STIPENDIARY MAGISTRATES AND SUPREME COURT OF THE NORTH-WEST TERRITORIES, 1876-1907*

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The author discusses the office and role of the early Stipendiary Magistrates in the North-West Territories and their effect on establishing judicial institutions.

I. INTRODUCTION: THE HUDSON'S BAY COMPANY PERIOD, 1670-1870

When the North-West Territories became part of Canada on 15 July, 1870, it had no judicial institutions, apart from those in the district of Assiniboia (also known as the Selkirk or Red River settlement). Its centre was upper Fort Garry, now Winnipeg. The Hudson's Bay Company had established trade routes and maintained a measure of order. "But agricultural and surveyed lands, an educational system, municipal and judicial institutions constituted no part of the Company's legacy to the Dominion."[1]

True, the Hudson's Bay Company's Charter of 2 May, 1670 gave power to the Company to create courts. However, it had created none by 1800. When one Lamothe killed King in a dispute over furs near the present Elk Point on the Saskatchewan River in Alberta in 1802 there was doubt as to the jurisdiction of Canadian courts to try him.[2] This incident stirred the British Parliament in 1803 to enact that crimes in Indian Territories could be tried in Lower Canada, or if more convenient, in Upper Canada.[3]

In the next seventeen years the clashes between the North West Company on the one hand and the Hudson's Bay Company and Selkirk settlers on the other produced a spate of trials, civil and criminal, in both Upper and Lower Canada. Doubt remained as to whether Indian Territories included Rupert's Land, so when the Company and the North Westerns made peace in 1821, Parliament passed an Act that said (s. 5) that the 1803 Act applied to the Company's territories. It authorized the appointment of Justices of the Peace with power over non-capital cases and civil cases. The Upper

* This is a revision of a paper given at a Conference at Carleton University, Ottawa on Canadian Law in History in June 1987. The writer is indebted to W.H. Hurlburt, Q.C. of Edmonton and to Dean Trevor Anderson of Winnipeg for helpful comments on an earlier draft. He extends thanks too, to the staff of the Law Library, University of Alberta, the Alberta Archives (Edmonton), Glenbow Archives (Calgary), Saskatchewan Archives Board (Regina) and the Public Archives of Canada (Ottawa) for guiding the writer to relevant material. The writer also acknowledges the fine work of Desmond Brown in gathering biographic material on the Stipendiary Magistrates and judges some time ago. The Alberta Law Foundation provided a grant which made possible the help of Dr. Brown and which covered part of the costs of the archival research. Two small points: "Northwest Territories" and "North West Territories" and "North-west Territories" were all used at different times, the last being the general spelling; (2) the term "half-breed" was used in the early statutes. "Metis" is a preferable term today.

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1. Oliver, 19 *Canada and Its Provinces*, (1914) 148.
2. Morton, *A History of the Canadian West to 1870-71* (2 ed., 1973) 513, 514.
3. Canada Jurisdiction Act 1803 (U.K.), 43 George III, c. 138.

Canada Courts still had jurisdiction and the Company's power to establish courts was preserved.[4]

The Justices of the Peace were never appointed but the Company established a Council in Assiniboia to act both as a primitive court and a legislature. Then after Lord Selkirk's heirs surrendered the settlement in 1836 the Company established courts with a Recorder. The first Recorder was Adam Thom who came in 1839. There was always argument as to whether the Assiniboia Court could try capital cases or whether they had to go to Upper Canada. However, Thom tried an Indian in 1839 and another in 1845. Both were acquitted but a third Indian was tried, convicted and hanged in 1845.[5] In 1848 one Calder was brought to Assiniboia, charged with murder on the Peace River outside of Rupert's Land. Recorder Thom wrote a lengthy judgment to show the Assiniboia Court had jurisdiction.[6] Calder was let out on bail and there is no record of the disposition of the charge. The Company's enemies insisted that the Company had no power to try capital offences in Assiniboia and some members of the Select Committee of the House of Commons inquiring into the Company's affairs in 1857 took this view.[7]

The surrender of Rupert's Land so it could become part of Canada was a slow process. The BNA Act (s. 146) contemplated the admission of Rupert's Land and the North-West Territories into the Union. In 1868 the British Parliament authorized the surrender and also an Imperial Order in Council to declare the admission of Rupert's Land to Canada. The British Parliament further authorized the Canadian Parliament to make laws and constitute courts, but existing courts were continued in the meantime.[8] Because of Louis Riel's Red River Rebellion, an Order in Council was not made until June 23, 1870. It fixed the date at July 15, 1870. On that date, the North-West Territories became part of Canada while the province of Manitoba, much smaller than it is now, was carved out of the Territories.

The Canadian Parliament in anticipation of the transfer had, in 1869, passed an Act for the Temporary Government of the Territories. Though skeletal and imprecise, it enabled the Governor in Council to appoint a Lieutenant-Governor and to authorize him to provide for the administration of justice and to make laws for the peace order and good government of the Territories.[9] The Governor in Council could also appoint for the Territories a Council of not more than fifteen nor less than seven "to aid the Lieutenant-Governor in the administration of affairs, with such powers as may be from time to time conferred upon them by Order in Council." (section 5). This was replaced by a similar Act in 1871.[10]

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4. Act for regulating the Fur Trade and establishing a Criminal and Civil Jurisdiction within certain Parts of North America, 1821 (U.K.), 1 & 2 George IV, c. 66.
5. Stubbs, *Four Recorders of Rupert's Land* (1967) at 12-15; Gibson, *Substantial Justice* (1972) 30, 31.
6. *In the Case of James Calder* (1848) reported in 2 Western Law Times 1 (1891).
7. Report from the Select Committee on the Hudson's Bay Company (1857): Christy at qns. 5517-5524, 5894, 6010-6017; Roebuck at 5887-5891.
8. Rupert's Land Act, 1868 (U.K.), 31-32 Vict., c. 105.
9. 32-33 Vict., c. 3, extended by the Manitoba Act s. 36.
10. 34 Vict., c. 16.

II. THE FIRST FIVE YEARS, 1870-75: CREATION OF THE NORTH-WEST MOUNTED POLICE

The first Lieutenant-Governor of Manitoba was Adams Archibald, appointed 15 May, 1870. On the assumption that the tasks of the Lieutenant-Governor of the North-West Territories would be light, Archibald was given that role as well. On 4 August, 1870 he received instructions to make contact with the Indians and also to report on the state of the laws in the Territories, "together with a full report as to the mode of administering justice, the organization of the courts, the number and mode of appointment of Justices of the Peace, the police arrangements and the means adopted for keeping the peace, etc. etc.". He was also to report on the system of taxation and licensing and municipal organization; also on the state of the Indian tribes, the nature and amount of currency, the land desirable for settlement, and on all subjects connected with the welfare of the Territories.[11]

When Archibald took up his duties at Winnipeg he did not even have a copy of the statute under which he was appointed as Lieutenant-Governor of the Territories. Faced with a serious small-pox epidemic in the valley of the Saskatchewan and south to the United States border, he purported to appoint a Council of three. On 22 October, 1870 he reported this to Ottawa and also reported on the epidemic with a copy of an Ordinance of the same date to prevent the spread of the small-pox.[12] This measure was effective, but on 17 November Joseph Howe, the Secretary of State, wrote Archibald to point out that the latter had no power to appoint the Council and to imply that the ordinance was passed without authority. The ensuing correspondence shows the difficulty Archibald had in knowing his powers. He urged the appointment of a Council but Ottawa did not act until 1873.[13] However the Lieutenant-Governor's hand in dealing with the small-pox was strengthened by an Order in Council of 3 August, 1871 that authorized him to make laws necessary to prevent the introduction of any epidemic and its spread in the Territories.

As to reporting on the condition of the country, Archibald took prompt steps. A British officer, Captain William Francis Butler, had come to Red River in the summer of 1870 as an Intelligence Officer attached to the Wolseley expedition that brought an end to the rebellion of 1869-70. On 10 October Archibald gave him instructions to go to the Territories to report on disorders, the need for troops and "to state your views on what may be necessary to be done in the interest of peace and order." He was also to deal with the small-pox epidemic and report on the Indians and the fur trade.[14] Butler left Fort Garry on 25 October and returned on 20 February, 1871. His amazing journey up the Saskatchewan as far as Rocky Mountain House and back in the coldest winter weather is told in his remarkable account, *The Great Lone Land*.[15]

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11. Oliver, *The Canadian North-West*, Vol. 2 (1915) 974, 975.
12. *Id.* at 975-979.
13. *Id.* at 979-988.
14. Butler, *The Great Lone Land* (1968) at 353-355.
15. *Id.* His formal report is at 355-386.

As to law and order he reported: "The institutions of Law and Order, as understood in civilized communities, are wholly unknown in the regions of the Saskatchewan, insomuch as the country is without any executive organization, and destitute of any means to enforce the authority of the law." And later, "robbery and murder for years have gone unpunished; Indian massacres are unchecked even in the close vicinity of the Hudson's Bay Company's posts, and all civil and legal institutions are entirely unknown".[16] He gave a graphic account of the epidemic, which was worst at St. Albert, Edmonton and Victoria. He also described the Indian tribes. Then he mentioned the traders at Fort Benton in Montana and their trade in whiskey and arms, even on the Canadian side. He predicted that if trade outward along the Saskatchewan River was neglected it would go to Fort Benton. Finally, came his recommendations for bringing about order, establishing the authority of the Dominion, the promoting of colonization in the fertile belt, and prevention of an Indian war. First, there should be a civil magistrate or commissioner to hold court, assisted by local magistrates. Second, a force of 100 to 150 mounted men should be organized for service on the Saskatchewan. Third, there should be government stations at Edmonton and at the junction of the North and South Saskatchewan Rivers with a view to extinguishing Indian title to land along the river so as to make it available for settlement.

Elaborating on his recommendations, Captain Butler thought the commissioner would represent "a commencement, as it were, of civilization in these vast regions". He added that the civil government had to be backed by a "material force".[17] He ended with an eloquent plea that if a powerful nation were to arise across the continent then "surely it is worthy of all toil of hand and brain, on the part of those who today rule, that this great link in the chain of such a future nationality should no longer remain undeveloped, a prey to the conflicts of savage races, at once the garden and the wilderness of the Central Continent."[18]

Butler added in an appendix a list of persons he recommended for appointment as commissioners or justices of the peace. Besides six named individuals, he recommended "all HBC officers in charge of posts", a tribute to the stature of those in charge of the forts. He also listed crimes committed in recent years on the Saskatchewan — five murders and an attack by Crees on Blackfeet as they left Fort Edmonton in April 1870.[19]

To return to the Territorial government at Winnipeg, Archibald was succeeded as Lieutenant-Governor by Alexander Morris in December 1872. Morris had been Chief Justice of Manitoba before he became Lieutenant-Governor of both Manitoba and the Territories. On 12 February, 1873, an Order in Council appointed the first Territorial Council with eleven members. Only two lived in the Territories. The same Order in Council empowered the Lieutenant-Governor in Council "to make provision for the administration of justice in the said Territories, and generally to make and establish such ordinances as may be necessary for the peace,

16. *Id.* at 357 & 367.
17. *Id.* at 383.
18. *Id.* at 385, 386.
19. *Id.* at 388.

order and good government of the North West Territories." However no ordinance was to come into effect until approved by the Governor General in Council except in case of emergency, and the power of disallowance was imposed as well.[20] In the following August an oath of office was prescribed but it enjoined secrecy for all matters.[21] Secrecy was not intended to apply to legislative matters, so on 1 October another Order in Council made this clear.[22] The secrecy was confined to executive functions.

In March 1873 the Council at its second meeting noted that the immediate appointment of Justices of the Peace was of urgent importance for the repression of crime. It passed an "Act" (or ordinance) authorizing the appointment of 21 men at places scattered between Mackenzie River and Fort Francis. The great majority, if not all, were Hudson's Bay Company factors. Oliver points out that in the old regime, factors were regarded as magistrates. "The Company's officers were still the fittest agents for the administration of justice as Justices of the Peace or Local Magistrates."[23]

When this "Act" came under the scrutiny of Sir John A. Macdonald as Minister of Justice he said the Act was valid but "until the settlement of the country shall have reached a more advanced stage it will be inexpedient to allow the Act to go into operation" However, he thought the justices of the peace should be appointed. Accordingly an Order in Council of 13 October accepted the recommendations and on 23 December appointments were made — not only of the twenty one but fifteen more.[24]

Parliament gave some attention to the affairs of the Territories in the same year by the enactment of four statutes.

(1) The appointment of the eleven councillors had exhausted the power to appoint, so the 1871 Act was amended to permit the Governor in Council to appoint additional councillors up to a maximum of twenty one.[25]

(2) The 1871 Act was vague in assigning legislative powers to the Lieutenant-Governor and his Council, so an amendment made it clear that laws for the administration of justice and for peace, order and good government were to be made by the Lieutenant-Governor in Council rather than by the Lieutenant-Governor himself. These laws could be disallowed within two years and matters outside the power of the Territorial Council were vested in the Governor General in Council. In addition, a large number of Acts of Parliament dealing with criminal law and procedure were made applicable to the Territories.[26]

(3) An Act to fix the rate of customs chargeable on goods brought into Manitoba and the Territories included the significant prohibition of importation of spirits into the Territories, and also forbade the manufacture of spirits in the Territories except by permission of the Lieutenant-

20. O/C Dept. of Int. Vol. 1 at 289.
21. *Id.* at 395.
22. *Id.* at 457.
23. *Supra* n. 11 at 997.
24. *Supra* n. 20 at 507.
25. 36 Vict., c. 5.
26. 36 Vict., c. 34.

Governor. The penalties for contravention included forfeiture of the liquor.[27]

(4) Of the utmost significance was an Act, urgently needed, to bring order to the Territories. In essence it met Butler's recommendation for courts and a police force.[28] Assented to on 23 May, 1873, it authorized the appointment of one or more Stipendiary Magistrates to hold office at pleasure. They had the jurisdiction of two Justices of the Peace. They could try offences like petty theft and assault without a jury. For offences carrying a maximum of seven years imprisonment, two Stipendiary Magistrates or a Manitoba Queen's Bench judge could try the case in the Territories without a jury. Where the crime was punishable by death or imprisonment in the penitentiary the trial was to be in the Manitoba Queen's Bench and Manitoba's jury laws applied.

