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PARALLEL STATUTES: ANOTHER LOOK AT THE ORIGINS OF AUSTRALIA'S NOT-FOR-PROFIT ASSOCIATIONS LEGISLATION

ABSTRACT

In the middle third of the 19th century Upper Canada (now Ontario) followed by South Australia passed statutes for the legal recognition of religious bodies. The latter statute has already been the subject of a brief history. This article considers the background to the enactment of Upper Canada's statute and whether South Australia's might have been a copy of it. The article concludes not only that there is no evidence of copying, but that the background to the enactment of the two statutes was very different. In particular, Upper Canada was concerned with confirming its identity and self-image as an island of Britishness—with all that that implied in the first third of the 19th century—in an American sea, while South Australia was promoting its self-image as a 'Paradise of Dissent'. The two statutes, while somewhat similar on the surface, were thus motivated by rather different considerations.

I INTRODUCTION

When I wrote about the history of Australia's legislation for the incorporation of not-for-profit associations,[1] I was only dimly aware of a possible Canadian precedent for the statute that was the origin of such legislation in Australia—South Australia's *Associations Incorporation Act 1858*. Accordingly I dismissed the idea that the South Australian legislation of 1858 could have been inspired by some external source. I have now discovered that

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1 Greg Taylor, 'The Origins of Associations Incorporation Legislation—The *Associations Incorporation Act 1858* of South Australia' (2003) 22 *University of Queensland Law Journal* 224.

the Province of Ontario—to use the modern name for what was at the time Upper Canada[2]—has had several pieces of comparable legislation going back to 1828.

Could the South Australian legislation have been merely a copy of Upper Canada's? In this article I examine this question and come to the conclusion that, while I cannot positively disprove the existence of such a link, it is rather improbable. Therefore it is still very likely that my earlier conclusion holds and that the South Australian legislation was independently conceived. Nevertheless, the story of the legislation for the incorporation of not-for-profit associations in Upper Canada is worth telling, not only for its inherent interest, but also because it forms an interesting contrast with the South Australian legislation.

Some of the very differences between South Australia's and Upper Canada's legislation that appear to establish their independent origins also shed light upon the boldness of the South Australian innovation of 1858 when compared with the timidity and limited nature of Upper Canada's statute. This difference arose because the nature of politics and society in the two British colonies was quite different in respects that were crucial in this field. This article is therefore also an essay on the comparative legal history of two different parts of the second British Empire.

II Plagiarism?

By the time South Australia came to enact its legislation for the incorporation of not-for-profit associations in 1858, Canada's statute book already contained a suite of comparable legislation. As was usual at that time, none of the legislation had short titles. The earliest piece of legislation, and the one that will be of most interest in this article, was *An act for the relief of the religious societies therein mentioned* of 25 March 1828,[3] which I shall hereafter refer to, adapting the name of its modern descendant,[4] as the *Religious Organisations' Lands Act 1828*. That statute permitted certain named denominations of Christians—Presbyterians, Lutherans, Calvinists, Methodists, Congregationalists, Independents, Anabaptists, Quakers, Mennonites, Tunkers[5] and Moravians—to hold land for the purpose of a church, meeting house, chapel or burial ground. In 1846 and 1850 two short statutes—containing respectively two and one sections—were enacted, permitting lands held for a school (under the 1846 Act) and a burial ground (under the 1850 Act) to be held by trustees with perpetual succession. I shall refer to these two statutes as the *School*

2 From 1791, when it was created, to 1841 Ontario was called Upper Canada. From 1841 to 1867 it was united with Quebec in a single polity, the Province of Canada; the former Upper Canada was in this period referred to officially as Canada West, but the old name persisted informally and will be used in this article.

3 1828 (Upper Canada) 9 Geo 4, c 2.

4 *Religious Organizations' Lands Act*, RSO 1990, c R23. Another modern Ontario statute on a similar topic is the *Corporations Act*, RSO 1990, c C38, pt 3.

5 Now known as the Brethren in Christ. Their own account of their history may be read online: <http://www.bic-church.org/about/history.asp>.

Trust Conveyances Act 1846[6] and the *Cemeteries Act 1850*.[7] Finally, in 1851 a more elaborate 10–section Act entitled *An Act to provide for the incorporation and better Management of Library Associations and Mechanics' Institutes*[8] was passed—I shall call this the *Libraries and Mechanics Institutes Act 1851*.[9]

In summary, by 1858 Canada had statutes permitting the holding of land by a corporation created for that purpose if the land was used for Christian places of worship or as burial grounds, schools, libraries or mechanics' institutes. Section 11 of South Australia's *Associations Incorporation Act 1858* contained a similar but rather broader list of institutions entitled to have access to the same facility: 'churches, chapels and all religious bodies; schools, hospitals and all benevolent and charitable institutions; mechanics' institutes, and associations formed for the purpose of promoting and encouraging literature, science and art'. Did South Australia obtain from Canada the idea of a statutory facility enabling not-for-profit institutions to hold land conveniently, or did the idea arise independently in the two colonies?

Broad, general similarity does not of course establish copying, as I have written elsewhere;[10] it might just be coincidence. Given that, at the broad general level, the societies of South Australia and Upper Canada shared some degree of similarity in the mid-19th century (as they do today) and the legal needs of not-for-profit associations were not wildly divergent, coincidental similarity is not to be ruled out. For a number of reasons, it is in fact more likely than copying.

First, a closer inspection of the types of association that were eligible for incorporation in the two colonies shows significant divergence that suggests independent conceptions. It is noticeable that South Australia's approach is broader than Upper Canada's. South Australia rejected the piecemeal, four-statute technique of the Upper Canadian legislature in favour of one broad general statute applying to all sorts of not-for-profit institutions, and South Australia's list, even when all the Canadian statutes are combined, is broader and more liberal. South Australia's statute includes more bodies, such as hospitals and associations for the promotion of literature and art. Upper Canada, on the other hand, started off, for reasons that will become clear, with a statute not only restricted to religious bodies but also

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6 Now enacted as the *School Trust Conveyances Act*, RSO 1990, c S3.

7 Modern Ontario statutes with this name do not seem to contain precisely equivalent provisions; however, see *Religious Organizations' Lands Act*, RSO 1990, c R23, s 2(c).

8 1851 (Province of Canada) 14 & 15 Vict, c 86.

9 A mechanics' institute was an early form of workers' educational establishment. 'Mechanic' is used here in the broad sense of manual worker. The functioning of mechanics' institutes in 19th century Canada is considered in Lorne Bruce, *Free Books for All: The Public Library Movement in Ontario, 1850–1930* (1994) 18–28, 52; see also Gaye Wells, *Mechanics' Institutes in Ontario 1831–1895* (unpublished, Archives of Ontario, 1974).

10 Greg Taylor, 'Is the Torrens System German?' (2008) 29 *Journal of Legal History* 253, 254.

containing a list of favoured Christian denominations (set out above) which alone were entitled to take advantage of the legislation.[11] The statute's favours were extended to all Christian denominations in 1845[12] after it was inevitably discovered that some perfectly inoffensive denominations had been left out, and one of them—the Bible Christians, an offshoot of the Methodists—petitioned the legislature for inclusion.[13] Restriction to the Christian religion was retained, however, until as late as 1890, when the Jewish religion was admitted into the charmed circle, and then no further religions were admitted until 1979.[14] South Australia, on the other hand, has never known of a restriction to—let alone within—the Christian religion. (This difference will later be shown to reveal much about the very different motives behind the two jurisdictions' apparently similar enactments.)

At the detailed level of drafting and machinery provisions, the South Australian and Upper Canadian enactments are also noticeably divergent. There are no similarities of wording whatsoever which would suggest that the later South Australian statute was enacted with knowledge of the earlier Canadian statutes. Likewise, the arrangement of the provisions does not suggest such a conclusion, with their detail also divergent on a number of points which are in themselves of no particular significance and might well have been uniform had the statutes been related. For example, South Australia's Act provided in s 1 for registration to occur as a result of an official act by the Master of the Supreme Court (at that time the Registrar of Companies) and the deposit of a certificate with the Registry Office. In Upper Canada the Registrar of Deeds' function was rather that of registering a fait accompli effected by the conclusion of a trust deed without official involvement.[15]

The Canadian *Libraries and Mechanics Institutes Act 1851* s 4 regulated the election and titles of officers of corporations, and contained a long provision (s 6) on the power to impose fines and how they and subscriptions were to be recovered—there

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11 This did not however prevent special statutes being passed for other denominations as the need arose. The only example I have been able to find of this is the Act of 1829 (Upper Canada) 10 Geo 4, c 17, which applied to a free (non-denominational) church in West Flamborough.

12 1845 (Province of Canada) 8 Vict, c 15, s 1. The debates on this Bill make unusually interesting reading, both because of a joke that backfired on its perpetrator and because a test for Christianity was originally proposed for the revised Act, although later dropped: see Elizabeth Gibbs (ed), *Debates of the Legislative Assembly of United Canada 1841–1867* (1977) vol 4, 282–6, 989 ff, 1263 ff.

