we bring to historical enquiry, excluding other equally important relations of production:

Until we redefine economics to include the variety of activities carried on to ‘make a living’ within the household and redefine the family as an economic and political site – not simply an affective one – the culture and society of the nineteenth century rural majority will remain obscure, marginalized to the ‘real’ political and economic concerns of historians.¹³

As Sandwell has commented, “key aspects of the political economy upon which rural society was based were themselves marginalized within the parameters of both neoclassical and Marxist economic theory.”¹⁴ Leaving aside most of the implications of this homology as between neo-classical economics and hitherto dominant economist forms of marxism,¹⁵ it is important to observe that the industrialization paradigm was not particularly

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¹³Sandwell, 32.
¹⁴Ibid., 16.
relevant to Upper Canada before 1809, and neither was proletarianization. Preoccupation with those paradigms has blocked participants in both sides of the debate from producing more insightful work on the period. My concern in this final chapter, however, is primarily with the political economists and marxists and with other progressive historians and theorists, for it is that tradition, and not neo-classical economics, that has laid the basis for moving the discussion forward.

**Gendering The History of Law And The Economy**

Although I set myself the goal of integrating gender analysis into the thesis, women have appeared but rarely in the story I have told about creditor/debtor relations in early Upper Canada. Nevertheless, a desire to use the history of credit as a way to understand women’s legal and economic history was a strong factor motivating this research. I chose to work on the earliest period in Upper Canada because I thought it would be easier to study credit relationships when they were small, because of the small population, and new, because the colony was newly founded. I found newness had little to do with credit and debt in Upper Canada because the credit system in the new colony operated in relation to and was conditioned by the ideas and practices of the old world. And, even though the population was small, the complexities of the issues were already large.

At least two major issues affecting creditor/debtor relations in the early years were barely touched upon, even though there is ample material for research. These were the impact of religion and morality on creditor/debtor relations, and the technicalities of land ownership in the period. A substantial treatment of either issue would most likely have expanded and corrected many of the arguments made in this thesis, as well as facilitated the incorporation of a more focused and nuanced gender analysis. Unfortunately, a sustained

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consideration of either would have expanded the scope of this work beyond what can be encompassed in a master’s thesis.

Recent work has demonstrated the importance of religion and morality to business history,\(^{18}\) and it is another area in which the activities of women would have been more apparent than they were in the story that I told. This would be particularly the case in Upper Canada, where women were more able to be active in the creation of religious than of political discourse,\(^{19}\) and where the Methodist religion, with its tradition of women preachers, played a large role both as a symbol of disorder and as an active force in the lives of many people.\(^{20}\) A more stringent examination of the impact of religion and morality may have added depth of understanding to my arguments about the ideological importance of British justice, and it would certainly have added substance to the ideas about moral economy that I sketched out in chapter one.

Regarding the nature of landholding in early Upper Canada, as was briefly reviewed in chapter two, most of the land in Upper Canada during the first part of the period was held not in freehold, but on the basis of location tickets. Along with the other aspects of land holding and land law that were explored in chapters two and five, the fact that land was not (yet) freehold, and that it cost money to get land patented and thereby converted into freehold, was of some ideological significance. A more substantial analysis of the technicalities of landholding and of the manoeuvring of the elite would have contributed to the arguments about constitutionalism and expectations for British justice that have been

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central to this thesis. It may also have illuminated some of the history of women and property in the early period.

In the opinion of Chief Justice Elmsley in 1797, the holding of land on the basis of location tickets was a legal lacuna, creating an interest which he understood to be:

So unknown to our Law, as to be without a name, consequently it cannot of its own nature be accompanied by any of the incidents which accompany and distinguish the Interests which are so familiar to us by the names of Legal & Equitable Estates, of course, in an interest of this nature, neither the Husband is of right entitled to an Estate by the Curtesy, nor the Wife to Dower.21

Roughly speaking, curtesy was the common law right of a widower to a freehold life estate in any freehold lands of which his wife was seised in her lifetime, provided they had children who could inherit the estate. Dower was the common law right of a widow to a life estate in a one-third share of any land her husband had been seised of during his lifetime.