This same Act responded to the request for a police force. It authorized the creation of a Mounted Police Force. While the Bill was before Parliament the Cypress Hills massacre of Indians by whites on May 4 and 5 had shown the urgent need for such a force. The actual creation took the form of an Order in Council of August 30. The force was then organized and the march west began on July 8, 1874. Colonel Macleod's occupation of Fort Whoop-up and the establishment of Fort Macleod in the fall are well known.[29] The United States authorities refused to extradite the perpetrators of the Cypress Hills massacre, but three were caught on the Canadian side and tried at Winnipeg in 1876 before Chief Justice Wood of Manitoba and a jury. Though acquitted because of lack of proof, the fact of a trial had a favourable effect on the Indians.[30]

The actual appointment of Territorial Stipendiary Magistrates did not come about overnight. On 8 September 1873 the Territorial Council resolved that "the future welfare of the North West Territories greatly depends upon the prompt and efficient administration of justice" — specifically the need to remove to Manitoba for trial those charged with serious offences would be so expensive as to render the law of no effect. The Territory should have its own judges.[31] Sir John A. appointed none and the Liberals acted only at the end of 1875.

The 1873 Act creating the Mounted Police made the Commissioner and every Superintendent an *ex officio* Justice of the Peace (s. 15) and an amendment the next year gave the Commissioner the powers of a Stipendiary Magistrate while the Assistant Commissioner and Inspectors were *ex officio* Justices of the Peace.[32] The same amendment (section 19) in expanding the duties of the force gave the widest power to search buildings (including wigwams) and conveyances (including canoes) for intoxicating liquor and to destroy it.

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27. 36 Vict., c. 39.
28. 36 Vict., c. 35.
29. Official Report N.W.M.P., 1874 at 3-28, 57-67 in *Opening up the West* (1973); Denny, *The Law Marches West*, Chapters 3-5 (2 ed., 1972); Macleod, *The N.W.M.P. and Law Enforcement 1873-1905*, Chapters 2 & 3 (1976); Turner, *The N.W.M.P. 1873-93*, Vol. 1 (1950), chap. 4.
30. Sharp, *Whoop-up Country*, c. 4 (1955).
31. *Supra* n. 11 at 1003, 1004.
32. 37 Vict., c. 22, s. 15.

Throughout the Territorial period, officers of the Police did in fact try cases and in the early years handled most. The first Stipendiary Magistrates were appointed on November 15, 1875 as of January 1, 1876. They were Matthew Ryan and Colonel James F. Macleod.[33]

Earlier in 1875, Parliament had passed a new Act to consolidate and amend the previous laws.[34] Marking a new stage in constitutional development, it established a Council that was not connected to Manitoba. It had only five members including Stipendiary Magistrates, their maximum number being three.[35] The Lieutenant-Governor in Council had legislative power over six subjects including administration of justice but not appointment of judges. Provision was made for electoral districts when the population warranted. The creation of municipalities and schools was tied to those districts. Professor Lewis H. Thomas has criticized these provisions and also the uncertainty as to the relationship of council to Lieutenant-Governor in both legislative and executive capacities.[36] The Act however did look forward to the eventual replacement of the Council by a legislative assembly (s. 13).

Several provisions deal with matters that the provinces are given by s. 92 of the BNA Act — descent of land, wills, property of married women and registration of deeds. In the administration of justice, the Lieutenant-Governor could appoint Justices of the Peace and the Council could create judicial districts and the Lieutenant-Governor could provide for civil and criminal courts. In criminal cases the Stipendiary Magistrates were to sit with a Manitoba Queen's Bench judge, without a jury in less serious offences, a jury of six in the more serious, and a jury of eight in capital cases (s. 64). In those cases an appeal lay to the Manitoba Court of Queen's Bench (s. 65). The Stipendiary Magistrates were given jurisdiction in civil cases as well as criminal. They had co-ordinate civil jurisdiction with judges of the Court of Queen's Bench of Manitoba. In larger cases either party could demand a jury of six (s. 71), and in those cases an appeal lay to the Manitoba Court of Queen's Bench.

This Act was not proclaimed until October 7, 1876.[37] Within six months Parliament made important amendments.[38] The powers of the Council were removed from the Act and assigned to the Governor General in Council, doubtless to provide flexibility as changes were warranted. An Order in Council of 11 May 1877 alloted nine heads of power, not as extensive as those of provinces.[39]

The 1877 amendment increased the size of the Council to six, including the Stipendiary Magistrates as *ex officio* members (s. 2). Another provision made it clear that ordinances were to be made by the Lieutenant-Governor

33. O.C. 19 June 1880 reciting Macleod's appointment in O/C Dept. of Int. Vol. 3 at 353.

34. 38 Vict., c. 49.

35. *Id.*, ss. 3 and 61.

36. Thomas, *The Struggle for Responsible Government in the North-West Territories, 1870-97* (2 ed., 1978) 73-90.

37. 1877 Statutes, p. liv.

38. S.C. 40 Vict., c. 7, assented to 28 April 1877.

39. O/C Dept. of Int. Vol. 2 at 607.

sitting with the Council (s. 3). As to the courts, a new degree of independence was granted in both criminal and civil cases by ending the role of the Manitoba courts except for appeals (ss. 7 & 8).

III. THE STIPENDIARY MAGISTRATES

Mention has been made of the appointment of Ryan and Macleod as of 1 January, 1876. Macleod had been Assistant Commissioner of the Mounted Police but was relieved of those duties on becoming Stipendiary Magistrate. However Commissioner French resigned and Macleod was appointed in his place on July 22, 1876. He held that position until 1 October 1880. As Commissioner he had the powers of a Stipendiary Magistrate. During this four-year period he "performed the duties of Stipendiary Magistrate in the Bow River judicial district . . . in addition to his duties as Commissioner of Police."[40]

On the day Macleod was made Commissioner, an Order in Council appointed Hugh Richardson of Ottawa as Stipendiary Magistrate.[41]

Then when the 1875 Act came into effect on 7 October 1876 Ryan and Richardson were given new appointments as of that date, at a salary of $3,000.00 each.[42] It is hard to say when they first took up their duties. Ryan had come west in 1875 in connection with claims of half-breeds to the allotment of lands in Manitoba pursuant to s. 31 of the Manitoba Act. Instructions for an investigation into the claims were issued on 26 April 1875 and on 5 May J.M. Machar of Kingston and Matthew Ryan of Montreal, Barrister, were appointed as Commissioners. They visited parishes throughout the province to hear claimants and take proof of entitlement. They finished their work within a year and Colonel Dennis the Chief Surveyor said:[43]

> It is gratifying to know that the Commission has effected so much work within the time; and that the duties appear to have been administered well, and with great satisfaction to all classes in the province, not a single complaint, so far as I am aware, having been made of the manner in which the Commissioners have conducted their investigations.

Early in 1876 Archbishop Taché pointed out to the federal government that many half-breeds had moved to the Territories from Manitoba. The government accordingly appointed Ryan in June 1876 to investigate their claims. The Order in Council described him as "Stipendiary Magistrate at Swan River" and directed him to take evidence there and at other places where his duties took him. His authority was to extend over two years. He had not finished by that time and a Dominion land agent was appointed to complete the work.[44]

As to the precise residence of Ryan and Richardson it seems that both were at Swan River. The NWMP had a post called Fort Livingstone on Swan River near the HBC's Fort Pelly. At the time, this locality was of importance on the route west, though it soon became a back-water. Battleford was designated as the capital on 7 October 1876 and the new

40. *Supra* n. 33.

41. O/C Dept. of Int. Vol. 2 at 487.

42. *Id.* at 527.

43. Sessional Papers (No. 9) 1876 at 8.

44. Sessional Papers (No. 116) 1885 at 17.

commission to Ryan and Macleod on the same date directed "that the said Matthew Ryan shall until further order reside at Fort Pelly and the said Hugh Richardson shall until further order reside at Battleford." However, the buildings at Battleford would not be complete for another year and Richardson was still at Swan River when the Council held its first meeting at Fort Livingstone in March 1877.[45]

IV. THE SECOND TERRITORIAL COUNCIL ESTABLISHED, 1876

It is relevant to note the work of the new indigenous Council because the Stipendiary Magistrates, Ryan and Richardson were *ex officio* members. Colonel Macleod was not a Stipendiary Magistrate though as Commissioner he had the powers of one. The federal government wanted him on the Council so he was appointed as a member on 4 November 1876.[46] Thus these three men had a major role in the making of laws and in assisting the Lieutenant-Governor in his executive capacity. Indeed in the beginning they were the only members of the Council though before long they were joined by other appointed members and from 1881 by elected members. As long as the Council existed, and even after it was replaced by the Assembly in 1888, the judges, and notably Richardson, had a major role in the drafting of ordinances and indeed in shaping their substantive content. Many ordinances were based on legislation elsewhere, especially Ontario, and it was Richardson who selected the provisions that seemed appropriate for enactment in the Territories.

At the first session of the Council the Honourable David Laird of Prince Edward Island, who had been Minister of the Interior, presided as the new Lieutenant-Governor.[47] The two Stipendiary Magistrates and Colonel Macleod were present. Macleod had been married a few days after he became Commissioner, and brought his wife with him. He had to go from Fort Macleod to Chicago to meet her. They proceeded by train to Fargo, North Dakota, by stage to Winnipeg, by cutter to Portage la Prairie and then by dog team in frigid weather to Swan River. A recent article describes the large barracks of sixteen buildings at Fort Livingstone.[48] "There was no guard of honour as the provisional government of the new territory assembled, no booming of guns, no aides, merely four unassuming men seated around a table in a small room in the governor's dwelling."[49]

V. MATTHEW RYAN'S CAREER AS STIPENDIARY MAGISTRATE

Biographical information on Ryan is scanty. Born at St. John's, Newfoundland in 1810 he was a journalist there. In 1842 he went to Montreal. After working at the *Times* and then the *Pilot* he studied law and was admitted to the bar on 5 May 1849.[50] That period was a stormy one in

45. O.C. 3 April, 1877, granting him 2 months leave "from the date at which he may start from Swan River", in O/C Dept. of Int. Vol. 2 at 585.

46. Richardson Papers, Saskatchewan Archives Board, Regina — 85, I 5(e).

47. *Supra* n. 36, c. 4 for an account of Laird's tenure of office.

48. *Norquay North Star* 1987 Tourist Edition at 11; see also *Western People*, June 12, 1986 at 6, 7 and MacLaren, *Braehead* (1986) 155, 156.

49. *Supra* n. 29 at 310.

50. The batonnier of the Montreal bar has confirmed this but has no other information. (Letter 29 July 1976 to the writer.).

Canadian politics. The administration was led by Baldwin and Lafontaine of the Reform or Liberal Party. They appointed Ryan in 1849 to the Civil Service where he remained until 1858. Thereafter he presumably practiced in Montreal until appointed to enumerate the Manitoba half-breeds in 1875.

From the time of his appointment as Stipendiary Magistrate, Ryan had difficulty in dealing with other officials. At the Council meeting at Fort Livingstone he showed hostility to Macleod and Richardson. The former wrote "There are three members, Richardson, Ryan and myself. The two first do not speak to each other and Ryan does not speak to me! I have proposed a triangular duel to settle the matter".[51]

From the beginning Ryan had difficulty with W.M. Herchmer of the Mounted Police, a brother of Lawrence Herchmer who became Commissioner in 1886. W.M. Herchmer was stationed at Swan River as Inspector until his headquarters were moved to Shoal Lake (now in Manitoba) in 1878.[52] Ryan and Herchmer quarrelled continually. As early as 26 March 1878, Lieutenant-Governor Laird at Battleford wrote this cryptic but ominous note to Ryan at Swan River: "Heard disquieting rumours a week ago, but believe them either false or greatly exaggerated".[53] Complaints about Ryan went to the Department of the Interior and early in 1880 were passed to the Minister of Justice, the Honourable James McDonald. He brought them before the Cabinet. An Order in Council of 3 March 1880 recites that some of the charges were trivial but others more serious and "that these charges taken as a whole appear [to the Minister of Justice] to show such an unsatisfactory state of the administration of justice in the district presided over by Mr. Ryan, as to call for immediate investigation." Three Commissioners were appointed to make enquiry — Edgar Dewdney (who was Indian Commissioner and later Lieutenant-Governor), Joseph Taillefer and James Aikins, a young Winnipeg lawyer who later attained great prominence. Ryan was granted leave of absence. As best the writer can tell, he did not attend meetings of the Territorial Council from this time. The Commissioners reported in 1881. The report has never been made public but it resulted in his dismissal.[54]

Ryan was bitter. He collected and sent to the Minister of Justice statements of various persons to show Herchmer's shortcomings — drunkenness and disorderly conduct, rudeness, attempts to persuade witnesses to tell the Commission that Ryan had been a Fenian, and to persuade one witness to deny he had bought an old NWMP wagon from Herchmer. He also sent a statement from the inhabitants of Minnedosa regretting the enquiry.[55]

Several years later his name came up in a full-dress debate in the House of Commons on the causes of the 1885 rebellion. On July 6, 1885 Edward Blake gave a lengthy and detailed account of the problems of half-breeds and settlers over land. His purpose was to show the neglect and procrasti-

51. Turner, *supra* n. 29 at 310; *see* also MacLaren, *supra* n. 48 at 156.

52. Commissioners Report 1878 p. 24 in *Opening Up the West*, *supra* n. 29.

53. Laird Letter-Book, File No. AL144, Sask. Archives Board, Regina.

54. *Saskatchewan Herald*, 18 July 1881.

55. Public Archives of Canada, RG 13 A-2, vol. 55 No. 136/83.

nation by the Conservative government from their return to power in October 1878. In reply, Sir John A. Macdonald described in detail the neglect by the Liberal administration of 1873-78 in dealing with the half-breeds' complaints. He criticized the appointment of Ryan and Machar as enumerators. The Liberal government had appointed them only to discredit the Conservatives and "for the purpose of finding employment for their hungry followers". He called the two men "incompetent enumerators".

Some time later, on 20 February 1886 Ryan wrote from Winnipeg to Sir John A. to take issue with the criticism and to ask for an explanation. He ended by saying, "At present my feeling is that you did me positive injustice no greater, however, than you did in acting upon the private information of that scoundrel Herchmer in 1881." He added a post-script. "I write with pencil because of the severe cold in my room; ink would really not flow."[56] He died in 1888 at Winnipeg.