13 Gibbs, above n 12, vol 1, 17, 103–4, 280. Two Christian ministers of unspecified denomination also petitioned the legislature for inclusion.

14 A H Oosterhoff, 'Religious Institutions and the Law in Ontario: An Historical Survey of the Laws Enabling Religious Organizations to Hold Land' (1981) 13 *Ottawa Law Review* 441, 441, 463, 465.

15 This comes across most clearly in s 3 of the *Religious Organisations' Lands Act 1828*, and s 2 of the *School Trust Conveyances Act 1846*, which required the deed effecting incorporation to be registered 12 months after it was made. Sections 1 and 2 of the *Libraries and Mechanics Institutes Act 1851* were more complicated but again they appear to treat the Registrar as a mere recorder of a fait accompli rather than as actually effecting a legal change by their own order.

was nothing similar in the South Australian Act. Another topic which was passed over in silence in South Australia but not in Canada was the rule-making power of associations: South Australia relied upon the common law for this, but Canada enacted s 3 of the *Libraries and Mechanics Institutes Act 1851* to deal with these topics. A reverse situation exists with regard to s 4 of South Australia's *Associations Incorporation Act 1858*, which provided that the members of associations were to remain liable for the associations' debts: there was no equivalent in Canada.

The statutes, in short, give every sign of having been enacted independently. They show the sort of random variation in sub-topics regulated, in wording and in the content of rules that would be expected if ignorance of the Canadian statutes' existence prevailed in South Australia in 1858.

A further difficulty with concluding that the Canadian statutes had been transmitted to South Australia would be identifying the source of knowledge about the Canadian statutes in South Australia in the 1850s. Even today the statutes of Upper Canada are not easily found in Australia; only a very few institutions possess copies; and such copies as exist are on microfilm and thus obviously were not available circa 1858. The Library of the Supreme Court of South Australia contains no copies of the Upper Canadian statutes of the period today.[16] Given that legal institutions do tend to retain materials such as statutes once they have acquired them, it may well be that the scarcity of Upper Canadian statutes in hard copy in Australia today indicates their scarcity 150 years ago.

Of course this does not make transmission impossible. Interchange of personnel among British colonies in the 19th century—both of governmental officials and of private colonists—was not uncommon. One remarkable example of such interchange, but certainly not the only one, was Sir Richard Hanson, later the second Chief Justice of South Australia, who was on the staff of Lord Durham in the late 1830s when Lord Durham drew up his famous report into colonial policy in Canada. Somewhat remarkably given his later religious opinions, unusual by the standards of the 19th century,[17] Richard Hanson's special subjects in this phase of his life included the clergy reserves—land set aside for the use of the Church of the same type as might later be held by religious bodies under South Australia's *Associations Incorporation Act 1858*.[18] At this stage, of course, only the first in the series of four Canadian statutes had been enacted, and there was still over a decade to go before the advent of the *Libraries and Mechanics Institutes Act 1851*, which was the latest, most detailed and broadly drawn of the Acts in terms of the types of institutions covered. Once that is remembered, this possible avenue for transmission loses some of its attractiveness. We might also ask why, if the idea had

16 This was confirmed to me by Renee Amyot, Reference and Research Librarian, South Australian Supreme Court Library.

17 Sir Richard Hanson's opinions on religion are surveyed in C H Spence, 'Sir Richard Hanson' (1876) 1 *Melbourne Review* 427.

18 Lord Durham, 'Appendix A', *Report on the Affairs of British North America*, House of Commons Papers (1839) vol 17, 121 ff; Alan Wilson, *Clergy Reserves in Canada: A Canadian Mortmain* (1968) 141.

been conceived on the basis of Sir Richard Hanson's Canadian experience, he did not introduce the Bill himself into the Parliament of South Australia, of which he was a member in 1858 (Lord Durham's former assistant was, by this time, Attorney-General of South Australia). Instead, he seems rather to have stood quite aloof from the Bill.

Now it is certainly possible that Sir Richard Hanson, or some other person entirely, could have become aware of the full range of the Canadian innovations in a variety of ways between 1851 and 1858. Even if the statutes themselves were not available, the general idea might conceivably have become known in Adelaide, thus explaining the differences in detail between the two enactments. The difficulty with this hypothesis, however, is that no-one pointed out any such link at the time of the debates on the Bill that became the *Associations Incorporation Act 1858* (SA). There seems no earthly reason why a Canadian precedent for the South Australian legislation should not have been referred to, had one existed. I have previously expressed great scepticism about the alleged motivations for hushing up the link that is supposed by some to have existed between the Torrens system of lands titles registration and the law of Hamburg.[19] The allegation is that fears of an alien domination of South Australia were so great at the time that the German origins of the system had to be suppressed. However, whatever we may think of that, such a motive could not possibly be applied to a Canadian link: Canadians were neither aliens by the standards of the day (but rather fellow citizens of the Empire) nor could have been said, by any stretch of even the most vivid and timorous imagination, to be threatening to swamp South Australia.

IIII A DIFFERENT CONTEXT

There is thus no positive evidence that the South Australians copied the Canadian statutes in 1858, and it seems that the probabilities are against the existence of some lost link. In what follows, I shall demonstrate that, even if we could establish that South Australia had copied one or more Canadian statutes, South Australia so changed the meaning in their societal context—and most particularly the meaning of the *Religious Organisations' Lands Act 1828*—that any such link would hardly deserve to be considered a real and substantive link anyway. In order to make this point it is necessary for me to trace in some detail the history of the *Religious Organisations' Lands Act 1828* in Upper Canada, the only one of the four statutes passed which caused any debate and about which there is therefore plenty to say.

It is nevertheless not always easy to investigate the precise circumstances of the passage of early Upper Canadian statutes. In particular, some records that we take for granted nowadays, such as a collection of Bills introduced into the legislature and an official report of legislative debates,[20] are absent, either not having been

19 Greg Taylor, 'The Torrens System—Definitely Not German' (2009) forthcoming *Adelaide Law Review*.

20 On parliamentary reporting in Upper Canada at the time of the *Religious Organisations' Lands Act 1828*, see Mary McLean, 'Early Parliamentary Reporting in Upper Canada' (1939) 20 *Canadian Historical Review* 378, 379–86; see also below

kept in the first place or having been destroyed by means such as the numerous fires that occurred in Canada in the 19th century (often prompted by a need for heating that did not exist to anywhere near the same extent in Australia). One is sometimes tempted to say in despair, quoting another and rather more prominent comparativist:

> τὸν ἐφικτὸν εἰκότι λόγῳ καὶ βάσιμον ἱστορίᾳ πραγμάτων ἐχομένῃ χρόνον διελθόντι, περὶ τῶν ἀνωτέρω καλῶς εἶχεν εἰπεῖν,‘τὰ δ᾽ ἐπέκεινα τερατώδη καὶ τραγικὲ ποιηταὶ καὶ μυθογράφοι νέμονται, καὶ οὐκέτ᾽ ἔχει πίστιν οὐδὲ σαφήνειαν.’ … εἴη μὲν οὖν ἡμῖν ἐκκαθαιρόμενον λόγῳ τὸ μυθῶδες ὑπακοῦσαι καὶ λαβεῖν ἱστορίας ὄψιν, ὅπου δ᾽ ἄν αὐθαδῶς τοῦ πιθανοῦ περιφρονῇ καὶ μὴ δέχηται τὴν πρὸς τὸ εἰκὸς μῖξιν, εὐγνωμόνων ἀκροατῶν δεησόμεθα καὶ πρᾴως τὴν ἀρχαιολογίαν προσδεχομένων.[21]

Nevertheless, given the level of controversy the Act aroused and the traces thus left behind in sources such as contemporary newspapers, it is certainly possible to reconstruct much of the debate both inside and outside Parliament in Upper Canada in the 1820s on what became the *Religious Organisations' Lands Act 1828*. And perhaps the best indication of the difference between Upper Canada and South Australia is the simple statistic that it took six attempts and six-and-a-quarter years to pass in the former's legislature the *Religious Organisations' Lands Act 1828*, while the equivalent South Australian legislation flew through the Parliament of that province in a few weeks in little more than one session.[22]

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n 26. In relation to all the Bills from Canada, except the *Religious Organisations' Lands Act 1828*, newspaper reports of debates in the Lower House are collected in Gibbs, above n 12. However, this collection does not give any more information on the three Bills than would be available from the bare-bones minutes of proceedings (namely, that a Bill was read three times and passed). No debate is recorded, even on amendments and even when we are told that some time was spent on debate: see, eg, entry for 27 August 1851 at 1594. Other records that are often of assistance, such as the Vice-Regal dispatches to the Colonial Office, are also of no assistance in this case. For instance, the dispatch of 10 July 1828, forwarding a copy of the *Religious Organisations' Lands Act 1828* to London (CO 42/384/82, Archives of Ontario, reel B-312) says nothing about the Act.