Dower was an extremely important property right for women,22 and one effect of land holding by location ticket was to rescind this right.23 The Upper Canadian government intervened to make dower available, and, as in England, to provide married women with the legal ability to bar their dower right, by passing three statutes relating to dower before

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22The term “dower” has been used loosely here to cover the variety of forms of widow’s share that were known in English law. There were rough equivalents to dower for other forms of land holding, such as copyhold tenure. A considerable literature is available on the widow’s share at common law, its gradual replacement by equitable separate property, and its eventual abolition in England in 1833. See, for example, Eileen Spring, Law, Land and Family (Chapel Hill: University of North Carolina Press, 1993); Susan Staves, Married Women's Separate Property in England, 1660-1833 (Cambridge: Harvard University Press, 1990); Barbara Todd, “Freebench and Free Enterprise: Widows and Their Property in Two Berkshire Villages,” in English Rural Society, 1500-1800: Essays in Honour of Joan Thirsk, ed. John Chartres and David Hey, 175-200 (Cambridge: Cambridge University Press, 1990); and the essays collected in Sue Sheridan Walker, ed., Wife and Widow in Medieval England (Ann Arbor: University of Michigan Press, 1993).

23I am indebted to Professor Douglas Hay for alerting me to the potential importance of dower in the period, and to Professor Hay’s former student, Doug Brooker, for allowing me to see his unpublished work on dower. The insight regarding the effect of location tickets on dower is Mr, Brooker’s. See Doug Brooker, “The Invisible Relic: Ontario’s Dower History; Part I: Upper Canada, 1792-1840” (unpublished paper, 1992).
1812. A study of land holding and of dower law would have provided more of a picture of how women and women’s property fit into the picture of creditor/debtor relations. But the subject of dower is extremely complex, and it would have made the thesis even longer, without necessarily providing many direct connections to creditor/debtor relations.

The study of either landholding and dower rights or moral and religious ideas about credit and debt may have revealed information that would necessitate my rethinking some of my findings. There were also avenues of research that were precluded by my choice to work on very early Upper Canada. In particular, legal records are sparse, law reporting did not begin in Upper Canada until the 1820s, and I was unable to locate any contemporary legal treatise literature that was specific to Upper Canada. Without these, my arguments were mostly based on the bare face of the record in the minute books and term books produced by the various courts. Future research into the letters or family papers of judges, administrators, lawyers, and litigants might also necessitate some rethinking of my arguments.

Although married women were not able to contract at common law until the late nineteenth century, they were able to contract in respect of their equitable separate property, if they had any, from the late seventeenth century, if not before. Issues of debt and credit as between husbands and wives, and between married people and their creditors, were very common, and would have played a role in shaping both family law and creditor/debtor law. For example, creditor/debtor issues regarding property conveyed within families caused the seventeenth century English equity judges to create a hierarchy between “good” and


25 Staves.
"valuable" consideration, and eighteenth and nineteenth century law reports are rife with judgements on issues such as whether a husband’s conveyance to his wife was fraudulent, or when a married woman’s pledge of her credit in respect of her equitable separate property was good and when it was negated by her coverture. Married women were also economically active as feme sole traders where permitted by medieval borough law. Finally, the economic activities of widows should not be neglected in studies of credit. Widows invested their capital in enterprises or mortgages, lent money on bond, and bought shares in chartered companies. Jacob M. Price lists women who loaned money on bond to English and Scottish export merchants in the first half of the eighteenth century.

There is a growing body of evidence that women were more commercially active in the late seventeenth and early eighteenth centuries than they were in subsequent decades, and that changes in the private law of property and contract were instrumental in circumscribing their ability to act economically on their own behalf. These indicators of the changing status of women and of familial sources for business finance have been neglected by historians, but they provide a rich basis for further investigation into a history of credit that includes women.

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26 V. V. Palmer, The Paths to Privity: The History of Third Party Beneficiary Contracts at English Law (San Francisco: Austin & Winfield, 1992), 94.
30 Davidoff and Hall; Staves.
31 Staves.
New Questions For Legal Theory And Legal History

One factor not considered by Innes in his discussion of distinctions between “creative and destructive debt” is the particularities of the legal regime in which the credit system is situated. Much of this thesis has focused on demonstrating that Upper Canadian merchants had a great deal of legal power, in addition to their raw economic power, not (only) because they dominated the magistracy and, in the early years, all civil courts, but also because the law was on their side in tending to favour creditors. This was especially so in Upper Canada where land was open to seizure for debt, but it was not limited to Upper Canada, because the coercive structures of private law predated their use in Upper Canada.

Although it would be wrong to say that the law of credit and debt has acted instrumentally to always favour creditors, the doctrines and structures of Anglo-Canadian private law have helped to facilitate the accumulation of large concentrations of wealth. Yet both private law in general and creditor/debtor relations in particular have usually been viewed as noncoercive so long as they meet the substantive and procedural standards that have developed in the Anglo-Canadian system.