VI. COLONEL MACLEOD'S CAREER AS STIPENDIARY MAGISTRATE

Colonel James F. Macleod, the second of the two original appointees, was born on the Isle of Skye in 1836 and came as a child to Aurora near Toronto. He attended Upper Canada College and entered Queen's College (now Queen's University) in Kingston at age 15, receiving his B.A. in 1854.[57] He was articled to Alexander Campbell of Kingston and was admitted to the bar of Upper Canada in 1860. He practiced at Bowmanville. In 1870 he went as Brigade Major with the Wolseley expedition to the Red River. Though bloodless, it was arduous. Samuel Steele at an old timers' banquet said "The first man in our brigade to shoulder a 200 pound barrel of pork was our brigade major, Lieutenant Colonel Macleod, who carried it over the longest portage on the route and set an example to us in everything."[58] He was made a Companion of St. Michael and St. George and was mentioned in dispatches.

Macleod was always more interested in a military career than in the practice of law. After the Red River expedition he practiced but little, and was in Britain, thinking he might stay, when Sir John A. offered him an appointment as Superintendent in the new Mounted Police. He accepted and became Assistant Commissioner on 28 May 1874 before the march west.[59] His role in leading the force after Commissioner French went back to Swan River and in establishing Fort Macleod is well-known. As has been mentioned he resigned as Assistant Commissioner on January 1, 1876 when appointed Stipendiary Magistrate but on July 22 was appointed Commissioner. As such he still had the powers of a stipendiary magistrate. He was stationed at Macleod and the Mounted Police records show that he tried a good many cases.

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56. Macdonald Papers, Public Archives of Canada Vol. 325 Item 13.
57. Letter 26 July 1976 from Rose Mary Gibson, Assistant Archivist, Queen's University.
58. Glenbow Alberta, Institute Archives, James Farquharson Macleod M776 No. 11.
59. MacLaren, *supra* n. 48 c. 5 & c. 9.

In 1877 Colonel Macleod was called on to exercise all his skill. Around the beginning of the year, Sioux Indians under Sitting Bull, having retreated northward after the Battle of the Little Big Horn in June 1876, crossed the border and camped at Wood Mountain just north of the line and about 100 miles east of Fort Walsh. The total number of Indians who came over a period of time was more than 5,000. The Sioux remained for over four years. During all that time Colonel Macleod and Major Walsh handled them with tact and firmness. After long negotiations between Canada and the United States, most of it by way of the British government, the Sioux returned to the United States, and Sitting Bull surrendered to the Americans on 21 July, 1881.[60]

A second major event of 1877 was the signing of Treaty No. 7 with the Blackfoot Indians under Chief Crowfoot at the Blackfoot Crossing on the Bow River in September. Over 100 Police were present to accompany Lieutenant-Governor Laird and Colonel Macleod who were Commissioners to sign the treaty. The comptroller reported, "Not a single casualty occurred, nor yet was there disturbance of any kind amongst the Indians or traders, which was very remarkable when the large number of Indians of different tribes camped so close together is taken into consideration."[61] The Lieutenant-Governor said Macleod "was indefatigable in his exertions to bring the negotiations to a successful termination".[62]

The annual reports of the Commissioner provide a picture of the criminal cases. In 1878 the report for the southern district shows that Colonel Macleod with Inspector Crozier and a jury of six tried a man on three separate charges of stealing a horse. He was convicted and given three years of hard labour. He had to be taken all the way to Manitoba because there was no penitentiary in the Territories. The remaining 13 cases were tried either by Colonel Macleod as Stipendiary Magistrate or by one of the Mounted Police officers as a Justice of the Peace. The report shows that justice was tempered with mercy. The Commissioner's remarks were "Case dismissed for want of evidence", "charge withdrawn and prisoner released", "prisoner cautioned and released", "prisoner discharged; no proof of felonious intent". When the accused was found guilty the fine was very small.

Colonel Macleod added: "In addition to the cases contained in the list, there was an immense number of cases of assault amongst the Indians, generally rising out of disputes about women, which were settled by sending an officer to the camp; indeed, in many instances both parties make for the Fort, each trying to be the first to submit his case. In such matters I think it much better not to issue the usual process."

His report adds that he held two civil courts, one at Fort Macleod, and the other at Fort Walsh. The cases were all "matters of account".

The 1879 report of Colonel Macleod says that he held several civil courts both at Fort Walsh and Macleod and that "claims for over $8,000 have

60. *Opening up the West*, *supra* n. 29: 1877 App. D.; 1878 App. D.; 1879 at 11-16: 1880 at 14, 15; 1881 at 3, 4.

61. *Id.*: 1877 Report at p. 21; also Denny, *supra* n. 29, Chapters 11 & 12.

62. Denny, *supra* n. 29 at 116.

been entered and adjudicated upon."[63]

The 1879 reports from the various superintendents show;

(1) From Fort Saskatchewan, Superintendent Jarvis reported that an Indian had been convicted of murder and executed. A more detailed account by Turner says the Indian was Swift Runner, of good character, mild and trustworthy, a considerate husband and exceedingly fond of his children. However he became deranged, believing that a spirit was urging him to cannibalism. While living with his family near the mouth of the Sturgeon River close to Fort Saskatchewan his wife and children disappeared. Good work by Inspector Gagnon showed that Swift Runner had killed his wife and children and engaged in cannibalism. He was tried before Hugh Richardson and a jury on 8 August and convicted. He was hanged on 20 December.[64]

(2) From Fort Macleod Superintendent Winder reported that a starving Indian had killed a cow and offered a horse in payment. The relentless owner laid a charge and Colonel Macleod ordered the Indian to pay $20, the value of the animal. Another man was arrested for horse stealing, "the prisoner, being armed, showed fight; he was secured and brought to Macleod", convicted by Colonel Macleod and sentenced to one year's imprisonment with hard labour.

(3) From Wood Mountain, Superintendent Walsh reported that Sioux on the Canadian side had stolen ten horses and one mule on the American side and brought them to Canada. Walsh with a scout and three men tracked down the horses and returned them to the owner.

(4) From Fort Walsh, Superintendent Crozier reported that "many disputes and difficulties were settled to the satisfaction of justice without going through the legal process".

(5) Superintendent Walker at Battleford reported the pilfering and killing of settlers' animals by Sioux. He called a meeting of the "headmen" of the bands on November 4th. "I . . . cautioned them against intruding themselves on the settlers" and "I told them also, that our great Mother's laws were very just; if a white man stole any of their property, or killed any of their stock he would be punished and if an Indian committed depredations he would certainly be treated in the same manner . . . I also told the headmen that they must caution their young men against doing anything wrong, as the illegal acts of one or two men would bring discredit on the whole band."

(6) From Shoal Lake, Superintendent Herchmer reported four men undergoing sentence and two arrests for smuggling liquor.

The list of charges in the various districts shows that most were for importing or possessing or selling liquor, theft and assault. Many of the accused were acquitted. Of those convicted, most were fined and a few received prison sentences. Except for horse stealing they were short.

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63. 1878 Report at 26, in *Opening up the West*, *supra* n. 29.

64. Turner, *supra* n. 29 at 500, 501.

In 1880 Colonel Macleod was relieved of the duties of Commissioner as of 1 October, and received a new commission as Stipendiary Magistrate with precedence from 7 October 1876.[65] Like the Commissioners before and after him, he received some criticism and Sir John A. thought he should be relieved in spite of his excellent record. The main complaint against him was of extravagance. Professor Macleod suggests that Macleod's opposition to political appointments to the force was another factor.[66]

Irvine succeeded Macleod as Commissioner. By this time the Sioux were beginning to return to the United States though Sitting Bull remained. Irvine's report for 1880 points out that the disappearance of the buffalo would be harmful to the Indians and that there was a risk of clashes between Indians and settlers, who "unaccustomed to the Indian manner and habits, do not make due allowances and exhibit that tact and patience necessary to successfully deal with Indians".[67] The reports of the superintendents all show concern for the Indians and traffic in liquor. Superintendent Crozier at Wood Mountain described the problems arising from the stealing of horses on one side of the line by Indians who then took them across the border. The police were generally able to recover horses stolen in the United States and to return them there. The American system for returning stolen horses to Canada was not as efficient.

Superintendent Herchmer in reporting from Battleford described his arrest of two Indians at Frog Lake. "I tried them at Fort Pitt, sentenced them, and brought them on to Battleford." This double role of the police of course attracted criticism.

The 1881 report of Commissioner Irvine shows that the taking of stolen horses across the border each way was still a problem. The Mounted Police had returned American horses while "horses stolen by American Indians are, almost without exception, never returned".[68] Superintendent Crozier gave a detailed account of his efforts in restoring a large number of horses belonging to Americans. He pointed out that it was an offence under Canadian law to bring stolen property into Canada and that Indians had been found guilty of this offence. "The Court, however, taking into consideration that the Indians had not heretofore been punished under this Act, and that what they had done was not considered by them an offence in this country, deferred sentence and, after a caution, allowed them their liberty."[69]

The 1881 report also gives an account of the arrest and trial of the Indian charged with the murder of Constable Graburn. He had been murdered in the Cypress Hills in November 1879. (His grave can still be seen on the road from the Cypress Hills to Fort Walsh.) The trial was held before Colonel Macleod and Superintendent Crozier with a jury of six. The accused was found not guilty because after nearly 24 hours deliberation, the jury had doubts. The report adds that the accused "received a fair and impartial

65. O.C. 19 June 1880, *supra* n. 33.

66. Macleod, *supra* n. 29 at 40, 41; MacLaren, *supra* n. 48 at 171-174, 198, 201, 202.

67. 1880 Report in *Opening up the West*, *supra* n. 29, at 6.

68. 1881 Report in *Opening up the West*, *supra* n. 29 at 14.

69. *Id.* at 16.

trial, such as is afforded to the humblest of Her Majesty's subjects in every portion of the realm."[70]

In connection with the reports of the bringing of stolen horses across the border, it might be thought that the statements of the Mounted Police were scarcely objective and were self-serving. However favourable opinion of the work of the NWMP comes from a respectable Montana source, Granville Stuart, a prominent rancher in the Judith Basin. In his Reminiscences he refers to the theft by Canadian Indians of horses owned by one Harrison in Montana (the same incident mentioned in the 1881 report). Stuart describes Harrison's request for assistance from the Police, and the prompt arrest, trial, conviction and suspended sentence of the Indian thieves. Stuart adds that "their method of capturing and punishing the thieves and restoring stolen property as both expeditious and effective." He goes on to describe the difference in Montana where inaction by the government led to the formation of the stockgrowers association, some of whom became vigilantes and killed a number of alleged thieves.[71]

One modern American writer speaks in the most complimentary terms of the efficiency of the Police and of the merits of a centralized force. He concludes by saying:[72]

> Within twenty years the Mounties earned and received support of courts and public unmatched by lawmen in the United States. Better law enforcement even contributed to immigration northward to Canada. Settlers preferred the dependable and equitable protection of a central force to local constables or vigilance committees. Indians, outlaws, and ordinary citizens alike came to respect the North West Mounted Police as upholders of the law.

In 1888 Stuart on behalf of the Montana Stockgrowers Association and the Territorial Board of Stock Commissioners, wrote to Commissioner Herchmer to set out a resolution giving a vote of thanks to the officers and men of the NWMP and also the Canadian authorities generally for assistance given to many of the citizens of Montana in recovering horses stolen from Montana.[73]

Sometimes the American authorities reciprocated. Superintendent Antrobus in his 1888 report from Maple Creek described the action of Colonel Otis of Fort Assinboine in the United States. Three horses had been stolen from Blood Indians on the Canadian side and taken as far as Belknap in Montana near the Idaho border. Colonel Otis had them brought back to the boundary and turned them over to the NWMP. Antrobus said, "I would beg to request that my appreciation of the assistance and courtesy I have at all times received from Colonel Otis, USA of Fort Assinboine, and his officers to be placed on record. They have been the means of our recovering government property taken to Montana by deserters, and it has afforded me much gratification to render them like assistance in a couple of cases."[74]

In 1888 and 1889 the list of crimes was much longer than it had been in earlier years. The more serious cases were tried by judges who had formerly

70. *Id.* at 25.

71. Stuart, *Reminiscences*, Vol. 2, 162, 163.

72. Prassel, *The Western Peace Officer* (1972) 216.

73. 1888 Official Report at 8 & 65, in the New West (1973).

74. *Id.* at 119.

been Stipendiary Magistrates and were now judges of the Supreme Court of the North West Territories.

In 1885 the Minister of Justice called on Colonel Macleod to settle an unseemly dispute between officials of British Columbia and the Dominion. As early as 1869, Parliament had passed an Act for the Preservation of Peace on Public Works.[75] The Governor in Council could proclaim the Act in force where a railway, canal or other public work was under construction. While the proclamation was in force, arms and liquor were banned from the area and could be seized. A commissioner was appointed to administer the Act in the locality where it was in force. He had power to hear cases arising under it. In the Spring of 1885 the Act was in force on the railway belt of the CPR near Farwell (now Revelstoke),[76] also known as the West or Second Crossing of the Columbia River.

On 18 April, 1885 George Johnston was appointed as Commissioner. On 28 May George Burbidge, the Deputy Minister of Justice, made a memorandum to say that the province was granting liquor licences and was enforcing the provincial liquor laws in the railway belt. He was concerned lest the province would challenge the validity of the Public Works Act. During the next month the Secretary of State, J.A. Chapleau, had correspondence with Lieutenant-Governor Cornwall and Premier William Smithe of B.C. over the clash of authority that had arisen. The Premier asserted that the Public Works Act was poorly enforced so that the province was obliged to keep peace and order. He asked the federal government not to interfere. Ottawa refused to withdraw the Public Works Act. The dispute, however, was not settled. Johnston had at Farwell 24 special constables including one Ruddock and later about 20 Mounted Police. On the provincial side were Stipendiary Magistrate Sproat, an official named John Kirkup and one constable. This small force was later augmented by volunteers.

As best I can interpret the events from Johnston's reports to Ottawa, the trouble began in late May. Johnston's Constable Ruddock seized liquor possessed by the holder of a provincial license. Johnston fined the possessor and confiscated the liquor. Then Sproat had Ruddock arrested, seemingly for theft of the liquor. Johnston found the arrestor guilty of assault in arresting Ruddock. Then Sproat laid charges against Johnston, Ruddock and one Orchard for obstructing the provincial police and for rescuing Ruddock from lawful custody.

On 28 August Johnston sent to the Honourable John Pope, Minister of Railways and Canals, a wire setting out the events just described and continuing with the following account. When the charges against Johnston and his two men came on before Sproat, Johnston demanded a seat on the bench as Commissioner of Police. Sproat refused. Johnston then stated "I heard the evidence for the prosecution and dismissed the case". Johnston then ordered Ruddock to leave and Sproat had Ruddock arrested. "He resisted on my instructions." Two days later, on 30 August Johnston again wired to Pope to say that he and Ruddock and Orchard were arrested the

75. 32-33 Vict., c. 24.