21 The translation—from Plutarch, *Plutarch's Lives* (Bernadotte Perrin trans, 1914 ed) Theseus [1.1]–[1.3] <http://www.perseus.tufts.edu/cgi-bin/ptext?lookup =Plut.+ Thes.+1.1> at 6 September 2009—reads:

> now that I have traversed those periods of time which are accessible to probable reasoning and which afford basis for a history dealing with facts, I might well say of the earlier periods, 'What lies beyond is full of marvels and unreality, a land of poets and fabulists, of doubt and obscurity.' … May I therefore succeed in purifying Fable, making her submit to reason and take on the semblance of History. But where she obstinately disdains to make herself credible, and refuses to admit any element of probability, I shall pray for kindly readers, and such as receive with indulgence the tales of antiquity.

22 See below n 84.

The first Bill which was eventually to lead to Upper Canada's *Religious Organisations' Lands Act 1828* was debated in the Lower House of its provincial Parliament, the House of Assembly, from 7–14 December 1821 following its introduction by Barnabas Bidwell.[23] The same man was very early in 1822 to be expelled from the Assembly as an ineligible alien—namely, an American.[24] In his second reading speech, Bidwell stated that he expected no opposition to exist to what was a simple and innocuous Bill to make life easier for religious organisations holding land. How wrong he was must have become apparent to him almost as soon as he sat down, as a number of members stood up to offer objections, criticism or advice. Sir John Beverley Robinson, the Attorney-General, thought that the Bill should not apply to the 'Established Church', by which he meant of course the Church of England—the very phrase was however likely to inflame many on the left, for, as we shall see, the concept of an Established Church in Canada was one of the most controversial issues of the day.

The Church of England, Sir John Beverley Robinson continued, would be governed and assisted by English ecclesiastical law when it had unfolded its ministrations across the Province to an extent more nearly approaching that of the Church of England in England. Thus it would have no need of the Bill's provisions, as it would be governed by the public law as in England. He also wondered whether permitting trustees to hold land for religious corporations was a good idea, as trustees would constantly quarrel with their clergy.[25] On 17 December, the Legislative Council, the nominee Upper House of Parliament (the debates of which were never reported)[26] killed the Bill using the polite fiction then current of ordering the Committee of the Whole to resume consideration of it in three months (by which time prorogation would have taken care of the Bill's fate).[27] Although we have no record of its reasons, later events suggest that the Council's difficulty was almost certainly with the idea of unlimited religious toleration.

The House of Assembly tried again with a Bill by the same title in the next session of the legislature, early in 1823; again it passed the Bill in under a month; again

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23 See *Journal of the House of Assembly of Upper Canada*, 7 December 1821, 53; 10 December 1821, 64; 11 December 1821, 67; 13 December 1821, 70; 14 December 1821, 72, 74. See also *Journal of the Legislative Council of Upper Canada*, 15 December 1821, 21; 18 December 1821, 23.

24 *Journal of the House of Assembly of Upper Canada*, 4 January 1822, 152 ff. There is a sophisticated and amusing (if, for my taste, slightly too legally realist) analysis of this episode in Paul Romney, 'Re-Inventing Upper Canada: American Immigrants, Upper Canadian History, English Law and the Alien Question' in Roger Hall, William Westfall and Laurel Sefton MacDowell (eds), *Patterns of the Past: Interpreting Ontario's History* (1988) 78.

25 *The Kingston Chronicle* (Kingston), 11 Janaury 1823, 2.

26 Jeffrey McNairn, *The Capacity to Judge: Public Opinion and Deliberative Democracy in Upper Canada, 1791–1854* (2000) 173 ff; Jeffrey McNairn, 'Towards Deliberative Democracy: Parliamentary Intelligence and the Public Sphere in Upper Canada, 1791–1840' (1998) 33(1) *Journal of Canadian Studies* 39, 53 ff.

27 *Journal of the Legislative Council of Upper Canada*, 17 December 1821, 23.

the Legislative Council rejected it.[28] No substantial record of the debates in either House on this occasion survives. In a later debate in the House of Assembly, William Morris (of whom more shortly) said that a failure to specify the amount of land which a religious corporation could validly own was at the root of the Upper House's objection.[29] I suspect that the objection went deeper than that, and Morris was trying to keep alive hopes for the passage of the third version of the Bill then before the House, rather than to inform later readers.

A general election occurred in mid-1824 and left the House of Assembly very evenly divided between reformers and conservatives.[30] The cudgels were taken up for a third time in early 1825. This time the Bill was introduced by William Morris,[31] whose remarks I just quoted. He had been one of Bidwell's opponents in the successful campaign to expel Bidwell from the House as an American alien, but was also a champion of the rights of the Church of Scotland,[32] one of the churches that was to be named as entitled to appoint corporate trustees as land-holders in the Act finally passed in 1828.

Even if we had only the official journal of motions passed,[33] it would be apparent that disagreement on principle and details, so far from petering out on this third attempt, was now greater than ever before and had spread within the House of Assembly. Even the unanimity of previous years in the House of Assembly was gone, for the Bill took the better part of three months to pass that House (having been introduced on 13 January 1825 and finally passing on 2 April of the same year). This long delay, if nothing else, essentially ruined the Bill's chances of being passed that session by the Legislative Council, as the session was prorogued shortly afterwards, on 13 April.

The Bill was referred to a Select Committee of the House of Assembly twice and divided upon four times before passing through the House of Assembly. The incompleteness of surviving records and the complexity of the parliamentary manoeuvring renders it hard to follow exactly where everyone stood and what was going on, but it is possible to distil the following essential events. On 7 March 1825, a motion by William Morris, as the Bill's sponsor, for the Bill to be recommitted

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28 See *Journal of the House of Assembly of Upper Canada*, 28 January 1823, 280; 3 February 1823, 291; 5 February 1823, 297; 6 February 1823, 301. See also *Journal of the Legislative Council of Upper Canada*, 7 February 1823, 117; 11 February 1823, 119.

29 *The Kingston Chronicle* (Kingston), 4 February 1825, 3.

30 S F Wise, 'Upper Canada and the Conservative Tradition' in Edith Firth (ed), *Profiles of a Province: Studies in the History of Ontario* (1967) 31, 22.

31 *Journal of the House of Assembly of Upper Canada*, 13 January 1825, 4; 17 January 1825, 9.

32 See the entry for William Morris in the *Dictionary of Canadian Biography*.

33 *Journal of the House of Assembly of Upper Canada*, 13 January 1825, 4; 17 January 1825, 9; 18 January 1825, 12; 21 January 1825, 16 ff; 22 January 1825, 17 ff; 9 February 1825, 35; 4 March 1825, 54–5; 7 March 1825, 56; 30 March 1825, 79; 2 April 1825, 81.

was lost 14–16; following this, Morris immediately moved that it pass as it stood; an amendment to this motion, this time opposed by Morris, urging recommittal was lost 17–18; and the Bill was then, apparently without a division, referred to the Committee of the Whole which finally reported it on 30 March. While all these facts are recorded in the legislative journals, they give very limited information about why these various Byzantine parliamentary manoeuvrings took place and what precisely the two recommittals were intended to accomplish.

This time, however, some records of the content of the debates have survived. From them it is clear that what was at stake on this occasion—and probably on the two earlier occasions as well[34]—was, in short, the degree of religious tolerance that the House was prepared to countenance on behalf of the society it represented.[35] Almost a year later, John Rolph still recalled the 'very warm'[36] (today we should perhaps say 'heated') tone of the discussions in this debate. The great question of principle was whether the Act should apply to all religions, all Christians, or some Christians only. There were in essence four positions: the Act should apply to all religions; it should apply to all persons professing Christianity; it should apply to an 'open' list of undoubtedly Christian denominations, with the possibility of others being recognised as Christians; or it should apply to a 'closed' list of Christian denominations, with no others being admitted. In the last case, there was of course also a need to decide which denominations would be approved.

In an overwhelmingly Christian society, there was not much difference in effect—although the difference in principle might well be argued to be worth fighting for—between providing facilities to all religions and providing them to all Christians. In debate the two positions were often not distinguished, and there was no attention directed towards the Jews, to take the most obvious example of a non-Christian religious minority that would occur to us today. The first synagogue in Toronto was not established until 1856, many decades later,[37] and one estimate has barely a hundred Jews living in both Upper and Lower Canada in 1831.[38] Thus there was no need to provide them with a convenient means of holding land for religious purposes and the subtle elision of Christianity and religion was easily made.

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34 The titles of the Bills passed by the House but not the Council in 1821 and 1823 suggested an unlimited coverage—they omitted the words 'therein mentioned' in the Act of 1828 which referred to the closed list of favoured denominations—but if the Bills of 1821 and 1823 could be recovered it would cause no great surprise if it were found that they were limited to Christians only.

35 There was also some discussion about the limit on the amount of land that each congregation could hold. As this barely raised any question of principle (beyond the occasional fear that some religions might become too powerful), I do not pursue it here.