Innes did, however, highlight one feature of the legal system, which he refers to as “relative freedom of contract.” For Innes, freedom of contract translates into a relatively non-coercive credit system. But freedom of contract is an ideological construct. Moreover, it is an ideological construct that was generated during the nineteenth century. The classical contract law of the nineteenth century:

Generated a new ideological imagery that sought to give legitimacy to the new order... ‘Freedom of contract’...was the legitimating image of classical contract law.... It projected an ideal of free competition as the consequence of wholly voluntary interactions among many private persons, all of whom

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32 See chapter 3.
33 On the contrary, specific legal regimes have swung between favouring creditors and favouring debtors. The swings occurred because of political as well as economic factors, and they were often highly moralized as well. For a brief account of swings between pro-creditor and pro-debtor provisions in late eighteenth and early nineteenth century English law, see Hilton, 263-4.
were in their nature free and equal to one another. As a result, the
nineteenth-century law of contracts consisted of a series of forms ostensibly
designed solely to realize the will of free and equal parties, as that will was
objectively manifested in agreements.\textsuperscript{35}

Even this critical view of contract law as ideology confines its critique to the level of the
development/dependency debate, that is, to contractual relations between free white men,
the only people who had contractual rights during most of the nineteenth century.

Innes’s (and by extension, McCalla’s) use of freedom of contract as a factor by
which to judge the level of coercion in colonial creditor/debtor relations, then, falls into the
ideological use of contract law in two ways: by its use of nineteenth century developments
to read back into the colonial period, and by the assumption that contractual agreements
between parties who were juridically equal but economically unequal were freely chosen.
However, there is another level on which their use of contract law is ideological, and on this
level the problem is also shared by marxist approaches to private law. The problem, of
course, is the exclusion from the freedom of contract paradigm of people who did not have
contractual rights.

Freedom of contract has been a concept of some importance in marxist legal theory,
where the figure of the proletarian who has some measure of freedom because he sells his
labour power rather than being tied into a feudal (or slave) labour relationship has been
valourized. A great deal has rested on the relationship of the labourer to commodity
exchange relations, and on whether the labour in question is useful for commodity exchange
(the creation of value in the marxist sense). For some marxist legal theorists, even a
proletarian is a property-owner; liberated from feudal social relations and “free” to sell his
labour power.\textsuperscript{36} It is this freedom that Bob Fine first translates into a legal notion of “the

\textsuperscript{35}Jay M. Feinman and Peter Gabel, “Contract Law as Ideology,” in \textit{The Politics of Law: A

\textsuperscript{36}This idea has been much criticized by theorists and historians. See, for example, Gibson-
Graham; Sandwell; Scott, “On Language, Gender, and Working-Class History”; Shelley A.M.
Labor, Marriage, and the Market in the Age of Slave Emancipation} (Cambridge: Cambridge
social incarnation of *free and equal human labour*\(^{37}\) (a dubious proposition at best), and then seizes on to show that although “equality before the law necessarily entails inequality in fact,” equality before the law nevertheless provides “a measure – albeit limited and formal, but not illusory – of equality.”\(^{38}\) This right is a patriarchal one, for it did not include women; and Fine’s emphasis on exchange relations occludes the fact that male proletarians owned their labour power, while their wives did not. By law, their labour power was owned by their husbands, who would receive any wage that their wives earned. Fine equates this situation unqualifiedly to “equality before the law.” Women’s unwaged labour, which is not useful for commodity exchange, does not enter into or affect his assessment of the real but limited freedoms provided by bourgeois legal rights.

This idea about the measure of equality provided by bourgeois law and the capitalist economic system needs to be rethought in a manner that fully integrates the fact that married women, whose labour power was owned by their husbands, did not gain that measure of formal legal equality enjoyed by men until the married women’s property acts of the late nineteenth century. Further, the assumed universality of this limited measure of equality, and the largely unexamined legal forms and procedural rules through which it is expressed, play an important role in maintaining the strength and flexibility of an ideology of rule of law which appeals to and universalizes notions of British justice and freedoms.

Like economic history, legal history and legal theory needs to move away from its pre-occupation with capitalist industrial development and formal equality in order to open up its field of inquiry to include people and social relations that have heretofore been excluded. I have tried to use this study to problematize and workshop the issues in a

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\(^{38}\)Ibid., 161.
beginning attempt to develop an adequate framework for looking at credit. In doing so, I have opened a very small window on a very large vista. It is clear that the topic of credit and debt intersects social, legal, and economic relations. A research agenda that includes women in the study of credit has the potential to open the subject up from the narrow doctrinal legal and entrepreneurial histories that have hitherto dominated.
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