76. The following account is based on items in the Victoria Daily Colonist and in James Farquharson Macleod, *supra* n. 58 no. 5, and on microfilm.

night before by the Provincial Police. Johnston ordered his men to stay quietly in the barracks. Two B.C. policemen were under arrest for assaulting Dominion Police.

On 30 August, the same day that Johnston sent his second wire, Sproat wrote to the Attorney General of B.C. his account of the events. It was printed in full in the Daily Colonist for 6 September. It describes the action of Johnston and his special constables:[77]

> "They defied the law and the court, rescued a prisoner from lawful custody, assaulted and imprisoned two provincial policemen, pursued another one, assaulted and imprisoned an innocent messenger . . .; threatened to arrest myself and every officer connected with the province, and marched into the chief streets of this town like cowboys on a raid.
>
> Recognizing that this was civil war and that the situation created was military, I arranged to take the barracks with an overwhelming force of police and volunteers under my personal command, at an early hour on Saturday morning; but having fortunately succeeded by a dash, during the night, in capturing the ringleaders Johnson, Rhodes [Ruddock?] and a man called Fane, the necessity for an attack did not seem immediate though two provincial policemen are still imprisoned."

He adds that he is "awaiting events", and "In the meantime the Dominion policemen are practically confined to their barracks. Yet when messengers went to the barracks on a peaceful mission federal police assaulted and imprisoned one of them and threatened a second messenger who went to the barracks armed with a white flag." He concluded by observing: "This tinges the affair with the burlesque."

Ottawa acted quickly. Burbidge wired Colonel Macleod on 3 September — "Go to West Crossing and straighten it out" adding that the Dominion government selected him as "an officer of experience and judgment". On the same day, the government also provided him with a Commission under the Preservation of Peace Act and another Commission under Canada's Police Act of 1868.

He arrived at Farwell in time for the trial of Johnston and his cohorts on 23 September. Sproat asked Macleod to sit with him on the bench at Johnston's trial because he thought it improper that he alone should try Johnston. The charges against him were for obstructing two provincial special constables and with aiding the rescue of Ruddock from lawful custody. At this point "the defendant withdrew his plea of not guilty, and pleaded guilty and made submission to the court." Kirkup who was Chief of the provincial police in the area, speaking on behalf of the three provincial constables who were the complainants, said they did not wish a vindictive penalty but only that the position might be made clear. Sproat said "I am glad . . . to have associated with me a distinguished judge from a sister territory on the other side of the mountains". Then he set out his views of the law on obstruction of peace officers. The original charges were serious but in view of the conciliatory position taken by the complainants and the plea of guilty and because Johnston "acted throughout on erroneous legal advice", the Magistrate said "It would be beneath the dignity of the court to inflict a vindictive penalty." He fined Johnston $10.00 on each of the three charges against him. Colonel Macleod then retired from the bench and Magistrate Sproat disposed of the other cases, remitting the mounted policemen to their own officers for trial.

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77. Johnston's wires of 28 and 30 August to Joseph Pope, Minister of Railways.

The last item is in the Daily Colonist for October 7, being a dispatch from Farwell on September 30. It says "Colonel Macleod, Canadian Commissioner to report upon the late troubles here, left on the 24th. The result of his inquiries may be inferred from his sitting on the bench with Mr. Sproat when the offending Commissioner of Police, Mr. Johnston and others, (some in mounted police uniform) pleaded guilty and made submission to the court. The somewhat startling action of the Magistrate and the authority of this court are thus memorably and completely vindicated. It is understood that diplomatically, Colonel Macleod (who won golden opinions here) and Mr. Sproat got on very well".

It is hard to say why Johnston capitulated. Probably the federal government in its anxiety to avoid a worse confrontation with the British Columbia authorities, ordered him to plead guilty. The Preservation of Peace on Public Works Act seems to have come off second best in its competition with provincial laws. However the last spike in the C.P.R. was driven by Lord Strathcona on 7 November at a point just west of Farwell so there was no longer any need for the special protection of the railway line.

VII. HUGH RICHARDSON, THE THIRD STIPENDIARY MAGISTRATE

Hugh Richardson was born in London, England on July 21, 1826 and at the age of five came to Toronto with his parents. He was admitted to the Upper Canada bar in 1847 and was a successful practitioner at Woodstock from 1852 to 1872 having been Crown Attorney from 1856 to 1862. In 1872 he joined the civil service of Ottawa as Chief Clerk in the Department of Justice. When the NWMP were about to move west in June 1874, Richardson "arrived from Ottawa, and held the last conference with the Commissioner. He also brought the final instructions from the government."[78] He has been credited with drawing the 1875 North West Territories Act.[79]

He held the rank of Lieutenant Colonel in the militia and organized the Oxford Rifle Regiment. During the Fenian raids he served at La Prairie in 1864-65 and at Sarnia in 1866.

As mentioned earlier, he was appointed on 22 July, 1876 as a Stipendiary Magistrate and received a new Commission on 7 October. It assigned him to Fort Battleford. It is hard to say when he came west. It was probably late in 1876. Certainly he was at Fort Livingstone early in 1877 where he stayed for the time being because buildings at Fort Battleford were not ready. In February he applied for leave of absence to go to Ottawa to bring out his family. Edward Blake, the Minister of Justice had "very great hesitation in recommending any leave of absence" but did so. Two months leave was granted by Order in Council of 3 April, 1877.[80]

The move took far longer. Richardson went to Ottawa to bring out his ailing wife and three daughters. They left Ottawa in early July and went by

78. Denny, *supra* n. 29 at 15.

79. This is from the Saskatchewan Herald in a clipping in Richardson Papers in the Saskatchewan Archives.

80. *Supra* n. 45.

train to Prescott, Sarnia and Duluth. They had to hire a "strong wagon and two horses" for the trip on to Winnipeg. Heavy rain kept them there twenty days. On August 3 they continued by horse and wagon by way of Portage La Prairie, Fort Ellice, Touchwood Hills and Fort Carlton. There they had to wait while their house was being completed at Battleford. They reached that place on 29 September. It is no wonder that the expenses came to $4,976.94 and that the Minister of Justice wanted details of the enormous cost.[81]

The plans for the house show a spacious four-bedroom dwelling but it was not comfortable. Richardson wrote the contractor at Winnipeg that the house had been drafty and bad for his invalid wife. "Everything was freezing within three feet of a hot stove." A letter, written to Richardson just after his arrival, from Thomas Scott, the chief architect in the Department of Public Works at Ottawa asked: "let me know if you wish to be among the redskins and on the prairie or in civilized society (but not in Ottawa)." Travel from Battleford to other places where Richardson held court was tedious. To explain a large account for a journey to Fort Pitt, Victoria and Edmonton in December 1877 soon after his arrival he wrote, "there are no such places in this country as hotels by the way. Consequently unless one strikes a HBC Post, where the officers in charge are always hospitable and put one up for the night, a trip of this sort is camping out". He added, "you hire horses where you can" and observed that it was unsafe to travel in winter without two men and spare horses.

Almost as soon as the Richardson family arrived in Battleford one of the sub-constables named Elliott fell in love with one of Richardson's daughters whose name seems to have been Luders. Richardson learned of this and forbade Elliott to come to the house which he had done to bring the mail. Elliott wrote Richardson on 18 February 1878: "having heard that you had issued an order to the effect that I was not to convey the mail to your house as heretofore, I beg to state that it gives me great pleasure in giving up so arduous an undertaking, and that prior to this date I had made up my mind to discontinue the carrying of your mail, as only one construction can be put upon the meaning of your order".

On February 25, Elliott and three other constables — Marshall, Balfe and Davis went to Richardson's home and in spite of parental objection took the daughter away. She and Elliott were married that day by a Presbyterian minister, the Reverend Straith. It is hard to tell what happened next but the inference is that her parents took her back home. On the following day Elliott wrote Mrs. Richardson. He was grieved that she was unhappy. He loved her daughter and she returned that affection. They thought they could not obtain sanction from her parents, and being of age, were married the day before, a few minutes past three — honorably married in sight of God and man. "Let my wife come to me Mrs. Richardson . . . I do not wonder at the treatment I received last night for well I know your hearts are nearly broken. I hope you will forgive us."[82]

At the same time Elliott wrote Colonel Richardson agreeing to "propositions" that Richardson had made through Amedee Forget who was

81. *Supra* n. 46, R-85 I 9.

82. Saskatchewan Archives R-85 I 10.

secretary to the Lieutenant-Governor. He does not say what the propositions were, and concluded "my actions . . . will be strictly honorable."

On the evening of the wedding Superintendent Walker who was in charge at Battleford wrote Richardson to say "the men you mention are not on duty this evening but . . . will require to be back here by 9:30 . . . I will endeavour to keep Elliott employed for a few days so that he may not give you any trouble."

On March 2 Walker wrote Richardson to say that Elliott was confined to barracks, adding, he might try to "get your daughter out" by way of a ladder at a window.

On the same day Richardson wrote a letter to Walker enclosing criminal charges against the four members of the force under Walker's command and requesting that they be brought before Walker without delay. He gave a list of seven witnesses and asked Walker to let him know the time, because he wanted to be present and give evidence.

Colonel Richardson made three formal complaints. The first alleged that Elliott and Marshall "feloniously and fraudulently allured one Luders Richardson out of the possession and against the will of this informant, her father, she . . . being under 21 years of age and having a certain contingent interest in the real and personal estate of this informant, with intent her, the said Luders Richardson to cause to be married to the said Elliott . . ."[83]

The next complaint was made under the Act to establish the NWMP. The Act contained a lengthy list of offences by members of the force. One of them was "disgraceful, profane or grossly immoral conduct."[84] This information charged Elliott and Marshall with disgraceful conduct in having solicited the clergyman to perform the marriage ceremony, falsely representing the parties to be of full age and that the consent of the bride's parents could not be obtained; and in having on the night of 25 February attempted unlawfully and forcibly to enter the house of Richardson.

The last information is against the other two constables, Balfe and Davis for disgraceful conduct in that on the night of 25 February they had been present when Elliott and Marshall entered the dwelling house of Hugh Richardson and neglected to arrest Marshall and Elliott as in duty bound to do as peace officers.

The next day, March 3, Balfe wrote to Richardson to say "you have defamed me and I am made a prisoner" and asked Richardson to agree with Balfe's allegations or Balfe would see his legal adviser.

On the night of 4-5 March, Elliott, Marshall and Balfe deserted, taking with them Deschamps, a prisoner.[85] Two of the horses were the government's, one was Major Walker's and one was Marshall's. Four saddles were missing. Marshall wrote a letter to Walker to say they were obliged to go, and were sorry to do so, and that they had no fault to find with him as he had been a good officer. Apparently they intended to go to Montana.

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83. The Offences Against the Persons Act, 32-33 Vict., c. 20, s. 54 made it an offence to abduct an heiress against the will of her father: this provision came from the Imperial Act of 1861; earlier statutes are the Abduction Act, 9 Geo. IV, c. 31 and 4 & 5 Philip & Mary, c. 8 (1558).

84. 38 Vict., c. 50, s. 1.

85. From this point the account of Elliott's trial is from the Saskatchewan Herald, 23 September and 30 December 1878.

Walker sent out a search party but the melting snow destroyed the tracks and the searchers turned back at the Red Deer River. On 9 March a trader named Gunn provided the fugitives with food on the South Saskatchewan. The four went on toward the Cypress Hills.

In September Elliott surrendered at Fort Walsh. Brought back to Battleford, he was charged with theft of government property and tried on 23 December at the police barracks. A large number of spectators were present. Richardson and W.J. Scott, a Justice of the Peace, presided with a jury of six. Walker was the prosecutor (and also a witness) while Hayter Reed, the Indian agent at Battleford and also a lawyer, defended Elliott. According to the careful account of the evidence in the Saskatchewan Herald for 30 December the evidence was presented in a competent manner while Reed's cross-examination was skilful.

The only defence witness was Sub-inspector French who had been in charge at Battleford in the autumn of 1878 during Walker's absence. Reed called him to try to show that Elliott had already undergone punishment for the offence now being tried, since he had been incarcerated between 12 September and 12 November. The court refused to permit this question. Then "Mr. Reed delivered an affecting address to the jury, in which he referred pathetically to the feelings of the prisoner's widowed mother, of whom he was the sole support." The newspaper account next says this: "The Stipendiary Magistrate charged the jury at some length and very strongly against the prisoner, after which the jury retired. After about five minutes deliberation they returned a verdict of not guilty."

Three days later Elliott was brought up before the Stipendiary Magistrate on the remaining charges, namely stealing Major Walker's horse and aiding Deschamps to escape. Walker asked for an "enlargement" because of new evidence. He could not fix a definite date because the roads were bad. Elliott was released on his own recognizance of $400. The writer does not know whether Elliott was ever brought to trial on these charges.

Shortly after this the Herald carried a note of the death at Battleford of Richardson's wife and another of the death of his mother at St. Thomas, Ontario, both on 2 February 1879.

Richardson had a large part in the framing of Ordinances. The new Council that came into being on 7 October 1876 inherited practically none for very few of those passed by the old Council came into effect.[86] Indeed the Minister of Justice a week later reported that he had not had time to go through the resolutions of the late Council and he recommended that the new Council should deal with them.[87]

As mentioned earlier, the new Council began its first and only session at Swan River on 8 March 1877. In two weeks the Council made 13 ordinances. The titles show the topics that were of concern to the Council — infectious diseases, protection of buffalo, master and servant, fences, prairie fires, licences and gambling. In addition, there were some technical subjects — administration of justice, exemptions from seizure, assignment of debts, registration of deeds, short forms of deeds and the transfer of real estate by women.

86. *Supra* n. 36 at 67, fn. 89.

87. The Order in Council is dated 25 October 1876.

These ordinances were ill-fated because the 1877 Act, passed on 28 April five weeks after the session ended provided that the powers of the Territorial Council be allotted by the Governor General in Council, as mentioned above.[88] The new Minister of Justice, The Honourable Rodolphe Laflamme, seemed to think that the change in the Act rendered the ordinances of no effect — a rather odd opinion, considering that the 1875 provision was still in force when the ordinances were passed. A memorandum made in 1881 says "none of the ordinances of the Northwest Territories passed prior to 1878 are in force. Those of 1877 were pronounced *ultra vires* by the then Minister of Justice, and were never printed. At the suggestion of the Minister they were repealed and re-enacted since, excepting numbers five and twelve" which provided for protection of buffalo and assignment of debts.[89]

The council moved to Battleford for the 1878 session which opened on 10 July. The Council was reminded of its new list of powers under the Order in Council of May, 1877 and of the new Oath of Secrecy, confined to executive matters.