36 *The Canadian Freeman* (Toronto), 1 December 1825, 2. I take it that the reference to Rolph's 'last year', at 3, means 'last session'.

37 See the entry for Lewis Samuel in the *Canadian Dictionary of Biography.*

38 Louis Rosenberg, *Canada's Jews: A Social and Economic Study of Jews in Canada in the 1930s* (1993) 10.

The promoters of the Bill of 1825 appear to have adopted one of the two positions under which all Christians would be entitled to take advantage of it. The long title of the Bill referred to a coverage of 'the different religious bodies within this province', but the first Select Committee's amendments suggested that it covered 'Christians'—no doubt this could be explained with only some blushes by stating that they were the only sorts of religious bodies within the Province.

Some members went even further and advocated providing the facility of incorporation to all religions. Captain Matthews, a Unitarian, held—as W L Mackenzie's newspaper *The Colonial Advocate*[39] approvingly reported—that the Bill should grant 'general toleration, in its fullest extent'.[40] On the other hand, those opposed to the idea of allowing all Christians to take advantage of the Bill sometimes ridiculed this view by asking whether in fact toleration should be extended even beyond Christians. As John Rolph is reported to have said: if all are to be tolerated, why not even the 'Mahometans'?[41] Of course, this was largely a theoretical question in the circumstances of the day, but some rightly saw it as an important point of principle.

It is not difficult to imagine in our time what arguments were deployed in the debates in the 1820s in favour of either the 'all religions' or at least 'all Christians' views, thus removing the state from judging on matters of conscience. The arguments then were the same in essence as we might hear today. In addition to those arguments, however, one member, the newly elected liberal B C Beardsley, invited members to look across the border at the United States of America; and to that list of potential model countries, Dr John Lefferty, also newly elected, added Prussia, Holland and France. With considerable hyperbole the latter railed against the 'disgraceful' situation in Upper Canada, suggesting that, despite its 'boasted constitution, of superior excellence', it was the only place in the world to have prisoners of conscience who were 'in chains, on account of their religious opinions'.[42] Had these members possessed more experience, they might have realised that arguing on the basis of the American position was an own goal at this time and on this subject more than is usually the case in Canada—a theme I shall take up in the next section.

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39 *The Colonial Advocate* (Toronto), 20 January 1825, 3. Mackenzie also stated that naming denominations in the Bill was a good idea: this is not a contradiction if done as an open list.

40 Ibid, 27 January 1825, 2.

41 *Upper Canada Herald* (Kingston), 19 April 1825, 1.

42 'Supplement', *The Kingston Chronicle* (Kingston), 8 April 1825, 2; *Upper Canada Herald* (Kingston), 19 April 1825, 1. It is possible that there was an example of an imprisonment at the time owing to actions connected with religion, but not for religious beliefs as such. Thus, for example, s 1 of the Act of 1821 (Upper Canada) 2 Geo 4, c 11, criminalised the celebration of marriages in the Province by clergymen not authorised to celebrate them, which included, for example, Methodists: see below n 93.

The first Select Committee on the Bill of 1825, chaired by William Morris, advocated the open list, under which the Bill would name some denominations as definitely coming under the umbrella of the Act (the Church of Scotland—clearly non-negotiable for the Presbyterian Morris—as well as Lutherans, Calvinists and Methodists), but would also have applied to 'any other Congregation or body of Christians'.[43] In committee on 22 January, a successful motion was moved to add Mennonites, Tunkers and Quakers as worthy of special mention, but without restricting the general clause applying to other religions as well.[44] Methodists survived queries about whether they should be deleted, the point being made that they were quite respectable.[45] The 'open list' approach would prevent mischievous arguments about whether Methodists, for example, were Christians, but was otherwise the same in effect as the idea of complete tolerance for all Christians. It might be necessary, however, under the 'open list' as under the 'all Christians' approaches for someone, presumably the Courts, to determine whether fringe groups were indeed Christians, something which clearly made some members uneasy.[46]

The 1825 Bill appears to have come out of the House in roughly the same form as it was eventually enacted in 1828—with a closed list of the denominations to which it applied and no clause extending it to all other Christians. Its long title on 7 March, which is not recorded as having been amended thereafter, was (emphasis added), *An Act to enable* certain *religious bodies within this Province to hold land*. A significant advocate for this view was John Rolph, who expressed the general fear that if Christians of all stripes were enabled to hold land the number of sects would simply increase (as if the state were the guardian of the unity of Christendom), as well as a more specific fear of the propensity of Roman Catholics to acquire wealth and power.[47] Not only should tolerance not be granted to all existing sects, it should also not be granted to those that might arise in future, for even in London, 'in this enlightened age' men of substance and education had become disciples of Johanna Southcott.[48]

Those of this view were therefore in favour of a very limited toleration for denominations selected by the state. It clearly surprised some other members to hear such a limited view from Rolph, who in a long life, during which his opinions were known to alter on various views, was known for one thing: his 'eloquent and consistent support for the voluntary principle in religion'.[49] Such a view is of

43 *Journal of the House of Assembly of Upper Canada*, 21 January 1825, 16 ff.

44 *The Colonial Advocate* (Toronto), 27 January 1825, 2.

45 *The Kingston Chronicle* (Kingston), 4 February 1825, 1; see also 'Supplement', *The Kingston Chronicle* (Kingston), 4 February 1825.

46 See below n 65.

47 *The Colonial Advocate* (Toronto), 27 January 1825, 2; 'Supplement', *The Kingston Chronicle* (Kingston), 4 February 1825, 1.

48 *The Kingston Chronicle* (Kingston), 15 April 1825, 2. There is another report of this debate in *Upper Canada Herald* (Kingston), 19 April 1825, 1 ff, quoting *The Observer* (Toronto), 11 April 1825.

49 See the entry for John Rolph in the *Canadian Dictionary of Biography.*

course not the same thing as advocacy of complete religious tolerance, but the two naturally go together. Mackenzie, writing in *The Colonial Advocate*, commented upon Rolph's eloquence, his

> impassioned energy of manner, and the modulated, well-marked cadences of his voice, [which] gave double voice to his periods, and justified the opinion which some of our most accomplished scholars had expressed, namely: That his manner as a public speaker approaches nearer to the peculiar style of eloquence, for which the English Parliament is celebrated, than either to the oratory of the Bar, or the pulpit.[50]

One is left to wonder whether this fulsome praise of oratorical style was meant to imply something about the content to which it was applied.

Needless to say the list of 'approved' religious denominations might vary among the persons in the 'closed list' camp: the Attorney-General, Sir John Beverley Robinson, was in this camp, but regretted certain 'allusions to the Roman Catholics, who were a learned body, and no more to be dreaded than other sects'.[51] He also thought their numbers 'insignificant' and added that they were 'good and valuable members of society; and the least cause of dissatisfaction we give them the better, the more support would the government have'.[52] He remained against the inclusion of his own Church of England, again on the grounds that it was the Established Church which should not be treated as a mere sect. Left-wingers such as Beardsley and Lefferty opposed this on the grounds that they wished to see the Church of England on the same level as other denominations and were opposed to its monopoly of the extensive land-holdings in the form of the clergy reserves granted to it as a quasi-Established Church. They were unsuccessful, however, and the Church of England triumphantly succeeded in its aim of being left out.[53] When the Act was eventually passed in 1828, the Anglicans remained in splendid isolation from it for 50 years, until finally included in 1878.[54]

In relation to religious bodies less exalted than the Established Church, Sir John Beverley Robinson advocated that the closed list be drawn up according to a criterion of whether a religious denomination had settled preachers or not—which had at least the virtue of being apparently neutral as regards theological opinion, while also relating to the purpose of the proposed Act. Such a criterion would include denominations as varied as Roman Catholics, Presbyterians and Anabaptists, but not Methodists. This brought forth the objection from out-of-doors that the land was not meant to be vested in the preachers, but in resident trustees, and thus the Methodists should be included.[55] As we shall see, there was a good

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50 *The Colonial Advocate* (Toronto), 27 January 1825, 2.

51 Ibid.

52 *The Kingston Chronicle* (Kingston), 4 February 1825, 3.

53 Ibid, 15 April 1825, 2; *Upper Canada Herald* (Kingston), 19 April 1825, 2.

54 Oosterhoff, above n 14, 463 fn 137.

55 *The Colonial Advocate* (Toronto), 10 February 1825, 1.

deal more to this distrust of Methodism than met the eye, and even if this was a theologically neutral opinion it was certainly not a politically neutral one.