The Council repealed the 1877 Protection of Buffalo ordinance, which the half-breeds had requested, though Ottawa disallowed it anyway. The 1877 ordinances were re-enacted and new ordinances dealing with brands, and stallions running at large were passed. As a start in establishing judicial machinery a Civil Justice ordinance was passed and it included Rules of Court, making use of the Ontario rules and forms and it set up a system of judicial districts. Originally there were three — Saskatchewan, Bow River and Qu'Appelle.[90] Other ordinances dealt with constables, notaries public and limitation of actions.

These ordinances had a better fate than those of 1877, for they were not disallowed. In 1879 the session began on 28 August and lasted a month. The subject matter was much the same as it had been — infectious diseases, lunatics, ferries, prairie fires, master and servant, licencing and gambling, administration of justice including exemptions, and registration of deeds.

In 1880 the Northwest Territories Act was consolidated. It enabled the Lieutenant-Governor in Council to exercise such powers as the Governor General might confer just as the 1877 provision had done. However section 95 repealed the 1875 and 1877 Acts. The Council had not met in 1880 but met on 26 May 1881. On that date no Order in Council had been made conferring powers under the new Act.

Richardson on June 7 wrote a memo pointing out these facts. He concluded the Lieutenant-Governor in Council had no legal power to make ordinances. He recognized that section 95 of the 1880 Act said that the repeal of the earlier Acts should not affect duties accrued and rights acquired under the earlier Acts. He did not think however that this operated to preserve the Order in Council of 11 May 1877. He added that he had prepared the ordinances but could not aid in making them law.[91]

88. *Supra* n. 38 and 39.

89. Orders in Council on Dominion and Provincial Legislation 1867-1895 at p. 1236.

90. For an account of the sittings of the court in each judicial district under the 1878 ordinance, see McCaul, "Constitutional Status of Northwest Territories" (1884) 2 *Canadian Law Times* 49 at 57-61.

91. Journals of N.W.T. Council 1881.

The other members of the council were not deterred by his opinion. Neither was the federal cabinet, because none of the ordinances were disallowed. Everyone but Richardson assumed that the Order in Council of 1877 was still in effect and indeed it was not replaced until a new Order in Council of 26 June 1883 which conferred the same powers.

The 1881 ordinances dealt with stray animals, fences, sheep, driving off of horses and cattle, bulls running at large and ferries. Other ordinances provided for security by public officers, and amendments to the Registration of Titles ordinance, chattel mortgages, marriage and the sale of medicine.

At this period the Council still had the three Stipendiary Magistrates though Ryan was on the verge of dismissal. I doubt he attended the 1881 meeting. Professor Thomas says of the Ordinances of 1878, 1879 and 1881: "The legislation seems to have been carefully prepared, as indeed it should have been with three judges among the councillors."[92] Edgar Dewdney succeeded Laird as Lieutenant-Governor on 31 October 1881. The Council did not meet in 1882. By the time it met in August 1883 Regina had been made the capital and Richardson had moved there.

In the six years Richardson was at Battleford he covered a large area holding court. He was hardly settled in the fall of 1877 when he went on a circuit in December that took him as far as Edmonton, travelling by sleigh. Court was held in any available building such as the Police Orderly Room. When he came to Edmonton in December, 1881, the situation was described as follows in the Edmonton Bulletin: "It was intended that the new school house should be placed at the disposal of the Court, but as the chimney was not quite finished and the stove could not be lighted, it could not be used. Mr. Hardisty then offered the use of the sales room of the Hudsons Bay Company in the Fort for the purpose, and was accepted".[93]

When the Lieutenant-Governor was concerned about establishing electoral districts so that members could be elected to the Territorial Council, his secretary, A.E. Forget on 25 November 1882 asked Richardson to determine if the Edmonton District had the requisite population of 1,000. The district was 30 miles from north to south and 42 miles from east to west and included St. Albert and Fort Saskatchewan. The letter to Richardson said, "You will serve a public interest in providing a report showing the result of your inquiries". With the help of Superintendent Gagnon of the N.W.M.P. and Father Leduc and of one S.D. Mullins, Richardson took a very careful census and on 6 February 1883 wrote Lieutenant-Governor Dewdney to say "While in Edmonton in December 1882 I made the most exhaustive inquiries within reach and have arrived at the conclusion that this District possesses the right to an elected representative under the Act".[94] In the election for Edmonton, Frank Oliver was elected and so began a long and turbulent career in politics. Between the investigation of Ryan and the appointment of Rouleau, Richardson and Macleod were the only Stipendiary Magistrates in the whole Territories. Sometimes prisoners had to await trial for lengthy periods. In February

92. *Supra* n. 36 at 93.

93. *Edmonton Bulletin*, 17 December, 1881.

94. *Supra* n. 46, I 2.

1881 an editorial in the Bulletin criticized Richardson for not holding court at Edmonton. It added that in the winter of 1876 two Indians died in confinement and in 1877 three prisoners were confined for trial until the middle of December.[95] One might suggest that the criticism is unfair because during much of that period Richardson was engaged in moving his family west. At the time the Bulletin made this criticism, the Lieutenant-Governor on 28 January 1881 asked Richardson to go to Qu'Appelle to try prisoners who had been awaiting trial for nearly six months because Ryan was "absent or incapacitated from performing his duties".[96]

The Courts Lists for 1883[97] give an idea of Richardson's activity at that time. He was alone in the Eastern part of the Territories until Rouleau was appointed late in the year. Civil sittings were separate from the criminal and involved actions in debt, account, replevin, partnerships and torts. The sittings were at Prince Albert in January and May, at Regina in April, August and October, and at Fort Qu'Appelle in April and August, and at Edmonton in July. The lists were lengthy. Sometimes lawyers appeared. Many cases were withdrawn or settled.

From time to time Richardson received letters setting out a complaint against someone or asking for help. He invariably replied promptly. After pointing out that he could not advise or help the person, he outlined the course that the person should follow. On one occasion Father Andre at Duck Lake wrote an indignant letter complaining that Inspector Herchmer and one Owen Hughes had broken down fences around the Roman Catholic Mission and had opened a road across a field. Richardson replied to explain that redress could be had only through the District Court which would sit in Prince Albert in October. Not long after he received a letter from Hughes asking if Richardson could get the Lieutenant-Governor to keep the old trails open. Hughes complained that he could not go anywhere without breaking down someone's fence.[98]

Early in 1882 at Edmonton a number of squatters had settled on land owned by others. The leading citizens of the community formed a vigilance committee with a view to stopping this practice. One Bannerman had erected a house on land he did not own at the top of the river bank near the present Convention Centre. The vigilance committee pushed it over the bank and Bannerman had the leading members charged with malicious destruction of property. After a preliminary before Inspector Gagnon the trial came on before Richardson on June the 17th. The accused were leading citizens — Frank Oliver, D.R. Fraser, Laurence Garneau and Matthew Macaulay. The jury after a short absence found them not guilty.[99]

In August, 1883 Richardson was involved in an incident connected with Nicholas Flood Davin, the colourful and contentious newspaper editor and lawyer from Regina. While en route home from the East by train, he was seen in the corridor at night with his trousers off. Herchmer and his

95. *Edmonton Bulletin*, 7 February, 1881.

96. *Supra* n. 46 I 7.

97. *Supra* n. 46 I(1)(c).

98. *Supra* n. 46 I 3 and I 5(a).

99. This account is taken from articles in the *Edmonton Bulletin* of 11 and 18 February, 4 March, 25 March, 17 and 24 June.

wife were on the train. Herchmer charged Davin with illegally bringing liquor into the Territories. Richardson tried him at Regina on 8 September. He asked Davin if he denied the charge. By way of inducing the judge to impose a light penalty, Davin said it was a small amount such as was usually brought into the Territories by travellers, and that the custom of the police had been to spill the liquor on the frontier and not to prosecute. He said he had not intended to violate section 90(3) of the N.W.T. Act 1880, which prohibited the importation of liquor without special permission. Richardson imposed a $50 fine. The Deputy Minister of Justice asked Richardson to comment on Davin's bitter complaints against Superintendent Herchmer and Inspector Steele. Richardson replied as follows: "During six years residence in the country and frequent travel over a considerable portion, charges of grave misconduct either collectively or individually against Officers of the Force have not come to my notice".[100]

VIII. RYAN'S REPLACEMENT — CHARLES BORIMEE ROULEAU

Though Ryan was dismissed in July 1881 no new magistrate was appointed until 28 September 1883. Charles Borimee Rouleau was selected to replace Ryan. He became an *ex officio* member of the Council and was stationed at Battleford and later at Calgary. Born in Lower Canada in 1840 he taught school at Aylmer and then was inspector of schools. Turning to law, he was admitted to the bar in 1868. In 1876 he was appointed Stipendiary Magistrate for the district of Ottawa and seven years later came West.

Soon after Louis Riel returned from Montana in 1884, Dewdney wrote Rouleau to ask particulars of the half-breeds' agitation. A lengthy reply of 5 September 1884 urged that the government settle the half-breeds' claims at once. The Grits used the agitation for their own political ends; the longer the agitation continued the harder it would be to allay; settlement would take away Riel's ammunition; the half-breed agitation meant that the Indians would agitate; once the half-breeds were quiet the Indians could be controlled. Rouleau added that the crops were a failure and the government must give the Indians help or there would be misery and starvation.[101] This perceptive advice came from a man who had been in the Territories for only a year.

Rouleau lived in a house on the south side of the Battle River where the main settlement then was. The Mounted Police Fort was on the north side. Probably his house was the one built for Richardson. Right after the clash at Duck Lake, a large number of Indians including Poundmaker's surrounded the town and its inhabitants took shelter in the Fort. Rouleau moved his family out to Swift Current. Colonel Otter's force, coming from Swift Current, reached Battleford on April the 23rd. This ended the looting and burning by Indians. As the troops approached they saw clouds of smoke. "The smoke the troops saw was the result of the Indian's last defiant act at Battleford, the burning of Judge Rouleau's substantial home".[102]

100. *Supra* n. 46, I 5(b).

101. Glenbow Archives: *Dewdney Papers*, M 320 Vol. VI at 1402.

102. Beal and Macleod, Prairie Fire at 240 (1985).

IX. JEREMIAH TRAVIS, THE ADDITIONAL STIPENDIARY MAGISTRATE

In 1885, Ottawa yielded to requests for a fourth Magistrate and Parliament amended the Northwest Territories Act to authorize this.[103] Jeremiah Travis was appointed on 30 July, and assigned to the Alberta district with his seat at Calgary. Born at Saint John, New Brunswick in 1830 he obtained an LL.B. from Harvard in 1866, and had written a book on Canadian Constitutional Law. It was a rather intemperate criticism of decisions of the Privy Council, the Supreme Court and the Provincial Courts.[104] He was in Winnipeg at the time of his appointment, having tried without success to receive an appointment to the Manitoba Court of Queen's Bench. He came to Calgary right after his appointment. In letters to Lieutenant-Governor Dewdney on 11 September and again on 19 September he said he was pleased with his reception by the Calgary Bar and looked forward to working with Dewdney on the Territorial Council.[105] He was in error in thinking that he would automatically be a member of Council because unlike the other three Stipendiary Magistrates, he was not made an *ex officio* member.[106] In the next three months Travis clashed with Mayor George Murdoch, the Calgary Herald and the "whiskey ring".[107] The strict liquor law was unpopular and often violated. The Mounted Police in trying to enforce it were not always popular. Travis was a zealous teetotaller. A councillor S.J. Clarke, who was also a hotel owner, resisted a search by the police for liquor. On 11 November Travis found him guilty of obstructing or assaulting a police officer in the course of duty and sentenced him to six months at hard labour. In his last letter to Dewdney written 3 December, 1885 Travis conceded that "a reaction has set in". He described his sentence of Clarke as moderate. A public meeting condemned Travis. He ruled that Hugh Cayley, editor of the Herald, was guilty of contempt and fined him. Cayley refused to pay and went to jail on or about 6 January. After loud protests on his behalf he was released on 27 January.

The next episode involved municipal affairs. At the year's end an election was held for mayor and councillors for 1886. One mayoral candidate, James Reilly was anti-liquor, while the incumbent George Murdoch, was in the "whisky ring". He and his followers were easily successful, much to the indignation of Travis. He ruled that Murdoch and his followers were disqualified from office by reason of irregularities in the election. He went further and declared James Reilly and his supporters to be elected. The result was chaos. The town was divided into pro- and anti-Travis groups. Protests were made to Ottawa over Travis's actions. He was

103. 48-49 Vict., c. 51, s. 126.

104. *See* J.S. Ewart's sarcastic review in (1884) 1 *Man. law J.* 120; (1885) 2 *Man. Law J.* 28 and Travis's defence at 41.

105. *Supra* n. 101 at 1687, 1691.

106. *House of Commons Debates*, 27 April, 1886 p. 889 col. 2.

107. See Peter Ward's unpublished thesis, University of Alberta, "The Administration of Justice in the North-West Territories 1870-1887" (1966) at 81-85 and Foran, the "Travis Affair", (1971) 19 *Alta. Hist. Rev.* No. 4 p. 1.

suspended and a commission was appointed under Judge Taylor of Manitoba. He reported in June 1887. The report was not published. The Commission recommended dismissal because Travis had not been prudent. The problem was solved when the Stipendiary Magistrates were replaced by the Supreme Court of the Territories on 18 February 1887. Travis was not appointed to the new court.

With this background it is no wonder that the Territorial Council passed an ordinance at its 1886 session calling for an election to end the deadlock in Calgary's municipal affairs. It recited that "doubt has arisen concerning the personnel of the mayor and councillors . . . for the year 1886, and various persons have claimed and are claiming the positions of mayor and councillors . . ." and that "by reason of the said rival claims, vexatious delays and litigation have ensued, involving great loss and inconveniences to the property holders . . . and it is at present doubtful if a legal council exists".[108]

One episode involving Travis is not as well known as those just described. While the investigation was under way, Travis wrote to George Burbidge, Deputy Minister of Justice, on 28 August, 1886.[109] The letter begins by saying that members of the Whisky Ring had organized meetings and petitions against Travis because they knew they could not force him to support them in their crime: "Had I been like one of my colleagues (I state nothing but what I am prepared any minute to sustain) lying day after day drunk here at one of the hotels (the Royal) with parties and witnesses kept waiting here from day to day to get him sober enough to hold a court, the opposition and petitions would have no more followed in my case than they have done in his. Likewise as to the action of the government. I should think the government must soon be alive to the fact that if ever there was a time here when a judge was required to administer the law according to his oath (without fear, without favour and without malice), that this is the time."

Burbidge checked to try to identify the judge mentioned by Travis and found that the only one who had sat in Calgary besides Travis was Rouleau. Not wanting to leave Travis's letter on file without giving Rouleau a chance to respond, Burbidge wrote Rouleau on 2 September. After quoting the allegations, Burbidge said "the Minister of Justice has not thought it necessary to ask for a formal report through the Secretary of State. However, he is unwilling to file Mr. Travis' letter without giving you an opportunity for making any explanation which you desire to make." On the same day Burbidge wrote Travis telling him of Burbidge's letter to Rouleau.

On 8 September Rouleau wired Burbidge: "Please send copy of Travis' libelous letter. Intend to prosecute him unless he be sent to asylum. Will answer letter." His answer of the same day said that the accusation was false in every particular and that Rouleau had called a meeting of the Calgary

108. Ordinance re Municipality of Calgary, O.N.W.T. 1886, No. 1.

109. Saskatchewan Archives, Regina. S.H.S. 188.

advocates, numbering 12, to lay Burbidge's letter before them in order to give the Department of Justice a unanimous protest against such a vile and malicious accusation. However he explained that Travis came to him and admitted the charge was a falsehood so far as Rouleau was concerned. He asked Rouleau not to let the lawyers see the contents of Burbidge's letter and Rouleau agreed. Travis wrote Burbidge the same day to say he made no charges against Rouleau and did not have him in mind in his first letter. However, he added this curious conclusion: "the statements in my letter of the 8 August were nevertheless literally true, and can be established by incontrovertible testimony whenever that becomes necessary".

On 8 October Burbidge wrote Travis to point out that Travis could have meant no one but Rouleau even though not naming him, but that it now appeared that Travis was not speaking of his own knowledge. On the same day Burbidge wrote Rouleau to explain why he had notified Rouleau of Travis's original letter and Burbidge put a memo in the file the same day "As it appears Mr. Travis' charge of drunkenness against one of his colleagues was not made from his own knowledge but from hearsay, it is not thought necessary to take any further action thereon".

On 14 October Travis wrote a letter making a feeble attempt to justify his original letter to Ottawa. Then he referred to the Reverend John McDougall and James Reilly, Mayor of Calgary as being persons cognizant of the facts. He concluded the letter by saying that when he came to Calgary conditions were bad with illicit liquor sale, drunkenness and prostitution. He added that he had improved things and that "had government supported me the marked improvement would have been permanent, instead of all having been thrown back as it has been." He concluded by saying that the Northwest was divided into two great classes — the respectable, supporting Travis and the criminal, his opponents.

After his short experience as Stipendiary Magistrate, Travis never returned to public life. He remained in Calgary, amassing some wealth in real estate. He died there in 1911. His unhappy tenure produced some criticism of the government for appointing outsiders, but fortunately the next two appointments of outsiders were excellent.

To sum up the work of the Stipendiary Magistrates, Ryan and Travis were unsatisfactory but neither functioned for long. The other three covered the Territories and dealt with all the important civil and criminal cases for over a decade. They did not produce lengthy written judgments. One group of trials, however, must be noted — the trials for the capital offence of high treason, for the less serious crime of treason felony, for murder, for arson and for theft, all arising out of the Riel Rebellion.

X. THE RIEL REBELLION OF 1885: TRIALS BEFORE RICHARDSON AND ROULEAU

The main events of the rebellion are well-known. The metis on the South Saskatchewan near Batoche persuaded Riel in 1884 to return from Montana to help them with their complaints against the government of Ottawa. Tension increased from month to month. The metis clashed with a band of Mounted Police and volunteers at Duck Lake on 26 March, 1885. In the following weeks Indians of various tribes threatened Battleford.

This was when they burned Rouleau's house and other buildings. Big Bear's Crees massacred nine whites at Frog Lake on 2 April. A few days later the Police abandoned Fort Pitt and the Crees occupied it on 15 April. The main Canadian force under General Middleton marched from Qu'appelle to the Batoche area. His troops fought an inconclusive battle with the metis at Fish Creek on 24 April. Colonel Otter's troops marched from Swift Current to Battleford and moved on to Cutknife to attack Poundmaker's Crees on 2 May. The attack was a failure. A week later came Middleton's decisive victory over the metis at Batoche. Then on 15 May Riel surrendered. Big Bear moved northward from Fort Pitt and after a confrontation at Frenchmen's Butte on 28 May and a final encounter with Major Sam Steele's pursuing force at Loon Lake on 3 June, Big Bear finally surrendered at Fort Carlton on 2 July.[110]

Louis Riel's trial has been called the greatest state trial in Canadian history. On the other hand it has been criticized. Lewis H. Thomas has described it as "judicial murder".[111] This is most unfair to Richardson who presided with a Justice of the Peace and a jury of six. Perhaps Riel's sentence should have been commuted but that was a matter for the executive. While it is hard to recapture the atmosphere of a trial from the printed page, the record shows that Richardson acted with dignity, spoke little and did not demonstrate hostility to Riel, though one can guess that he felt it. Twice he allowed Riel all the time he wanted to make a long speech. The greatest problem Riel's counsel had was with their client who objected to their submission that he was insane — the only possible defence. Richardson's direction to the jury on the defence of insanity was completely in accord with the law of the day. It will be remembered that Riel appealed to the Manitoba Court of Appeal and lost and then applied to the Privy Council for leave to appeal. This was refused.[112]

Many charges were laid against some seventy or eighty Metis and Indians and indeed a few whites in connection with the rebellion. All were tried before Richardson at Regina or Rouleau at Battleford. The trials went on throughout the summer of 1885 and until late October. Some persons thought Rouleau was more lenient than Richardson while others believed he was more harsh.[113] It is hard to generalize but on the whole the trials show an effort by the two Stipendiary Magistrates, and the Crown as well, to be fair. Poundmaker and Big Bear were found guilty of treason felony and sentenced to three years in the penitentiary. Each was released after some seven months at Stony Mountain. A number of Indians were charged with murder for the killings at Frog Lake and two near Battleford. Eight of them were found guilty and were hanged in one "drop" at the Mounted Police barracks at Battleford on 26 November.[114]

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110. See Stanley, *Louis Riel* (1963); Morton, ed., *The Queen* v. *Louis Riel* (1974); Beal and Macleod, *supra* n. 102. The last of these has an excellent bibliography at 367-372.

111. This is the title of an account by Dr. Thomas of the trial of Riel, written in 1975.

112. *Regina* v. *Riel* (No. 1) (1885) 1 Terr. L.R. 20; *Regina* v. *Riel* (No. 2) (1885) 1 Terr. L.R. 23; 10 App. Cas. 275.

113. *Supra* n. 102 at 100, 331.

114. For an account of all the trials, see Beal and Macleod, *id.*, Part 3.

XI. ESTABLISHMENT OF THE SUPREME COURT IN 1887; THE JUDGES' ROLE IN LEGISLATION

In the wake of the Riel rebellion Parliament in 1886 passed three statutes. The North-West Territories Representation Act (c. 24) gave the Territories four members in the House of Commons. Since the British North America Act, 1867 had not provided for representation from the Territories, the Imperial Parliament validated the legislation.[115] The second act, which had been proposed as early as 1878, was the Territories Real Property Act (c. 26). It provided a system of land titles (the Torrens system), similar to the one Manitoba already had. It was much easier to establish in a territory where nearly all the land was still in the hands of the Crown than in a settled community.

The third act (c. 25) amended the North West Territories Act and the amendments were included in the revised statutes of 1886 as c. 50. It was of such significance in Alberta's constitutional development that it was published with other Canadian and some Imperial statutes as late as the 1955 Revised Statutes of Alberta. Section 3 declared the laws of the Territories to be those of England as of 15 July, 1870 "insofar as the same are applicable to the Territories" and insofar as they have not been or might be repealed or changed by legislation of the United Kingdom or Canada or the Territories. Sections 4, 5 and 6 established a Supreme Court of five judges (without a Chief Justice). Those eligible were provincial Superior Court judges, the Stipendiary Magistrates and barristers of ten years standing. The appointment was during good behaviour. Section 14 gave to the court the general powers of a Superior Court of civil and criminal jurisdiction. Judicial districts were to be created (s. 17) and each judge was assigned to one of them, though every judge had jurisdiction throughout the Territories (s. 8). For appeals the court was to sit "in banc" at the "seat of government" which was Regina (s. 15). The Lieutenant-Governor in Council was given jurisdiction over administration of justice in the Territories just as the provinces had under section 92(14) of the B.N.A. Act (s. 27).

This Act came into force on 18 February, 1887.[116] Five judicial districts were created by Dominion Order in Council — Eastern and Western Assiniboia, Southern and Northern Alberta and Saskatchewan.[117] The centenary of this momentous step in the development of legal institutions in the Territories was, so far as the writer knows, scarcely noticed and not observed.

Except for Travis, the Stipendiary Magistrates were all appointed to the new Supreme Court and on 17 September were appointed as members of the Council for its last session.[118] Richardson was the senior judge followed by Macleod and then Rouleau. Before describing the two new judges, Wetmore and McGuire, it is relevant to note that when the Council was replaced by an Assembly in 1888, the statute (s. 2) provided that judges to a

115. B.N.A. Act 1886, 49-50 Vict., c. 35 (U.K.).

116. North West Territories Act Amendment Act, 49 Vict., C. 25.

117. 1887 Statutes CLiii: previously Ordinances of 1878, 1883 and 1884 had created judicial districts — 3 then 4 then 3.

118. O/C, Dept. of Int., No. 9 at 593.

maximum of three could be appointed as legal experts.[119] They were to be appointed by the Governor General and became members of the Assembly. They could take part in debates but not vote. The three former Stipendiary Magistrates were appointed on 23 October 1888.[120] There was opposition to the presence of the judges in the Assembly and in 1891 the position of legal expert was abolished.[121]

Mention has been made of Richardson's role in drafting ordinances. When the new Lieutenant-Governor, Joseph Royal opened the first session of the Assembly on 30 October 1888 he announced that he had appointed Richardson and A.E. Forget, the Secretary to the Lieutenant-Governor, to revise and consolidate the Ordinances. The revision was effective 1 March, 1889. It is in one volume of 526 pages. The longest ordinances were for municipalities, civil justice and schools. Others had to do with government and administration, some with commercial matters, debtor and creditor, and many were related to agriculture — livestock, noxious weeds and prairie fires. There is no doubt that Richardson was the main architect of this revision as he had been of the Ordinances of the previous 10 years. The consolidation shows a creditable performance in the making of laws at a time when the Council's powers were both uncertain and restricted. Many of the Ordinances of course were borrowed, at least in part from legislation of the provinces or of England but many of them were original. Both as to substantive content and drftsmanship they were creditable. The new Assembly had a good foundation on which to build.

The revision came under the scrutiny of the Minister of Justice, John Thompson. He thought some of the provisions in the Municipalities Ordinance might deal with subjects under Parliament's control, and that the Companies Ordinance in dealing with bills and notes of a company might infringe on Parliament's jurisdiction over negotiable instruments; and that the Schools Ordinance did not give to separate schools the safeguards that section 14 of the North West Territories Act (R.S.C. c. 50) required. However he did not recommend the disallowance of any of the Ordinances. The Minister added that "care seems to have been taken in the revision and that the legislation as a whole is remarkably free from any attempt to usurp authority in respect to subjects that are exclusively within the jurisdiction of the Dominion Parliament."[122]

At the first session of the Assembly Richardson drew rules to govern procedure in the Assembly. These seventy two rules were much more elaborate than the old ones of the Council. He made a number of motions. The Assembly sought his opinion on the right of the Assembly to hold a plebiscite on prohibition. He replied that it could do so only if the matter were one of a local nature and prohibition was not in that category.[123]

The first nine years of the Assembly's existence marked the struggle led by Frederick Haultain for responsible government. The successive steps —

119. 51 Vict., c. 19.

120. O/C, Dept. of Int., No. 10 at 499.

121. 54-55 Vict., c. 22, s. 2.

122. O/C 27 Jan., 1890, in Orders in Council on Dominion and Provincial legislation *supra* n. 89 at 1249-51.

123. Journals of Assembly 1888.

Advisory Council, Executive Committee and finally in 1897 an Executive Council providing the traditional type of Cabinet government — are outside this account.[124] However, the judges still had an important role in connection with federal legislation. The Dominion government looked to them for help in amending the Territories' Real Property Act 1886.

When a Senate bill proposed to remove from the judges their power to deal with examination and adjustment of disputed titles to land, Richardson wrote on 29 December 1892 to the Department of the Interior to say that while this change would relieve judges from the most important of their duties under the Real Property Act, "the judges do not object to performing such duties". He proceeded to give cogent reasons: there had never been an appeal from a judge's decision, there had been no conflicting decisions of the judges, the public had become conversant with the system and the change would give to the Registrar the powers of a judge though he had a less important status.[125]

The judges made recommendations when the Real Property Act was replaced by the Land Titles Act in 1894 and later made suggestions as to amendments.[126] An examination of the numerous reported judgments on land titles matters, including the leading case of *Wilkie* v. *Jellett* [127] shows real concern with making the system work. The writer's generalization is that the rulings were sound and fair. When new problems arose there was sometimes uncertainty and differences of opinion, but no persistent disagreement.

The other federal legislation that required close attention from the Territorial judges consisted of a group of statutes enacted in 1869 to specify various crimes and deal with criminal procedure.[128] The North West Territories Act had special provisions for criminal procedure. In 1891 when Parliament was preparing the Criminal Code that was enacted the next year, the Territorial judges thought that the federal government planned to repeal the special provisions for a jury of six and the power in the judge to select the jury in a peremptory way. Mr. Justice Wetmore drew up a memorandum which Richardson adopted. On 8 June 1891 he sent to the Deputy Minister of Justice a letter saying:

(1) the number of jurors should be kept at six because there were few eligible people at some judicial centres and no accommodation for more.

(2) Section 71 of the North West Territories Act which permitted the judge to summon the jurors should be kept because

(a) it produced a better class of juror and

(b) it expedited the trial and saved expense and time and

(c) the system had worked.

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124. *Supra* n. 36 c. 7-9, gives a good account of these developments.

125. *Supra* n. 46, III 18.

126. *Id.*, II and III 18 contain bulky material on the Real Property Act and the Land Titles Act. Richardson and McGuire had the main carriage of this work.