The debates took up so much time in early 1825 that the Bill was not sent to the Legislative Council in time for it to consider what had become a controversial although not complicated measure before prorogation. The Bill therefore lapsed, and was introduced for a fourth time in the session of late 1825. A similar debate again occurred in the House of Assembly,[56] but this time Rolph appears to have changed his mind, saying, '[i]t was not for us to propose that we will sanction only those that we think to be right. He left men to preach and convince, and in that case those that were in the right would take the ascendancy in the science of religion.'[57]

In this spirit, a suggestion by the Unitarian Captain Matthews to extend the Bill to cover all those *professing* Christianity (not just being Christians in the view of some allegedly objective judge of the question) was accepted.[58] This covered Matthews' Unitarian faith, which claimed the status of Christian denied it by some. It is interesting to reflect that it would also have covered the Mormons, then in the course of formation. Nevertheless, tolerance was not to be complete, at least in theory, as no other religions were included.

On 24 November 1825 the House passed by decisive majorities of at least two to one—and with the votes of both Sir John Beverley Robinson and Rolph—a Bill granting the capacity to hold land corporately to all those professing Christianity.[59] On this occasion, predictably enough, a disagreement of principle between the Council and the Assembly largely took the place of the earlier disagreements within the Assembly. The Legislative Council was not going to accept a corporate status for anyone who chose to assume the name of Christian. Thus the Council amended the Bill to impose a closed list, which this time ran: Roman Catholics, Presbyterians, Lutherans, Congregationalists, Baptists, Methodists, Quakers, Mennonites, Tunkers and Moravians. Inclusion within the favoured circle was furthermore subject to the proviso, obviously inspired by the Attorney-General's view, that there should be a 'settled minister or teacher, regularly ordained', who was a British subject either natural born, naturalised by Act of the Imperial (but not the local!) Parliament, or owing allegiance by virtue of the conquest of Quebec.[60]

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56 *The Canadian Freeman* (Toronto), 1 December 1825, 3.

57 *The Observer* (Toronto), 5 December 1825, 2.

58 Ibid; see also the title of the Bill as passed in the *Journal of the House of Assembly of Upper Canada*, 24 November 1825, 17.

59 There were two divisions, one on the motion that the Bill should be recommitted (lost 9–22), and one on whether it should pass (carried 28–4): see *Journal of the House of Assembly of Upper Canada*, 24 November 1825, 17.

60 Fortunately the Legislative Council's amendments are preserved in *Journal of the House of Assembly of Upper Canada*, 20 December 1825, 39.

The Roman Catholics had petitioned the House of Assembly, with their highly influential Scottish-born Bishop Macdonell at their head, asking to be added.[61] They had an even more powerful ally in the Legislative Council, who chaired all three sittings of its Committee of the Whole dealing with this Bill:[62] James Baby, a Roman Catholic from an old French family noted for loyalty to the Crown and traditionalist, anti-democratic views.[63] A newspaper report[64] indicates that the House of Assembly intended, in refusing a motion to postpone the consideration of this Bill indefinitely, to set up a formal conference with the Council on this Bill. In other words, the House still held out hope for a compromise; but the conference either never eventuated or was not reported or was not successful, for the Bill failed again in this session.

The fourth attempt having failed, a fifth one was essayed in late 1826. Rolph still favoured and indeed introduced 'a general Bill, giving power to all religious denominations of Christians to hold land', but the Attorney-General, Sir John Beverley Robinson said that he would prefer not to extend toleration 'to those [denominations] of whom the House knew nothing'. Otherwise, he said—and this was a new and ingenious argument, or at least is here recorded for the first time—a court of law might be compelled to decide whether a particular denomination was Christian or not, a matter that the House should decide for itself. As this and later debates showed, this was a clever argument—and not entirely without a relationship to today's debates about the proper role of the courts—as it was difficult to counter. One had to choose between, on the one hand, the alternatives of unlimited toleration and thus possible liberty for those beyond the pale or not yet in existence, and on the other, possibly giving to the courts the unenviable task of deciding who was a Christian.[65]

A sharp exchange followed at this point:

> Mr Bidwell [junior] said that it was his desire to afford to every man the right of worshipping God according to the dictates of his own conscience, and he thought the present measure connected with this right—he should therefore give the Bill his support.
>
> The Attorney-General, in reply, said he was not aware that in this Country there was any thing to prevent any man worshipping according to the dictates of his conscience—the allusion made on this subject was in his opinion uncalled for, and in no manner connected with the question—he had never heard of any complaints on the subject, and the measure now before the

61 *Journal of the House of Assembly of Upper Canada*, 16 December 1825, 34; 19 December 1825, 38.

62 *Journal of the Legislative Council of Upper Canada*, 28 November 1825, 20; 14 December 1825, 30; 19 December 1825, 35.

63 See the entry for James Baby in the *Dictionary of Canadian Biography*.

64 *The Colonial Advocate* (Toronto), 19 January 1826, 2.

65 See *United Empire Loyalist*, 16 December 1826, 231.

> House, whether adopted or not, would in no wise interfere with that religious toleration which had always existed in the Country.
>
> Captain Matthews thought that in this case the example of Turkey was worthy of imitation—there all denominations were tolerated, could build churches, &c. Can the Attorney-General make head or tail of the Athanasian Creed; has he more right to judge of my creed than I have of his? It had been objected on a former discussion of the subject to admit Unitarians to enjoy the advantages of the provisions of the Bill, on the ground that they were not Christians—he however contended that they were—he himself was an Unitarian and he was proud to avow it. ... [He] gave the history of the doctrine of the Trinity, and quoted many passages of Scripture to prove that Unitarianism is agreeable to the doctrines of the Bible.[66]

Before dismissing the Attorney-General's view out of hand, it should be remembered that in England the *Roman Catholic Relief Act 1829* (UK) c 7 was still not a reality, nor had the Test and Corporation Acts yet been repealed: this was accomplished later in 1828 by 9 Geo 4, c 17. The Attorney-General's pride in the long tradition of toleration of both Roman Catholicism and Dissent in Upper Canada was therefore not entirely without reason, for Upper Canada was still in advance of England on these points. But by 1826 this was definitely a backward- rather than forward-looking view. Upper Canada was in advance of an English position which was becoming intolerable there and was about to change radically. Captain Matthews had the future on his side.

Captain Matthews must however have known how provocative his comparison with Turkey was to many members, not only for the obvious reason that occurs to us even today but also because this utterance occurred in the middle of the hugely popular struggle of the Greeks for liberation from the Turkish yoke. Lord Byron had died only two-and-a-half years earlier. An unfavourable comparison of Upper Canada with Turkey may have appealed to Captain Matthews' gadfly instincts, but it was hardly the way to win friends and influence debate in 1826 either with conservatives or with anyone caught up in the enthusiasm for Greek freedom. Captain Matthews' disparagement of the doctrines of orthodox Christianity was also hardly the royal road to popularity. Was his intervention really necessary or helpful?

Again the Bill, which on this fifth attempt also proposed unlimited recognition for all Christians, came to grief on the attitude of the Legislative Council. Having again received a huge majority in the House of Assembly—although, ominously, the Attorney-General was among the three members who voted against it this time[67]—

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66 Ibid 230; see also *The Colonial Advocate* (Toronto), 14 December 1826, 3. A briefer and somewhat less provocative mention of there being some degree of Christian liberty in Turkey may be found in the remarks of Hamilton, reported in *The Observer* (Toronto), 5 December 1825, 2.

67 *Journal of the House of Assembly of Upper Canada*, 13 December 1826, 12; 15 December 1826, 13.

the Bill was again killed by the Legislative Council in mid-January 1827.[68] While its debates were still not reported, it was clearly not prepared to countenance unlimited toleration.[69]

The message to the House of Assembly from the Legislative Council was by now clear and the sixth and finally successful attempt to have the Bill passed showed that it had been heard and understood. The Lower House forwarded upstairs a Bill for an Act 'for the relief of the religious societies therein mentioned'.[70] That corresponds with the title of the Act as finally enacted and reflected the 'closed list' approach. This finally successful Bill was even introduced by the enigmatic John Rolph himself, changing his opinion back again to accord with his original view, although he said he introduced the Bill on behalf of William Morris, who was absent.[71] Rolph asked the members, rather sensibly, to consider whether the Bill, if on the statute book already, would be repealed—the answer, he said, would show its necessity. Such a test is not, however, one for perfection as distinct from utility; but the Assembly was now content to accept what it could get from the Council. Thus the House tamely rejected a motion by Captain Matthews for the Unitarians to be included,[72] perhaps not surprisingly given the pronouncement by that ever-tactless gentleman that the doctrine of the Trinity had been derived from pagan mythology; Dr Lefferty thought that a mention of the Unitarians would sink the Bill yet again.[73]

Still there was disagreement between the Houses about who should be on the closed list. The Legislative Council—which the Honourable and Venerable Archdeacon of York, John Strachan (later the first Bishop of Toronto) attended as a member on this day—removed the Presbyterians and Roman Catholics from the closed list.[74] The House of Assembly disagreed, and refused to accept those denominations' exclusion 'from [the] reasonable and important privileges conferred upon other religious denominations therein mentioned'.[75] Two conferences between the Houses followed—the Lower House's representatives included Messrs François Baby (a Roman Catholic like his elder brother James Baby), John Rolph, George Hamilton as a Presbyterian representative, and Peter Perry, a reform-minded MP of Methodist background.[76] Just as it appeared that failure was again imminent and a seventh attempt might be necessary to get the Bill through, a compromise

68 *Journal of the Legislative Council of Upper Canada*, 15 January 1827, 32.