127. (1895) 2 Terr. L.R. 133, affg. [1896] S.C.R. 282.

128. 32-33 Vict., c. 18-24, 27, 29, 30: these were made applicable to the Territories by 38 Vict., c. 49 Schedule B.

(3) The requirement that a Justice of the Peace must sit with the judge in jury trials should be abolished. The Justices did nothing relating to admission of evidence or charging the jury, and in imposing punishment were likely to do more harm than good.

(4) The number of challenges to a juror (which was smaller than that provided in the Criminal Procedure Act) should be retained.[129]

The recommendations must have had effect because amendments made in September 1891 did away with the need of a Justice of the Peace in jury trials and left the other provisions as they were.[130]

To complete the description of the role of the judges in connection with the content of legislation, it is necessary to note the 1898 Consolidated Ordinances. In February, 1897 the Lieutenant-Governor in Council commissioned Richardson and Mr. Justice Wetmore and C.C. McCaul, the great advocate, to prepare another consolidation of the Ordinances. The resulting consolidation of 1898, twice as large as that of 1888, was a most creditable piece of work. The Ordinances were organized by subject matter — those on government, on administration of justice, relating to real property, mercantile law, special relationships, professions and trades, companies, municipalities, schools and irrigation districts, then agriculture, stock and game, protection of persons and property, intoxicants and miscellaneous. A schedule traces the history of each ordinance from the time it was passed up to the consolidation. Another schedule lists the Ordinances repealed by the consolidation and a third schedule lists those that were left unrepealed but not included in the consolidation. These were nearly all in the nature of private bills including a number creating municipalities. The consolidation ends with a detailed index. The whole format is most useful to the user of the consolidation.

Bearing in mind the role of the judges as members of the Council, and for three years as members of the Assembly, and as draftsmen of the Consolidated Ordinances of 1888 and 1898, one can properly say that the good achievement in the enactment of ordinances from 1877 onwards, owes much to the Stipendiary Magistrates and Supreme Court judges, and in particular to Hugh Richardson.

XII. THE MEMBERS OF THE SUPREME COURT

To return to the original members of the Supreme Court: in addition to the three who had been Stipendiary Magistrates there were two new judges — Edward L. Wetmore and Thomas H. McGuire. The former was born at Fredericton, New Brunswick in 1841. In 1856 he went to King's College (now the University of New Brunswick) on a scholarship of £15 a year. He graduated in 1859 and honours were conferred on him for the handsome manner in which he had acquitted himself at his degree examination. At that time it was possible for a person to be come an attorney (solicitor) without becoming as well a barrister-at-law. Wetmore was admitted as an attorney in June, 1863 and as a barrister a year later. He practiced with a Fredericton firm and became a Queen's Counsel in 1881. He was Major of

129. *Supra* n. 46, III 8.

130. 54-55 Vict., c. 22, s. 67.

Fredericton for 2 years and a Commissioner for consolidating the New Brunswick statutes and an MLA from 1883 to 1886.

Stern yet fair, a stickler for form, he was in Mr. Justice Robson's words "in all aspects a satisfactory man".[131] The great counsel, C.C. McCaul in speaking of the first members of the court said "it is perhaps not an odious comparison to state that Judge Wetmore was quite the strongest member of the court".[132]

A particular contribution of Wetmore, beyond his judgments on substantive law, was a huge number of rulings in matters of civil procedure. The Judicature Ordinance[133] included Rules of Court based on those of England and in some cases of Ontario and Manitoba. In Volume III of the Territories Law Reports, pages 132-477 are almost exclusively practice rulings of Wetmore — by my count seventy eight of them. One cannot over-estimate the value of these rulings in helping to shape the practice. Wetmore complained in one case: "I must again express my regret that in forming my judgment with respect to the questions of law involved in this case I have had to rely largely on textbooks and digests. Now I have not even the benefit of a library at Regina. I do not suppose that there is a Superior Court in the Dominion of Canada so awkwardly placed in this respect as the Supreme Court of the Territories."[134]

In one case the defendant applied to set aside a statement of claim because it did not contain the material that the rules called for. Wetmore said:[135]

> As a rule I am not disposed to encourage applications on mere technical grounds when no injustice has been done, and when the party complaining has not been in any way misled, and when the application would appear to be made either for delay or for the purpose of obtaining costs. And I would I think be disposed when some trifling inadvertence was taken advantage of to support such application while I granted the application to refuse costs. But I think in this case the proceeding is such a very casual way of following the practice, that is either shews gross ignorance or gross carelessness on the part of the practitioner and ought to be marked. I will therefore allow the defendant his costs . . .

Thomas H. McGuire was appointed two months after Wetmore. Born in Kingston, he entered Queen's University in 1866. During the next four years he won four scholarships and won prizes in classics, rhetoric, mathematics, logic, botany and zoology, natural philosophy, metaphysics and chemistry. On graduation in 1870 he led all the graduates in Bachelor of Arts.[136]

He qualified as a barrister in Ontario and practiced in Kingston. Mr. Justice Robson has suggested it could only have been the spirit of adventure that led him to come west.[137] Robson added that McGuire "was a fine-looking man, tall and of a pleasant face, with a fine beard". He was "a proficient writer and a man of general legal experience."

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131. Robson, "Edward Ludlow Wetmore" (1944) 22 *Can. Bar Rev.* 442 at 446.

132. McCaul, "Precursors of the Bench and Bar" (1925) 3 *Can. Bar Rev.* 25 at 39.

133. R.O. 1888 c. 58.

134. *Allen* v. *Pierce* (1895) 3 Terr. L.R. 319 at 329: the library had been destroyed in a fire on 1 April 1895 — see Richardson Papers, *supra* n. 46, III 11.

135. *Clarke* v. *Brownlie* (1893) 3 Terr. L.R. 194 at 196.

136. Queen's College Calendars 1866-1870, made available through the kindness of Rose Mary Gibson, Assistant Archivist, Queen's University, 21 July 1976.

137. Robson, "Hon. Thomas Horace McGuire" (1945) 23 *Can. Bar Rev.* 139.

A reading of his judgments shows an excellent style and happy turn of phrase, including some Latin. He was particularly interested in doing what he could to keep the Justices of the Peace in line and to see that they did not go astray. Robson says, and the records show, that he wrote numerous judgments on review or *certiorari*. Indeed he wrote a hand book of seventy nine pages for Justices of the Peace. This useful little manual explained their role in connection with summary convictions and indictable offences.

His correspondence with Richardson shows a close relationship between them. They worked much together in connection with the Real Property Act and its successor the Land Titles Act and in making recommendations for amendments. He addressed Richardson as "My Dear Chief" though Richardson was not Chief Justice. In one letter from Prince Albert he said "It is swelteringly hot and has been about 100 degrees in the shade for a couple of days past and the sigh of the bard comes to me 'oh for a lodge in some vast wilderness! Some boundless contiguity of shade:'.[138]

In one case a man named Sparrow gave the defendant a bill of sale of a stack of oats. The plaintiff was a judgment creditor of Sparrow and made a seizure of the oats. He argued that the bill of sale was deficient because the Bills of Sale Ordinance required the defendant to take an affidavit that the bill was not executed for the purpose of protecting the goods against *any* creditors of the vendor.[139] The defendant's affidavit used the phrase "the creditors" instead of "any creditors". The plaintiff argued that "the creditors" could mean "some creditors" and was not the same as "any creditors". Mr. Justice McGuire reviewed cases holding that slight variations do not vitiate the affidavit. The he said:[140]

> The learned Counsel endeavored to show by syllogistic illustrations that the use of the words "the creditors" entirely changed the meaning of the affidavit, overlooking the fact that in cases of universal negatives the logicians say that both subject and predicate are distributed. I do not know that Mr. Bannerman is a logician, or if so, to what school he belongs; whether to an ancient or a modern school; whether he is to be classed as an Aristotelian, an Epicurean, or a Heraclitic-Protagorean; whether his mind is of the Rhetorico Sophistical, or Spenozistic-Metaphysical, or simply Transcendental-Aesthetic order; or is he, like many in these Territories, a lover of Bacon? The evidence does not enlighten us on any of these points nor do I think the omission material. The power of being able to "divide a hair 'twixt South and South-West side," may be interesting to sophistical rhetoricians who have leisure and taste for such subtleties. I do not think we should avoid a bill of sale by reason of the possibilities suggested here.

Mr. Justice Wetmore did not agree that the two phrases were the same but agreed in the result. Richardson, Macleod and Rouleau all concurred with McGuire.

As for the organization of the court, each judge sat as a trial judge in the district to which he was assigned, though he had jurisdiction throughout the Territories. The court *en banc* sat twice a year at Regina and in the later years sometimes in Calgary. In the beginning a judge could sit on an appeal from his own judgment but after 1894 the trial judge could not do so unless needed for a quorum.[141]

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138. *Supra* n. 46, II(1).

139. R.O. 1888, c. 4, s. 5.

140. *Emerson* v. *Bannerman* (1890) 1 Terr. L.R. 224 at 230. For another example of McGuire's invocation of the rules of logic see *Lamont* v. *CPR* (1900) 5 Terr. L.R. 60 at 63.

141. 57-58 Vict., c. 17, s. 4.

The practice and procedure on appeals seemed to be much like it is today. Appeal books were printed and so were the factums. As the Senior Judge, Richardson was president of the Court. The transcript of evidence was probably taken down in long hand by the judge or a clerk. The questions were often omitted but the answers seem to be complete.

As for the administration of the Court, this was in Richardson's hands. There were continuous problems over Court House space in every judicial centre and also over the inadequacy of lock-ups. Libraries were inadequate, particularly after the Court House fire at Regina in the spring of 1895. There was even a problem at this time over the supplying of judge's books and the payment for them.

It is fortunate that many important judgments have been preserved in the seven volumes of the Territories Law Reports. The original editor was N.D. Beck of Edmonton. Various memoranda at the beginning of Volume 1 are most useful to the historian. Beck was the editor for the first six volumes, aided by T.D. Brown of Regina in Volume 3 and by Brown and O.M. Biggar of Edmonton in Volume 6. By Volume 7 T.D. Brown had succeeded Beck.

The seven volumes cover the twenty years of the court's existence. They give an impression of high competence, a diligent concern over correctness in interpretation of statutes and application of the common law, fairness and good exposition in the written judgments. Those of Wetmore and McGuire are particularly striking. Each was independent but neither was a chronic dissenter. Rouleau and Richardson frequently wrote judgments on points of law but Macleod did not. His virtues were those of a trial judge.

One writer attempts to make an incompetent out of Rouleau by attributing to him this tired old yarn: after finding an accused to be guilty of theft and sentencing him to six months in jail Rouleau added (according to the story) "if I *really* thought you were guilty I would have given you six years".[142] The fact is that in criminal cases Rouleau was in the mould of N.D. Beck and Emmett Hall. He was especially solicitous of accused persons and more likely than his brethren to acquit. On a charge of theft of cattle he directed the jury to acquit. The jury ignored him and he was dissatisfied with the guilty verdict. However the full court upheld the conviction.[143] In two other cases of cattle theft he dissented from his brethren all of whom upheld the conviction.[144]

Then there were offences against the liquor laws. The North West Territories Act 1886, had strict provisions to prohibit liquor traffic though there was provision for a permit to import to be issued by the Lieutenant-

142. MacDonald, *Court Jesters*, (1985) at 120. The same author on the same page has Rouleau as a trial judge engaging in repartee with an unnamed Judge of the "Court of Appeal". There was no Court of Appeal. All Judges took trials and sat on appeals. There is nothing in the Territories Law Reports to support any suggestion of animosity between Rouleau and his brethren.

143. *Reg.* v. *Brewster* (No. 2) (1896) 2 Terr. L.R. 377.

144. *The Queen* v. *Collyns* (1898) 3 Terr. L.R. 82; *The Queen* v. *Forsythe* (1900) 4 Terr. L.R. 398; see also Macleod *supra* n. 29 at 67. Rouleau's charity toward accused persons appears also in *Re Nettleship* (1899) 4 Terr. L.R. 148. See *R.* v. *Mellon* (1900) 5 Terr. L. R. 301 for his insistence on the need to prove mens rea.

Governor.[145] Professor Macleod has described the serious liquor problem after settlers began to arrive. Many resented the strict enforcement that had rid the Territories of the whiskey trade. In Prince Albert as well as Calgary strife arose between the police and an element of the public. Macleod says that two decisions of Rouleau J. rendered difficult the enforcement of the liquor provisions. He held that police could not search a saloon without a warrant and in 1889 that once liquor was imported under a permit legal possession was not restricted to the permittee. Macleod adds that the decisions "were reversed before long".[146]

Under the Liquor Licence Ordinance of 1891-92 it was an offence for a hotel-keeper to sell liquor after hours. In two cases he acquitted the accused because the Crown did not show that the accused had a licence under the Ordinance.[147]

On a subject far removed from criminal law, Rouleau again anticipated the spirit of Mr. Justice Beck. Each was more interested in doing justice in the case before him than in strict adherence to precedent. In *Pacific Investments* v. *Swan*,[148] the plaintiff knew that certain receivers were to collect monies and pay them out to the defendant. Fearing that the defendant would obtain the monies and that they would be out of the plaintiff's reach should he obtain judgment, Rouleau granted an injunction against the payment to the defendant or the receipt by him of the monies. Mr. Justice Scott set the injunction aside. On the plaintiff's appeal, all three judges were agreed that the plaintiff's material was inadequate to justify an injunction. However, Rouleau differed from Wetmore and Richardson on the question of the Court's jurisdiction to grant an injunction. Wetmore said it could not be granted. The law was clear in England that no such injunction was possible. Rouleau was not concerned about the position in England. "The conditions in the North-West Territories are entirely different." In the Territories a debt could be attached or garnisheed before judgment. These procedures were not available here because the monies to be paid to the defendant were not a debt. He held however that the Court with its capacity to enforce the rules of equity had jurisdiction to grant an interim injunction.

> I am not concerned to seek whether or not any reported case can be found in which the Court of Chancery has interfered in the manner in which this Court may interfere here in a case and under circumstances similar to the present. It may be that there is none, but it is of little consequence that it should be so. It may be indeed that to the respondent is due the unenviable reputation of having been the first to design and contrive the peculiar phase of fraud which he rests upon as his defence to the plaintiff's claim; *crescit dolus*, but as fraud increases and extends its ramifications the remedial power of the Court of Chancery to prevent its consequence and to give ample and effectual redress extends also. It matters not how gigantic are its proportions or how new and uncommon the shape which it assumes, the remedial power of the Court rises and becomes equal to the occasion.

145. R.S.C. 1886, c. 50, ss. 92-100.

146. Macleod *supra* n. 29 at 139; also Commr. Herchmer's 1888 Report at 11 and 1889 Report at 22, both in The New West (1973). One of Rouleau's decisions is *Reg.* v. *Whitebeck* (1888) 24 *Can. Law J.* 478.

147. *The Queen* v. *Henderson* (1899) 4 Terr. L.R. 146; *The Queen* v. *Davidson* (1900) 4 Terr. L.R. 425.

148. (1898) 3 Terr. L.R. 125.

This passage shows that Rouleau was of the same mind as Lord Denning who said "Equity is not past the age of child-bearing".[149] Indeed Rouleau's position is analogous to that of Lord Denning when he was instrumental in establishing the Mareva[150] injunction. He was prepared to grant before judgment an injunction that would freeze assets within the jurisdiction in a proper case. "The Mareva injunction is the product of judicial creativity".[151] In Canada the typical Judicature Act has the same provision as the English one that was the basis for the Mareva injunction and Mareva is now widely accepted in Canada.[152]

In connection with Rouleau's interests outside his judicial work, he was a convivial person and enjoyed a poker game.[153] He was also something of a speculator.[154] At one stage, probably when he was stationed at Battleford, he bought three-quarters of a section of land south of the Battle River and one-quarter to the north. He hoped the railway would pass nearby but when built it ran on the far side of the Saskatchewan River.

In July 1890, after Rouleau had moved to Calgary, he sent to one Gauvreau a quantity of half-breed scrip that was good for 240 acres. He explained that he had formed a club to buy the scrip. Gauvreau selected land west of Edmonton. It is now well within the city limits, in Jasper Place.[155]

Six years later Rouleau began to acquire land on either side of the Saskatchewan River about 30 miles west of Calmar and 10 or 12 miles southeast of Tomahawk.[156] His purpose was to wash the gravel for gold and the property was called "Judge Rouleau's Mine". He purchased equipment for dredging but as far as one can tell no gold was ever produced. After Rouleau's death in 1901 the estate had difficulty in disposing of the machinery and it is not clear whether anything was realized from it. Rouleau's only assets were $10,000 in life insurance and the lands just described and a good library. All the assets apart from the insurance were valued at $2,000 while debts were $16,000. It took many years to settle the estate.

To sum up on the first five judges of the Supreme Court, Wetmore was the most outstanding. McGuire too was a strong judge. Richardson did not write so many judgments. He has been described as "dry" and "a bit ponderous" but was still a good judge. Of Macleod, C.C. McCaul said he

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149. *Eves* v. *Eves* [1975] 3 All E.R. 768 at 771.

150. *Mareva Compania* v. *International Bulk Carriers* [1980] 1 All E.R. 213.

151. 2 Current Law Statutes Annotated 1981, annotation to Supreme Court Act 1981, c. 37.

152. The Alberta provision is s. 13(2) of the Judicature Act. Its counterpart in Rouleau's time was s. 10(8) of the Judicature Ordinance, R.O. 1898, c. 21. Rouleau did not mention this provision. For a recent note see Erickson, The Mareva Injunction Comes to Alberta (1987) 25 Alberta L.R. 305.

153. McLaren *supra* n. 48 at 262.

154. The following account is based on the Short Ross Selwood Papers, B.F. S. 559 in the Glenbow Archives.

155. Of this parcel, 160 acres form a square between 92nd and 96th avenues from south to north and from 156th street on the east to 163rd street on the west. The remaining 80 acres are between 92nd and 94th avenues and between 163rd and 170th streets.

156. The property was in a number of small parcels in sections 9, 10, 16 and 35 in Twp. 50, R4, W5 and one parcel in section 2 of Twp. 51.

"did not profess to be a very well-read lawyer. In fact the nicer distinctions and subtleties of the law did not appeal to his type of mind at all. He possessed, however, a solid sense of justice and a fund of common sense; and above all, he was a gentleman and very human, the best of all qualities in a judge. His administration of criminal law was eminently satisfactory."

As to Rouleau, McCaul says he was of a different type. He had a good deal of Colonel Macleod's bonhomie and common sense, and they were very good friends, but Judge Rouleau was, above all things, a lawyer. McCaul speaks most highly of his mastery of English common law and equity and his faculty for working out the principles at issue in the case before him.[157]

Then Chief Justice Harvey said this of these five judges:[158]

> Speaking with a personal knowledge of its first members, with all but one of whom [Macleod] I was brought frequently in contact and with one of whom [Wetmore] I was subsequently a colleague, I feel no hesitation in stating that . . . there was no inferiority to the personnel of the Supreme Courts of the provinces. This is also apparent from a perusal of its reported decisions.

The opinions of Chief Justice Harvey and C.C. McCaul should suffice, one hopes, to bury for good such a calumny as this: "Two of the five judges of the Supreme Court weren't lawyers. It was difficult to find anyone who had even a smattering of legal training".[159]

The seven volumes of the Territories Law Reports show a substantial body of judgments by the original five members and D.L. Scott. They testify to a grasp of legal issues, good research (especially in the absence of adequate libraries), a sense of responsibility, and as far as one can discern from the judgments, an absence of cliques or or animosities.

XIII. DEATH OF MACLEOD AND APPOINTMENT OF SCOTT

The first of the original judges to die was Colonel Macleod in 1894. One sign of the esteem in which he was held came almost a decade before he died. Early in 1885, when he was stationed at Macleod as Stipendiary Magistrate, some eighty five Calgarians sent a petition to Ottawa to ask that Macleod be assigned to Calgary because that place had no resident Stipendiary Magistrate and arrested persons were kept in jail too long. (This was shortly before the ill-fated appointment of Travis.) The residents of Macleod in an undated counter-petition replied that their interests were at least as important as Calgary's; that Macleod was personally known to almost all the residents of Fort Macleod "and that as a judge his impartiality has won our admiration and as a citizen and a neighbour he has endeared himself to all".[160]

Macleod was not moved to Calgary until shortly before his death in 1894. An Order in Council of May 21 recited that Rouleau was overworked while there was comparatively little business at Macleod and the two judges agreed that both should reside at Calgary and both be assigned to North

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157. *Supra* n. 132 at 38, 39.

158. Harvey, "The Early Administration of Justice in the North West" (1934) 1 *Alta. L.Q.* 1 at 15.

159. *Supra* n. 142 at 122. Each of the five had been members of a provincial bar.

160. Glenbow Archives, *supra* n. 58, M776, No. 7; MacLaren, *supra* n. 48 at 263 puts this event at 1893.

and South Alberta. (Macleod was the judicial centre for South Alberta and Calgary for North.) Macleod's health was bad by this time but he continued his judicial duties until just before his death at Calgary on 5 September.[161] Condolences poured in from all over Canada.[162] An account of his work in the west, written much later by another original member of the North West Mounted Police, Sir Cecil Denny gives a good description of Macleod.[163]

> His tact and knowledge of human nature, coupled with great forbearance and patience, enabled the North-West Mounted Police to establish law and order in a hitherto wild and lawless territory. By his skilful handling of the savage and warlike Indian tribes, he gained their complete confidence. The main secret of his success was that when he made a promise it was scrupulously kept, as the Indians learned. While commanding the force later as Commissioner, he also carried out the duties of stipendiary magistrate. His dealing with the turbulent element was based on stern justice, and although he handed out many severe sentences, he retained the respect and confidence of all classes of the white population, including the criminals themselves.
>
> Upon leaving the force, he was appointed judge of the Supreme Court of the Territories, a position he occupied until his death, and in that responsible office no higher praise can be given than that he was an upright and just judge. He died a poor man. Although he had many opportunities to acquire wealth, he took advantage of none.

Macleod was replaced by David Lynch Scott. Born at Brampton in 1845 he was admitted to the bar of Ontario in 1870. He practiced in Orangeville and was mayor of that town. Moving to Regina in 1882 he was the first mayor. He had been active in the militia during the Fenian threat of 1866 and during the Riel rebellion at Regina organized a volunteer corps. He was the only local advocate among the four who prosecuted Louis Riel for treason felony in 1885. He also appeared in the trials that followed — of Poundmaker, Big Bear, the Indians responsible for the Frog Lake massacre and a number of others. Subsequently he often represented the Crown, and from 1 July, 1887 he was legal adviser to the Lieutenant-Governor.[164]

When appointed to the court he was assigned to Calgary. His judgments though not long were well written and careful. Just after his appointment he was asked by R.B. Gordon, clerk of the Assembly, for his views on the qualification of Justices of the Peace. His reply of 10 January 1895 said:[165]

> I doubt the advisability of an examination. It is not done elsewhere, though this is no argument against it. The appointment is one of honour and the matter should be looked at as a case of the position seeking the man and not the man seeking the position. If an examination were prescribed it would be only those who sought the position that would present themselves and though perhaps well versed in the duties do not always make the most desirable justices, some of them desiring it for the purpose of making an income out of the fees and for that purpose are inclined to encourage the bringing of cases before them.
>
> I am afraid that if an examination were required, those who would make the most satisfactory justices would not present themselves — that is men of good standing and reasonable education who do not covet the position but who have been appointed even without any knowledge of the duty, would soon acquire it and having no ends to serve would perform the duties in an impartial manner. Given a reasonable education I think the standing and worth of the appointee is of far more importance than the knowledge he may possess of the duties at the time of the appointment.

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161. *Id.* at 266, 267.

162. *Supra* n. 58, M776 No. 10.

163. Denny, *supra* n. 29 at 286.

164. O/C, Dept. of Int., No. 11 at 629.

165. Saskatchewan Archives, Regina NWT M41.

This letter not only throws light on Scott but deals with a very important institution in the establishment of law in the Territories — that of Justices of the Peace. Problems of selection (with patronage sometimes a factor) and paying the costs of the system, supplying the justices with statutes and other necessary information were all formidable but the system worked.[166]

XIV. THE LATER APPOINTEES TO THE SUPREME COURT

This account will conclude with a short description of the appointments made after that of Scott in 1894. In 1900 Parliament provided for a Chief Justice and four puisne judges.[167] One might have thought the appointment of Chief Justice would go to Richardson, but it went to McGuire in February 1902. He resigned after a year and A.L. Sifton, a Calgary lawyer and brother of Sir Clifford, was appointed in his stead in January 1903. The reaction to this appointment is described in the Canadian Annual Review.[168]

> The appointment was variously received. The Manitoba *Free Press* described Mr. Sifton as "one of the most competent members of the Territorial bar" and declared that the fact of his being a brother of the Hon. Clifford Sifton should not be a barrier to his advancement. Some regret was expressed, as the Regina *Leader* put it, that Mr. Justice Richardson had been again passed over, but as a whole the appointment was approved by the Liberal press. It was, however, strongly disapproved by the Conservative papers. The Regina *West*, for instance, called it nepotism, the sacrifice of judicial honour, treachery toward Judge Richardson and the turning of the Judiciary into a part of the political machinery.

Richardson retired in November 1903. Rouleau had died in 1901 and was succeeded by J.E.P. Prendergast in 1902. W.H. Newlands replaced Richardson in 1904 and in the same year Horace Harvey was appointed a fifth puisne judge.[169] Two additional appointments were made in 1906 — C.A. Stuart and T.C. Johnstone.[170] Thus the Court in the last few months of its existence had a Chief Justice and seven puisne judges.

Before leaving the Territorial judges, it is relevant to note their salaries. The Stipendiary Magistrates had received $3,000 a year.[171] The Supreme Court Judges originally received $4,000 each.[172] In 1901 a salary of $5,000 was provided for the Chief Justice and $4,000 for the other four.[173] In 1905 the Chief Justice was given $7,000 and the seven puisne judges, $6,000 each.[174]

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166. Unpublished thesis of Thomas M. Reynolds, "Justices of the Peace in the North West Territories, 1870-1905" (University of Regina, 1978) in Sask. Archives Regina R-E 1742. This is a very useful study.
167. 63-64 Vict. C. 44.
168. Canadian Annual Review, 1903 at 195.
169. Authorized by 3 Edw. 7, c. 27, s. 2.
170. Authorized by 4-5 Edw. 7 C. 31, s. 4.
171. O/C 22 July, 1876 appointing Richardson, in O/C, Dept. of Int. No. 2 at 487.
172. 49 Vict., c. 25, s. 10.
173. 1 Edw. 7, c. 39.
174. 4-5 Edw. 7, c. 31, s. 4.

XV. THE NEW PROVINCIAL SUPREME COURTS: THE LAWYERS: CONCLUSION

The provincial Supreme Courts replaced the Territorial Court on 16 September 1907. Those who went to the Supreme Court of Alberta were Chief Justice Sifton with Scott, Harvey, Stuart and N.D. Beck, a new appointee. For Saskatchewan, Wetmore was made Chief Justice with Prendergast, Newlands, Johnstone and a new judge J.H. Lamont.

By way of an aside, it is relevant to mention the lawyers of the Territories. McCaul has given a good account of the migration westward of lawyers to Winnipeg and on to the main towns in the Territories.[175] Many lawyers came in the 80's and 90's and distinguished themselves. It is beyond the scope of this article to set out even a list of them, but one can safely say that even before any legislation was passed to regulate the profession, able and responsible lawyers, many from Ontario, had come to the main centres of the Territories. The first Legal Profession Ordinance was made in 1885 (No. 18) just after the Riel Rebellion. It did not provide for a Law Society but did set out qualifications for admission. The judges had the responsibility of seeing that each applicant had the qualifications for admission to practice, and also had power to discipline an advocate for non-payment of monies received by him as advocate. The Lieutenant-Governor kept the roll of advocates. The Law Society of the Territories was established in 1898 (Ord. No. 21). It provided for Benchers to govern the society. They had control over admission to practise though the main power to discipline members remained in the judges. The Territorial Society like the Territorial Court survived the creation of the provinces by two years and then it was replaced by the two provincial societies.[176]

The writer offers the opinion that the Territories bequeathed to each of the two new provinces an efficient and well-organized court with able judges and a sound body of jurisprudence. Indeed the new provincial Supreme Courts were in large measure a continuation of the Territorial Court in personnel and structure.

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175. *Supra* n. 132 at 34, 37, 38.

176. Legal Profession Act (Alta.) 1907, c. 20: Legal Profession Act (Sask.) 1907, c. 19. A good study of the Territorial and Alberta Law Societies is an unpublished thesis of Peter M. Sibenik in 1984 in the Dept. of History, University of Calgary, entitled *The Doorkeepers: The Governance of Territorial and Alberta Lawyers 1885-1928*.