69 One MP even predicted that the Council would not do so, but would rather reject the Bill because it applied to all: see *The Kingston Chronicle* (Kingston), 29 December 1826, 2.

70 *Journal of the Legislative Council of Upper Canada*, 1 February 1828, 19.

71 *Journal of the House of Assembly of Upper Canada*, 25 January 1828, 16; *United Empire Loyalist*, 9 February 1828, 295.

72 *Journal of the House of Assembly of Upper Canada*, 31 January 1828, 23; *United Empire Loyalist*, 9 February 1828, 295.

73 *The Colonial Advocate* (Toronto), 7 February 1828, 2.

74 *Journal of the Legislative Council of Upper Canada*, 5 February 1828, 21.

75 *Journal of the House of Assembly of Upper Canada*, 10 March 1828, 91; *The Colonial Advocate* (Toronto), 13 March 1828, 3.

76 See the entry for Peter Perry in the *Dictionary of Canadian Biography*.

was suggested by the Legislative Council upon which agreement was reached: the Presbyterians would be in, but the Roman Catholics out. The expressed reason for this compromise was that the Roman Catholic Church already enjoyed the privileges which the Bill granted, and was thus in no need of them. The House of Assembly agreed to the compromise, while refraining from expressing an opinion on the justification for it, and the Bill was passed by both Houses and ready for assent on 18 March 1828, a week before the prorogation.[77]

The idea that the Roman Catholic religion was in no need of the Act is somewhat mysterious: in previous years, they had made it on to the list. The stated reason for their exclusion—that they enjoyed the privileges to be granted by the Bill already—probably reflected some vague idea that the Roman Catholic Church was recognised by the law already. While this view is certainly startling in a British colony, for a number of special reasons it was by no means a bizarre one. The Province of Upper Canada had once formed part of the territory of Lower Canada,[78] which might have had continuing consequences for Upper Canada's law if, as was possible,[79] some form of Roman Catholic establishment existed in its territory since the Conquest (1759) and before the division (1791). Priests in Lower Canada continued, for example, to be paid from state funds; and the Diocese of Kingston had been erected as the first in Upper Canada only in 1826.

While the two Canadas were not a paradise of religious harmony, the sport of public Catholic-baiting was much less developed there than it was in England owing to the religious make-up of Lower Canada; the loyalty which the Roman Catholic Church in Lower Canada had shown to the Crown since the Conquest; and what was by then a long tradition of religious tolerance in both Canadas, of which conservatives such as Sir John Beverley Robinson were, as we have seen, rather proud.[80] There is therefore every reason to believe that Sir John Beverley Robinson was not dissembling in his praise of the Roman Catholics quoted earlier, and that if he was responsible for the view of the law of Upper Canada taken at this point it was a genuine view. Furthermore, there was considerable Roman Catholic representation in Parliament and no protest by them is recorded at the exclusion of their Church. Bishop Macdonell was also, it should be noted, very well connected with the rulers of the colony and even in London, being the cousin of the later Lord Glenelg, Colonial Secretary for several years in the 1830s. Only a few years after the Act was passed in 1828, the Bishop was to take a seat of his own on the Legislative

77 See *Journal of the Legislative Council of Upper Canada*, 18 March 1828, 55 ff. See also *Journal of the House of Assembly of Upper Canada*, 7 February 1828, 34; 18 February 1828, 53; 10 March 1828, 91; 11 March 1828, 93–4; 14 March 1828, 100–1; 15 March 1828, 104.

78 The two Canadas were divided by operation of the Act of 1791 (Imp) 31 Geo 3, c 31.

79 The Church's official status in Lower Canada continued to be debated in and well after the 1820s. See, eg, Mark D Walters, 'Incorporating Common Law into the Constitution of Canada: *Egale v Canada* and the Status of Marriage' (2003) 41 *Osgoode Hall Law Journal* 75, 98 ff.

80 See, eg, S J R Noel, *Patrons, Clients, Brokers: Ontario Society and Politics, 1791–1896* (1990) 68 ff, which reports the drinking of a toast to the Roman Catholic Bishop by the members of an Orange lodge. See also Wise, above n 30, 25 ff.

Council. Perhaps other objectors to the idea of recognising the Roman Catholic Church were still numerous enough that the explanation for their omission was a polite way of postponing debate on the whole topic, while expressing the hope that their omission would make no practical difference. Perhaps, also, the official reason given reflected a genuinely held view about the possible state of the law. Whatever the truth of the matter, as early as 1841 the Roman Catholics were added in to the Act by an amendment.[81]

Perhaps some notion that the Presbyterians were already recognised by the law (as the local representatives of the established Church of Scotland) was also why they were originally to be left off.[82] It may be speculated that a desire to emphasise that Presbyterians were not on the same plane as the Church of England—which if an official Church in the colony would not need a special Act passed to enable it to hold property—led to their re-inclusion on the list of 'sects' which might take advantage of the Act.

In proroguing the parliamentary session on the religiously significant day of 25 March 1828, the Lieutenant-Governor was able to express his pleasure in being able to assent to the Bill 'for the convenient tenure of such parcels of ground as the various denominations of Christians may have occasion to occupy for religious purposes'.[83] The closed list to which the Bill offered this facility consisted of Presbyterians, Lutherans, Calvinists, Methodists, Congregationalists, Independents, Anabaptists, Quakers, Mennonites, Tunkers and Moravians.

IV Background

Why was such amazingly heavy weather made of this topic in Upper Canada in the 1820s, while in South Australia the equivalent Bill—covering all religions, not just a closed list of Christians—sailed through Parliament on the first attempt[84] with only speeches on its great utility and convenience to accompany it?

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81 1841 (Upper Canada) 4 & 5 Vict, c 73, s 3. There was also a need for a separate special Act in 1849 incorporating all the Roman Catholic bishops, which certainly suggests that they were not already recognised by the law: 1849 (Province of Canada) 12 Vict, c 136.

82 Note also the two statutes, the Act of 1824 (Upper Canada) 4 Geo 4, c 34, and the Act of 1824 (Upper Canada) 4 Geo 4, c 37, which permitted certain named persons and their successors as trustees to hold land for a Presbyterian Church in Toronto and Vaughan respectively, thus accomplishing much of what our Bill was to accomplish as far as that denomination was concerned.

83 *Journal of the House of Assembly of Upper Canada*, 25 March 1828, 135.

84 This is accurate in substance, but technically not quite correct. The first Bill introduced in South Australia did not pass because 'a trifling alteration was required' in it and time ran out to pass it before the end of the session: South Australia, *Parliamentary Debates*, Legislative Council, 7 September 1858, col 56. When the new session started, the Bill passed without difficulty.

Part of the reason is to be found, of course, in the sheer lapse of time. The British Empire of March 1828, when the Upper Canadian Bill was passed, was still a world without the reformed Parliament[85] and without Roman Catholic emancipation in its metropolis; it was still to see, later in 1828, the repeal of the Corporation and Test Acts. Nevertheless, the mere lapse of time between the Upper Canadian and South Australian statutes cannot be a complete explanation of the difference. This is strikingly illustrated by the fact that a similar statute in Nova Scotia passed in 1828 also without the controversy that had dogged the Upper Canadian one. Applying to 'any society or congregation of Christians for religious public worship' (s 1), the Nova Scotian legislation enjoyed the speediest imaginable passage through the Legislature of that Province on its first attempt, being introduced on 3 March 1828 and passing through both Houses by 15 March of the same year.[86] Furthermore, the Bill caused so little controversy that the *Novascotian*, the Province's principal newspaper, did not devote a single line to it; and this was so even though, as the least perusal of the Legislature's journals or the *Novascotian* will reveal, the religious identity of the colony was a concurrent source of much debate in Nova Scotia.

I have not attempted to trace the history of the Nova Scotian statute; indeed, owing to its early date and the lack of controversy surrounding it there may not be much that could be said. In South Australia, however, it is clear that the equivalent statute was seen by virtually everyone in the Province as a means of enhancing the community's corporate life, both on the religious plane and outside it, and reinforcing the local self-image as a 'Paradise of Dissent' as well as an island of high-minded tolerance among a sea of convict colonies. But in Upper Canada, the idea of recognising the existence of all religious bodies was rather seen by important and influential people as undermining fundamental attributes of their society. It challenged a number of essential elements in their vision of Upper Canada in a way that was never possible at any time in South Australia. That explains why the debate there was particularly long and heated, and also enables an explanation of why the outer similarity between the Canadian and South Australian statutes masked two very different sets of purposes and statements about colonial identity.

Upper Canadian history is not a field in which research has recently stood still, nor all controversies settled;[87] and it is certainly not my province to attempt to settle them here or elsewhere. But it can be said quite confidently, even without denying

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85 *Representation of the People Act 1832* (UK); *Representation of the People (Scotland) Act 1832* (UK); *Representation of the People (Ireland) Act 1832* (UK); see also Noel, above n 80, 80.

86 *Journal of the House of Assembly of Nova Scotia*, 3 March 1828, 256; 5 March 1828, 261–2; 6 March 1828, 264; 11 March 1828, 277; 15 March 1828, 288. I have also not attempted to discover the reason why a similar Act passed in Lower Canada in 1830 (10 & 11 Geo 4, c 63) was so quickly repealed in 1839 (2 Vict, c 26). The modern descendant of the latter is *An Act respecting Lands of Religious Congregations*, RSQ, c T-7. Further statutes on this topic include: 1849 (Province of Canada) 12 Vict, c 136; 1905 (Quebec) 5 Edw 7, c 21; and the *Roman Catholic Bishops Act*, SQ 1950, c 76.

87 See, eg, the salutary recent corrective in McNairn, *The Capacity to Judge*, above n 26, 10 ff.

the existence of alternative views in Upper Canada, that the elite of that colony, from its foundation in 1791 to its merger with Lower Canada in 1841, practised a high-Tory faith of much the same strength, if not stronger than high-Tory views in contemporary England[88]—subject always to the peculiar twists that were imposed upon high-Tory thought by Upper Canada's proximity to the United States of America and Roman Catholic Lower Canada. The controversy in Upper Canada about this comparatively minor and (one might have thought) unobjectionable statute affected core beliefs in early Upper Canadian elite thinking. It was in fact a battle that raised the fundamental question of what sort of society Upper Canada was going to be.

In short, the values which the proposed statute affected were threefold. The vision of the colonial elite—safely ensconced in the nominated Legislative Council, and since rather misleadingly christened the 'Family Compact'—was that Upper Canada was to be British, not American. As a result, it was to be a hierarchical polity and society, not fully democratic and egalitarian.[89] And it was to be endowed with an Established Church, not with complete religious equality. It is in the last point in particular, but also in the second, that Upper Canada differed profoundly from the 'Paradise of Dissent' that South Australia claimed to be[90] (and the need to distinguish one's own society from the American was not of great importance on the other side of the Pacific Ocean, either). These differences were carried into other areas as well, such as the constitution of the two colonies. It is not for nothing that South Australia, despite attempts to impose one, never had a nominated Legislative Council.[91] Upper Canada's Legislative Council, on the other hand, remained nominee throughout that Province's 50-year history, and in accordance with its view of the place of a nominee House composed of the best elements of society it did not hesitate to reject reforms proposed by the Assembly. For example, it carried on a war against the abolition of primogeniture that extended for decades.[92] More nearly related to the subject of the present article was its refusal, which extended from 1793 to 1829, to pass legislation allowing most Dissenters to celebrate marriages.[93]

Even today there are traces of this inheritance in Canada. The Canadian *Constitution Act 1867* (UK) 30 & 31 Vict, c 3 provides for a nominee Senate and claims that Canada is endowed 'with a Constitution similar in Principle to that

88 Wise, above n 30, 20, 31. Noel, above n 80, 3–7 points out that not everything is known about the political ideology of many early Upper Canadians. I therefore limit my point to the well-recorded and well-known elite of the colony.

89 Wise, above n 30, 31.

90 It is hardly necessary to refer to more than the title of what is still, and will long remain, the standard work on early South Australian history: Douglas Pike, *Paradise of Dissent: South Australia 1829–1857* (1967). What is said about the contrast between Canadians and Americans in Noel, above n 80, 7 ff—with all its limitations, to which reference is made there—might well be adapted as a thumb-nail sketch for contrasting the elite in both Canada and South Australia.

91 Pike, above n 90, 468 ff.

92 McNairn, *The Capacity to Judge*, above n 26, 368.

93 The story is told in William Renwick Riddell, 'The Law of Marriage in Upper Canada' (1921) 2 *Canadian Historical Review* 226.

of the United Kingdom'.[94] There is no little degree of continuity here, for similar words had also been addressed to the first Parliament of Upper Canada in 1792. J G Simcoe, Upper Canada's first Lieutenant-Governor, claimed in words that were to be repeated with 'mind-numbing regularity'[95] that Upper Canada had received 'a constitution which has stood the test of experience, and is the very image and transcript of that of Great Britain'.[96] This, clearly, was not and could not have been an entirely accurate statement; as matters turned out, it was more in the nature of an article of faith than a description of actual realities; and it was abandoned on all sides, even the conservative, by the 1850s[97] (hence the words 'in Principle' in the Constitution of 1867). But its very tenuousness required this article of faith, while it remained such as it did in the period under discussion here, to be defended all the more tenaciously. During the formation of Upper Canadian identity, as was still occurring in the 1820s, this vision was not only an article of faith about the present, but also still a programme for the future requiring effort for its realisation.

In the minds of Upper Canadian rulers in the 1820s, the religious make-up of the colony was connected to all three distinguishing features just mentioned: not only religious establishment, but also its Britishness and the desire for a hierarchical society. First, the constitution of Great Britain most decidedly included an Established Church. No part of the United Kingdom was to be without such a blessing until the *Irish Church Act 1869* (UK) c 42 came into force in 1871, and the Church of England in Upper Canada strained every muscle in order to have the same status recognised for itself, although the legislative support for this claim was at best equivocal.

Secondly, the Established Church was an institution which could distinguish the British colonies of North America from their American neighbours, who had decided to separate Church and state. An Established Church was part of that vast hierarchical web of relationships of fealty that ensured stable British—as distinct from volatile republican—government, and the fear was that the omission of any section of that web might cause the whole finely spun edifice to collapse as it had in what were now the United States of America.[98]

Thirdly, in those same American colonies, sects that were sometimes of a pronounced and (in Canadian conservative eyes) vulgarly demotic stamp, and which were possessed of insufficient reverence for the powers of this world, competed with long-established and ancient churches for the religious favours of the people. This was both distressing in itself to those who considered themselves above vulgarity and hoped their colony would be too, and more importantly dangerous for the stability of the colony because it promoted an egalitarian, levelling and republican outlook.

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94 *Constitution Act 1867* (UK) 30 & 31 Vict, c 3, preamble.

95 McNairn, *The Capacity to Judge*, above n 26, 23; see also Noel, above n 80, 45–7.

96 *Journal of the Legislative Council of Upper Canada*, 15 October 1792, 11.

97 McNairn, *The Capacity to Judge*, above n 26, 278, 306.

98 Noel, above n 80, 47.

In the 1820s, moreover, a concerted effort was made to defend this vision of Canada's future against attacks, thought to come from both within and without, and against the wide-ranging opposition provoked by the vision of an Established Church in a deferentially ordered society.[99] As far as the external attacks were concerned, this was an era of heightened American influence on Upper Canada and accordingly of heightened anxiety that it would fail to fulfil its supposed destiny. On the religious front this expressed itself in a strong dislike of American sects. This extended even to such generally inoffensive denominations as the Methodists because the English Methodists had agreed to abandon Upper Canada (other than Kingston) to their American brethren,[100] and the American Methodists in particular were suspected by the high-Tory element of spreading republican ideals and general disloyalty to the Crown within Upper Canada—'no bishop, no king'. This explains the flimsy objections that were raised from time to time to the inclusion of Methodists in the statute allegedly on the grounds that they had no settled preachers.

While it is certainly possible to draw an exaggerated caricature of the high-Tory view of Americans at this point in Canadian history—Bishop Strachan, for example, was an intelligent man and realised the need to adapt Church structures to colonial realities, and even borrowed significant innovations from the United States[101]—yet the lengths to which the paranoia about Americans was sometimes taken does leave us shaking our heads in wonderment at some points. On one notorious occasion Captain Matthews was deprived of his pension (until it was restored after the fuss died down) having been accused of the heinous sin of calling for 'Yankee Doodle' to be sung at a performance and removing his hat for it.[102] We have also seen that the first advocate of the Bill in Upper Canada was shortly afterwards expelled from Parliament as an ineligible American alien[103]—and this controversy did not die down until settled, as coincidence would have it, by another statute passed in 1828.[104] The movement for the recognition of the 'sects' outside the would-be Established Church thus had a distinct tinge of republican disloyalty to it. In South Australia, all this was a complete non-issue, not only for geographical reasons, but because the colony had been founded partly as a haven for Dissenters.

Within Upper Canada dissatisfaction with the semi-Established Church was also on the rise in the 1820s for internal political reasons. Dissatisfaction was strongly fuelled by the controversy over the clergy reserves which became the principal symbol in the broad debate about the religious future of the Province. Vast areas of land were given over to the clergy reserves pursuant to ss 36 and 37 of the

99 McNairn, *The Capacity to Judge*, above n 26, 48; and for an overview, see Gerald M Craig, *Upper Canada: The Formative Years 1784–1841* (1968) ch 5.

100 Ibid 167, 180.

101 Ibid 170.

102 See the entry for Captain John Matthews in the *Dictionary of Canadian Biography*; see also 'Appendix P', *Journal of the House of Assembly of Upper Canada*, 1826–7, which contains a Select Committee report on this storm in a teacup.

103 See above n 24.

104 1828 (Upper Canada) 9 Geo 4.

'constitutional' Act of 1791 (Imp) 31 Geo 3, c 31,[105] which set up the Province of Upper Canada, for the use of a 'Protestant Clergy', which the Church of England in Upper Canada considered meant itself and itself alone.[106] One purpose of the clergy reserves was to prevent the introduction of American religious sectaries;[107] another was to endow the Church of England and make it strong in the interests of creating an ordered, hierarchical British society of the type mentioned earlier. But just as that high-Tory vision of society was a controversial one from the very start, so also were the reserves. After 'a controversy that debilitated the province by threatening its unity',[108] the reserves were eventually secularised in the mid-1850s by a statute designed 'to remove all semblance of connection between Church and State'.[109] Yet in the period in question here, the 1820s, the Church of England was still fiercely defending what it saw as its land—the grant of which, in its view, was one of the chief foundations for its claim to establishment.

The Church of England in Upper Canada greatly added to the number of its enemies in the 1820s by various high-handed tactics, such as preaching sermons attacking its fellow Christian denominations and the publication in the second half of 1827, just as the Bill was nearing enactment, of misleading assertions about its strength in Upper Canada.[110] From the Church of England's point of view, the fear was that any legal recognition of Christian bodies alongside it, especially Protestant ones, might undermine its sole and exclusive claim to the clergy reserves as the sole authorised representative of non-Roman Christianity in Upper Canada.

From the point of view of the non-Anglican advocates of maximum toleration in the Bill, the Church of England's monopoly of the extensive clergy reserves merely showed how necessary both the Bill and toleration were, and of course such persons were also as a rule not enthusiastic about the broader agenda of a hierarchical society. The Methodist Peter Perry, for example, regretted

> that they were under the necessity of legislating upon this subject; if the ample reservations for religious purposes had been, as they ought to be, open to all denominations of Christians, it would have saved them this trouble; but as this was not the case, it was the duty of this House to remedy it now, thoroughly and fairly.[111]

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105 The *Short Titles Act 1896* (UK) 59 & 60 Vict, c 14 christened what was left of this Act as the *Clergy Endowments (Canada) Act 1791* (Imp) 31 Geo 3, c 31.

106 Craig, above n 99, 171; Wilson, above n 18, 16, 68.

107 Wilson, above n 18, 19.

108 Ibid 67.

109 1854 (Province of Canada) 18 Vict, c 2, s 3, preamble; see also 1853 (Imp) 16 Vict, c 21. In 1827 the Imperial Parliament passed an Act permitting the sale of the clergy lands—but only if the proceeds were used for the same ecclesiastical purpose as that for which they had been granted: 7 & 8 Geo 4, c 62. For a comprehensive study of this material, see Wilson, above n 18.

110 Craig, above n 99, 172 ff; Wilson, above n 18, 70, 94.

111 *Upper Canada Herald* (Kingston), 19 April 1825, 1.

V Conclusion

Against this background, why did the Upper Canadian Legislative Council agree to the Bill in 1828 at all? Those with their hands on the levers of power in Upper Canada at the time have left no record of their motivations in finally giving way in 1828. Two educated guesses may be hazarded. First, Upper Canada's *Religious Organisations' Lands Act 1828*, by making special provision for all the dissenting Protestant 'sects' but not for the Church of England, together with the explanation given for the omission of the Church of Rome, confirmed in a way the special status of the Anglicans. The list of Christian denominations mentioned in the Act sent the message that no statute was required for the legal recognition of the Established Church, which, as its representatives would occasionally explain, would have the benefit of the law applying to the Established Church in the mother country in due course. Particularly delicious to those holding this view was no doubt the inclusion of the Presbyterians—the Anglicans' sole and intermittent rivals for the status of establishment and the clergy reserves—in the closed list of approved denominations that needed special legislation in order to exist in the eyes of the law as a corporate body at all.

Secondly, the concession which the statute constituted towards the interests of the dissenters may have been intended to palliate the large claims of the would-be Established Church of Canada by sending a signal that it would not stand in the way of limited tolerance while still enforcing its claim as the national Church. Rather, just as Bismarck, on a much broader canvas, introduced social programmes partly in order to stem the rise of socialism and to palliate capitalism, it may have occurred to the high-Tory element in Upper Canada that the occasional judicious concession would show that their primacy was not to be hegemonic and that dissenters had far less to fear from it than they imagined.

Oddly enough, if these educated guesses are right then the suggestion that the South Australian statute of 1858 was enacted to further the interests of the ruling class—a suggestion that I ridiculed in my previous analysis—is not wholly out of place in Canada. It is not the whole story there, either, for otherwise the Protestant dissenters would hardly have cooperated, unless perhaps deluded about where their real needs lay and suffering from the ecclesiastical equivalent of 'trade union consciousness', to traduce Lenin's term. In Upper Canada, however, the interests of the ruling class are a part of the story in a way that they were not in South Australia. Even the mechanics' institutes which were recognised by the *Libraries and Mechanics Institutes Act 1851* of Upper Canada turn out to have been rather more of a haven for the middle class than their name would suggest[112] or was the case with respect to similar bodies in early South Australia—at least, judging by the examples I mentioned in my earlier piece involving their incorporation in South Australia by people such as machinists and telegraph station-masters.[113] In Upper Canada, prominent and influential people often were to be found in the front ranks

112 Wells, above n 9, 3 ff.

113 Taylor, 'The Origins of Associations Incorporation Legislation', above n 1, 236 ff.

of mechanics' institutes, even if their membership also included humbler folk.[114] Thus Upper Canada's legislation had rather more of an upper-class tinge to it—perhaps not surprising given that its Upper House was not elected but dominated by an elite.

Whether Upper Canada's statutes were inspired by American predecessors[115] is probably a question that will never be settled. There is nothing in the sources to indicate that any of those statutes was a copy of an American model. Nevertheless, the close proximity of the United States of America, the close connections of many Canadian dissenters with that country, and the prevalence of statutes for the incorporation of religious societies in the United States at this time make one or more of them an obviously possible source for the Upper Canadian statute.[116] There are no obvious similarities of wording between any American statute that I am aware of and the four Canadian ones examined here. It is possible, in the conditions of the time, that the idea behind them was transmitted across the border while the statutes themselves were not available in Upper Canada, so that there was no possibility of copying the actual drafting. Given the distrust shown by powerful people in Upper Canada towards American sects in the 1820s, it is also easy to imagine that knowledge of any American derivation would have been tactfully passed over in silence by those who possessed it. I have treated with some scorn the idea that the Torrens system's alleged derivation from a German source might have been similarly suppressed in South Australia in the late 1850s,[117] but in the case presently under discussion this article has demonstrated that there were much stronger reasons for suppression than existed in that situation.

On the other hand, it is not the case that a general registration statute for voluntary associations in general, or churches in particular, is such a remarkable invention that, as is supposed to be the case with the alphabet, it could only have arisen in one place with the consequence that all later appearances of the same idea must be traceable back to its first conception. In India the *Societies Registration Act 1860* may well have arisen—although I have not looked into the question—without conscious copying from any pre-existing model. Upper Canada's statute is different enough in structure and wording from all the earlier possible sources of inspiration of which I am aware that it is by no means clear that it was a copy. Thus it is not possible to come to a firm conclusion on the question.

There is certainly no evidence that the South Australian *Associations Incorporation Act 1858* was copied from any external source, and it is also much less likely that it was copied from North America given its distance from South Australia. There was furthermore not the slightest reason why any link with Canada would not have been

114 McNairn, *The Capacity to Judge*, above n 26, 99 ff.

115 See, eg, *An Act to provide for the Incorporation of Religious Societies*, 1801 (New York) c 79.

116 The same conclusion is reached by Oosterhoff, above n 14, 453, although he does not consider the absence of any admission of derivation in the surviving record of the debates in Upper Canada.

117 Taylor, 'The Torrens System—Definitely Not German', above n 19.

admitted; even a link with the United States of America would have been far less controversial in the 'Paradise of Dissent' on the other side of the Pacific Ocean.[118]

Even if there had been knowledge of the Upper Canadian statute of 1828 30 years later in South Australia, it would be worth hardly more than a footnote in the history of the latter colony given that the South Australian statute recognised the greatest possible degree of religious diversity—it covered all religious organisations of whatever hue—while that of Upper Canada began by being limited to the Christian 'sects' it named and did not even include the Jewish religion until 1890. The statutes were not entirely opposed in effect or intent, but the differences would be great enough that, even on the hypothesis that the earlier was known to those who promoted the later, one could not really be said to be an outgrowth of the other.

118 For a similar finding in the field of criminal law, see J Barry Wright, 'Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890s' (2008) 12 *Legal History* 19, 40 ff.